MYKOLAS ROMERIS UNIVERSITY
LAW SCHOOL
INSTITUTE OF PRIVATE LAW

YEVHEN DIEDUKHOV
EUROPEAN AND INTERNATIONAL BUSINESS LAW

SPECIFICS OF EVIDENCE COLLECTION IN CASES CONCERNING BREACHES OF COMPETITION LAW

Master thesis

Supervisor –
Prof. dr. Raimundas Moisejevas

Vilnius, 2021

TABLE OF CONTENTS

INTRODUCTION

Competition law is an evolving and relatively young field of law[1] with the specific and unique tasks. Moreover, the existing regulations must adapt to challenges presented by new technologies and lead to the efficient enforcement, rather than making obstacles. For this purpose, in the EU the major acts for harmonizing competition enforcement were introduced, namely the Directive (EU) 2019/1[2] fostering the public enforcement of competition law and Directive 2014/104/EU[3] aimed at removing barriers and harmonizing practices of private competition enforcement. Collection of evidence, in turn, is the process included in both of the proceedings and aimed at obtaining and preserving the information that may constitute an evidential value. Therefore, the promoted general effectiveness cannot be reached without the proper functioning of every element of the proceedings related to breach of competition law. Further, there are several jurisdictions out of the EU, such as Ukraine or Turkey, that have chosen the path of approaching[4] the legislation to *Acquis communautaire*. The achievements of current EU legal framework and practice may therefore perform a function of yardstick for evaluation of convergence for such countries. There are also common law jurisdictions, such as the UK, where legal rules traditionally differ from those established in civil law countries. However, it is a question, whether the difference in legal traditions will result in different evidence collection procedures and more beneficial outcomes.

In the light of the above-mentioned changes and challenges it is **relevant** to analyse whether they actually lead to the improvements in the evidence collection process, or the process remains unsettled, as well as to systemize the knowledge and practice available at this exact moment of time. Moreover, there is a need to assess whether the jurisdictions outside of the EU are able to meet the established requirements or even become a source of new solutions in terms of evidence collection.

To the author's best knowledge there are no fundamental books, researches or other literature dedicated straight to the specifics of evidence collection in cases concerning breaches of

---

[1] Richard Whish and David Bailey, *Competition law* (Oxford: Oxford University Press, 2015), 1.

[2] "Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market," EUR-Lex, Accessed 8 May 2021, http://data.europa.eu/eli/dir/2019/1/oj

[3] "Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union," EUR-Lex, Accessed 8 May 2021, http://data.europa.eu/eli/dir/2014/104/oj

[4] Art. 256, "Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part," kmu.gov.ua, Accessed 8 May 2021, https://www.kmu.gov.ua/storage/app/media/uploaded-files/ASSOCIATION%20AGREEMENT.pdf, and "Law On the State Program for Adaptation of Ukrainian Legislation to the Legislation of the European Union," zakon.rada.gov.ua, Accessed 8 May 2021, https://zakon.rada.gov.ua/laws/show/1629-15?lang=en#Text

competition law and especially containing the comparative analysis of evidence collection in EU and Ukraine. However, there is literature covering certain aspects of the chosen topic, that actually helped to make a theoretical basis for this thesis. Namely, there are reports[5] summarizing the investigative powers of competition authorities, which essentially constitutes a source from which the knowledge about methods and procedures commonly used for evidence collection in public enforcement can be retrieved. It has to be pointed out, however, that such reports are made predominantly in a statistical way. That is why the major sources for researching the evidence collection in public enforcement cases were the related legislation, soft-law regulations and judicial practice.

The view of the author on competition law, the concept of breach of competition law, is influenced by the "*Competition law*"[6] book by Richard Whish and David Bailey where concepts were comprehensively analysed both from legal and economic standpoint on the examples of EU and UK regulations and legal practice. David Ashton`s "*Competition Damages Actions in the EU. Law and practice*"[7] represents an extremely valuable and extensive analysis of private enforcement based on loss caused by infringements of Articles 101 and 102 of Treaty on the Functioning of the European Union (TFEU). This research is primarily based on the analysis of court practice gathered by author and competition practising lawyers in other jurisdictions and written in clear and precise logic and structure. The doctoral dissertation of Xiaowen Tan "*The Rules of Evidence in Private Enforcement of the EU Competition Law*"[8] represents a fundamental work where researcher analysed the history of private enforcement of EU law, discussed the rules of burden and standard of proof as well as the access to evidence and concluded that the EU law and court practice remains significantly silent on issues related to rules of evidence in private enforcement. This study helped to understand principles governing the provisions of Directive 2014/104/EU.

Considering the fact that mentioned literature only partially relates to the researched topic, it is possible to state that the **scientific novelty** of the current thesis is based on the lack of the research of the chosen topic.

The **significance** of this study is explained by the attempt of the author to systemize the knowledge in a poorly researched field of evidence collection. The conclusions and recommendations made may also constitute valuable advice for legislators and practitioners

[5] See e.g. ECN Working Group Cooperation Issues and Due Process, *Investigative Powers Report* (2012), https://ec.europa.eu/competition/ecn/investigative_powers_report_en.pdf, and International Competition Network, ICN Agency Effectiveness Project on Investigative Process, *Investigative Tools Report* (ICN, 2013), https://centrocedec.files.wordpress.com/2015/07/report-on-investigative-tools2013.pdf

[6] Richard Whish and David Bailey, *Competition law* (Oxford: Oxford University Press, 2015)

[7] David Ashton, *Competition Damages Actions in the EU: Law and Practice*, Second Edition (Edward Elgar Publishing Limited, 2018)

[8] Xiaowen Tan, "The Rules of Evidence in Private Enforcement of the EU Competition Law," (doctoral dissertation, University of Helsinki, 2020), http://urn.fi/URN:ISBN:978-951-51-5845-1

promoting the development of competition enforcement in Ukraine, allowing to change certain provisions of legal acts.

Therefore, the **aim** of this thesis is to analyse theory and practice of evidence collection in public and private competition enforcement in chosen jurisdictions in order to identify the methods and procedures used, compare them within researched jurisdictions and show possible strengths and weaknesses of existing practices.

In order to achieve such aim, the following **objectives** were formulated:

1. To identify and describe the concepts and relevant legislation which are making the grounding for the researched topic;
2. To analyse and compare the evidence collection through information requests and interviews performed by European Commission, UK and Ukraine competition authorities.
3. To analyse and compare the evidence collection through inspections performed by European Commission, UK, Turkey and Ukraine competition authorities.
4. To analyse and compare the limitations preventing collection of certain types of evidence or imposing additional treatment to collected evidence in practice of European Commission, UK and Ukraine competition authorities.
5. To discuss the judicial practice of evidence collection in private enforcement throughout Member States, UK and Ukraine.

While choosing the jurisdictions for the research, the author relied on objective-subjective considerations. Thus, the European Commission is known to be one of the leading institutions[9] in public enforcement of competition law and therefore was chosen as the sample for the comparison. The UK was chosen as the jurisdiction with strong competition enforcement and represented a country with common law doctrine. Turkey was chosen for the analysis primarily in light of recently introduced guidelines[10] for examination of digital evidence. Ukraine was chosen for comparison due to the policy of the approaching to *Acquis communautaire*, and due to the subjective reason as well. Namely, the author of this thesis is well aware of the Ukrainian legal system and therefore able to provide deep and comprehensive research of judicial practice, as there will be no language barriers. However, due to the specifics of private enforcement, where the evidence collected exclusively within national legal systems, several Member States practices were analysed in order to present European tendencies in private enforcement.

[9] Ian S. Forrester, "Due process in EC competition cases: A distinguished institution with flawed procedures," European Law Review 34 (2009): 818, https://www.biicl.org/files/5749_forrester_25-06-11_biicl_1.pdf

[10] "Guidelines on the Examination of Digital Data during On-Site Inspections, 20-45/617, 08.10.2020," rekabet.gov.tr, Accessed 28 April 2021, https://www.rekabet.gov.tr/Dosya/guidelines/guidelines-on-the-examination-of-digital-data-during-on-site-inspections1-20201120154515821-pdf

The **methodology** of current research includes the **descriptive** method, that was used for gathering and categorization of information included in legal acts, acts of soft-law and judicial practice as well as those contained in theoretical works explaining the concepts of evidence, evidence collection, competition and breach of competition law. The analysis as the part of **analytical** method was used throughout the entire work in order to divide the phenomenon of evidence collection in cases concerning breach of competition law into its component parts and explore each of them. This allowed the author to analyse afterwards the identified means for evidence collection such as information requests, inspections, interviews, disclosure of evidence and expert opinion. The **comparative** method was used in order to reveal the typical and unique features of evidence collection in researched jurisdictions and in parallel enforcements and to compare the typical ones using the analysis of legal norms and judicial practice.

The work structurally consists of five chapters, where the **first chapter** explains the basic underlying concepts, such as "evidence" and "collection of evidence". Additionally, the differences between evidence collection in public and private enforcement and available means of evidence collection are considered, as well as the legal framework in the field of private enforcement. The **second chapter** introduces the analysis of scope of evidence collected using the information requests and interview, practical methods used, as well as existing procedural rules making obtained evidence admissible. The **third chapter** describes the evidence collection process during the inspections of business or non-business premises, namely the scope of information that is possible to obtain, specific technical devices used for these purposes and procedures to be maintained for legitimate evidence collection. The **fourth chapter** concentrates on the question to what extent the legal professional privilege and privilege against self-incrimination limits the scope of evidence collection as well as on the special treatment of collected evidence required by non-disclosure obligation. The **fifth chapter** describes the judicial practice of evidence collection in private enforcement cases through disclosure of evidence ordered by court from parties or third parties or from competition authorities, possible limitations and obstacles.

Defence statement:

1. At the moment Ukraine could not formally meet the requirements set in Directive (EU) 2019/1 regarding the powers to investigate, due to the inaccurate regulation of requests for information and the absence of interview as a separate mean of evidence collection. The amendment of the existing legislation, based on the experience provided by the European Commission and the UK competition authority, will approach Ukrainian practice to the needed standard.

CHAPTER 1. REVIEW OF UNDERLYING CONCEPTS

The author is always faced with the question from what exact point to start the research. It seems that the volume of current work (master thesis) is such that allows not only to describe the phenomenon itself, but also to describe components of the phenomenon. That is why in the first chapter the author intends to lay out the foundation for the research. Specifically, the basic concepts necessary for the understanding of the essence of the topic will be discussed.

This will be useful in two ways. Firstly, to clarify the meaning of each of the components of the researched problem for the purposes of current work. Secondly, as the result will be the identification of exact and correct scope of study.

1.1. Concept of Evidence

To the authors` best knowledge there is no special concept of evidence provided exclusively by competition law, that is why it was decided to give few considerations on the notion of evidence in general.

The scientific discussion concerning the concept of evidence is not new. Henry T. Terry, in his Theory of Evidence published in 1904, noted that the word "evidence" itself has two meanings, which had to be clearly separated in order to avoid confusion. According to his findings the evidence means: "(1) Something directly presented to the senses of the triers, on perceiving which they become aware of a fact; (2) A probative fact[11]". Henry T. Terry explains that the first kind of evidence highlighted by him may consist of spoken words of a witness or a photograph from which the jury get the knowledge of existing fact or nature of certain object[12]. He also proposed the following classification of the evidences of the "first kind" (something that is directly presented to person): "(1) Oral evidence; spoken words; presented to the triers' sense of hearing; (2) Written evidence; written words; presented to the triers' sense of sight; (3) Real evidence; other objects introduced as evidence, such as photographs, models, etc.; presented to various senses of the triers[13]".

James Fitzjames Stephen in the Introduction to his Indian Evidence Act also noted that the word "evidence" is to some extent ambiguous and gave the following meanings: "(1) a testimony on which a given fact is believed; (2) the facts so believed, and (3) the arguments founded upon

[11] Henry T. Terry, "The Theory of Evidence," *The Yale Law Journal* 13, 4 (1904): 191-192, https://www.jstor.org/stable/783301
[12] Ibid, 192
[13] Ibid

them[14]". The resembling understanding of evidence also showed the Lee Loevinger when stating the following: "Recollections, documents and things relating to past events constitute the "evidence" on which courts and lawyers act and are the stuff out of which the "facts" are constructed[15]". As the Hock Lai justifiably pointed out[16] epistemologists, as philosophers concerned with the theory of knowledge, will refer the above discussed understanding of evidence as simply "objects of sensory evidence" according to Susan Haack[17].

The Hock Lai joined the proposed classifications and agreed that the understanding of evidence as an oral, documentary and "real evidence" should refer to the first type of perception of evidences. The understanding of evidence as something that allows to establish the fact is referred by him like second type or second "sense" of term "evidence". This author also gave an example that the presence of an accused person at the crime scene proving the possible involvement of person in crime should be understood as second sense of evidence, where "such presence must be proved by producing evidence in the first sense[18]".

The same author also suggested the third and fourth sense which can be attributed to the term "evidence". In his opinion the third concept of evidence simply broaden the second conception and is to show that "factual proposition" (*factum probans*) in the second sense is able to attest "a matter that is material for the case" (*factum probandum*)[19]. Therefore, in line with such concept of evidence, the "thing" perform functions of "evidence" only when it is related to the substance of the case. Thus, any tangible object can be an "evidence" that may be perceived, but not each of such objects can be related to the substantial matter of the case. However, it is important to note that for deciding if the object is possible to perform the functions of "evidence" in the third sense the preliminary assessment is necessary.

Hock Lai explains that the fourth sense in which the evidence could be understood involves the notion of "evidence" as something able of being admitted by the court, and this concept is referred like "the legal concept of evidence". Further the mentioned author gives an example of hearsay, that in ordinary life is treated like evidence, but at the same time will not be admitted by trial as evidence that counts in law[20].

---

[14] James Fitzjames Stephen, *The Indian Evidence Act (I. of 1872) with an Introduction on the Principles of Judicial Evidence* (London: Macmillan and Company, 1872), 6

[15] Lee Loevinger, "Facts, Evidence and Legal Proof," *Case Western Reserve Law Review* 9, 2 (1958): 155, https://scholarlycommons.law.case.edu/caselrev/vol9/iss2/7

[16] Hock Lai Ho, "The Legal Concept of Evidence," *The Stanford Encyclopedia of Philosophy* (2015), https://plato.stanford.edu/archives/win2015/entries/evidence-legal/

[17] Susan Haack, "Epistemology Legalized: Or, Truth, Justice, and the American Way," *American Journal of Jurisprudence* 49, 12 (2004): 48, https://ssrn.com/abstract=682642

[18] Hock Lai Ho, "The Legal Concept of Evidence," *The Stanford Encyclopedia of Philosophy* (2015), https://plato.stanford.edu/archives/win2015/entries/evidence-legal/

[19] Ibid

[20] Ibid

Discussed considerations and concepts are also reflected in legal acts. Some of them, for instance the German Code of Civil Procedure[21] (*Zivilprozessordnung*), US Federal Rules of Evidence[22] or Rules of Procedure and Evidence[23] applied in light of Rome Statute of the International Criminal Court, does not give the definition of evidence itself and providing only the rules on the admissibility of different evidences. Therefore, the fourth of discussed concepts is impliedly used, when only admissible evidence can constitute an evidence in sense of procedural rules. To uphold this argument, the opinion of Michael Lynch can be cited, who actually wrote: "Rules of evidence for court systems, such as the US Federal Rules of Evidence, provide disciplined versions of what counts as evidence. These rules are analogous in some respects to disciplined versions of evidence in the empirical sciences. In those fields, formal rules define what counts as (legitimate) evidence, and procedures are specified for reaching, testing, and verifying conclusions derived from such evidence[24]".

Another legal acts could provide us with valuable, in terms of current research, notion of "evidence" itself. Thus, in Code of Civil Procedure of Estonia it is stated: "Evidence… is any information which is in a procedural form provided by law and on the basis of which the court, in accordance with the rules provided by law, ascertains the presence or absence of circumstances on which the claims and objections of the parties are based, as well as other facts relevant to the just adjudication of the matter[25]". Such evidence may be in form of testimony, statements, documents, physical evidence, inspection or expert opinion pursuant to the mentioned act[26]. The Civil Procedural Code of Ukraine defines the evidence as: "any data on the basis of which the court establishes the presence or absence of circumstances (facts) that substantiate the claims and objections of the parties to the case, and other circumstances that are relevant to the case[27]". The conclusion can be made that more or less each of the concepts discussed in this subchapter is used in the legislative practice for definition of evidence.

It can be concluded that "evidence" itself is a multi-disciplinary notion, used in everyday life, during scientific research and in legal science as well. In other words, its meaning depends on

[21] "Code of Civil Procedure," gesetze-im-internet.de, Accessed 28 April 2021, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html
[22] "Federal Rules of Evidence," law.cornell.edu, Accessed 28 April 2021, https://www.law.cornell.edu/rules/fre
[23] "The Rules of Procedure and Evidence reproduced from Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A", icc-cpi.int, Accessed 28 April 2021, https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf
[24] Michael Lynch, "Vernacular visions of viral videos: speaking for evidence that speaks for itself," in *Legal rules in practice: in the midst of law's life*, Baudouin Dupret, Julie Colemans and Max Travers (New York: Routledge, 2021), 184.
[25] Para. 229(1), "Code of Civil Procedure, Passed 20.04.2005, RT I 2005," riigiteataja.ee, Accessed 28 April 2021, https://www.riigiteataja.ee/en/eli/513122013001/consolide
[26] Ibid, para. 229(2)
[27] Art. 76(1), "The Civil Procedure Code of Ukraine," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/1618-15#Text

the perception and context. The author of this thesis do not intend to limit the scope of research exclusively to "evidence" in the sense provided by the legal concept of evidence. The reason for such scoping is the fact that not all evidence collected may constitute an "evidence in law" and the process of preliminary assessment needed to decide on the admissibility of evidence in the sense provided by procedural legislation and rules on evidence. Therefore, in the text of this research the word "evidence" should be interpreted in the broad sense and the certain meaning to be decided depending on context.

1.2. Process of Evidence Collection

Considering the opinion that the liability in competition cases is of quasi-criminal nature and therefore the standards of proof constantly grow[28], and the fact that evidence collection stage has embodied into the laws on procedure, including criminal procedure, the author suggest to pay attention to the evidence collection theory established in criminal proceedings.

According to Semyon Schreifer, the process of collecting evidence is based on "finding, perceiving and consolidating evidentiary information[29]". Same author also notes that the collection of evidence "constitutes a system of actions aimed at the perception of objectively existing traces of the event and their procedural fixation"[30].

Raphail Belkin proposed to divide the evidence collection, understood like stage of evidentiary process, into: 1) detection; 2) fixation; 3) seizure; 4) preservation[31]. Gavrilin S.A. further explains the content of the stages. Namely, the detection stage should include "the detection of sources of information, their search, perception, identification" and may involve a variety of intended for this tactics and techniques. Fixation represents the usage of special techniques for the fixation of source of information in the form suitable for perception[32]. Gavrilin S.A. notes that fixation consists of two major parts, namely of the "procedural fixation" of evidence according to the law and of the "procedural registration" meaning the filing. The seizure stage is needed for the

---

[28] Юрій Терентьєв, "Ми використовуємо актуальний міжнародний досвід для забезпечення високих стандартів доказування в наших справах," amcu.gov.ua, Accessed 25 April 2021, https://amcu.gov.ua/news/mi-vikoristovuemo-aktualniy-mizhnarodniy-dosvid-dlya-zabezpechennya-visokikh-standartiv-dokazuvannya-v-nashikh-spravakh-yuriy-terentev

[29] С. А. Шейфер, *Следственные действия. Система и процессуальная форма* (Москва: Юрлитинформ, 1981): 6, http://library.nlu.edu.ua/POLN_TEXT/UP/SHEYFER_2001.pdf

[30] Ibid, 14

[31] Р. С. Белкин, *Криминалистическая энциклопедия* (М.: Мегатрон XXI, 2000): 211, quoted in S.A. Gavrilin, "Collecting of Proofs in Criminal Legal Proceedings," *Bulletin of the Moscow University of the Ministry of Internal Affairs of Russia*, 10 (2012): 164, https://cyberleninka.ru/article/n/sobiranie-dokazatelstv-v-ugolovnom-sudoproizvodstve

[32] S.A. Gavrilin, "Collecting of Proofs in Criminal Legal Proceedings," *Bulletin of the Moscow University of the Ministry of Internal Affairs of Russia*, 10 (2012): 164, https://cyberleninka.ru/article/n/sobiranie-dokazatelstv-v-ugolovnom-sudoproizvodstve

ensuring the possibility to use the evidence during the later stage of proceedings, where the only those evidences can be seizure that were already properly fixated[33]. The correct process of seizure must prevent the loss, replacement or damage of evidences. The last stage, preservation of evidence, should ensure the safety of evidences and their evidentiary value and possibility of use of evidence during the any stage of proceedings, that can be done using procedural (e.g. filing) or technical means[34].

When analyzing the provision on collection of evidence[35] of the Criminal Procedural Code of Ukraine, it was established that legislator listed the persons empowered to collect the evidences, that are the parties to the criminal proceedings, and the methods that can be used by such parties. Such methods, except the investigative actions, include "requesting and receiving from copies of documents, information, expert opinions, audit reports, inspection reports" and the seizure of tangible objects[36], when the latter can be performed only by investigative bodies.

Lawrence Siry, when reviewing[37] the current agreements on cooperation in cross-border criminal cases, pointed out some valuable features of evidence collection in modern time. Specifically, he argues that collection of evidence has significantly changed with the globalization, when the evidences are not to be found so often in personal premises as they may be found in person email account. He also notes, that notwithstanding the possibility to found couple or even all evidence in one place (personal accounts) the task of identifying jurisdiction where the data is stored sometimes can be difficult, especially when the cloud storage was used. Additional difficulties can be related to the cooperation with market giants possessing the big data, such as Google or Facebook, therefore governments need to improve tools of collection independent from the influence of such companies[38].

The one of the reasons why the evidence collection theory actively developed in course of criminal proceedings could be the fact that different kind of investigation procedures developed primarily in course of investigating crimes. Also the "weight" of mistake could be higher in criminal law and process. Nevertheless, this does not give right to attribute the collection of evidence, as a stage and corresponding regulations, exclusively to the criminal science.

---

[33] S.A. Gavrilin, "Collecting of Proofs in Criminal Legal Proceedings," *Bulletin of the Moscow University of the Ministry of Internal Affairs of Russia*, 10 (2012): 165, https://cyberleninka.ru/article/n/sobiranie-dokazatelstv-v-ugolovnom-sudoproizvodstve

[34] Р. С. Белкин, *Избранные труды*, (М.: Норма, 2008), 209, quoted in S.A. Gavrilin, "Collecting of Proofs in Criminal Legal Proceedings," *Bulletin of the Moscow University of the Ministry of Internal Affairs of Russia*, 10 (2012): 165, https://cyberleninka.ru/article/n/sobiranie-dokazatelstv-v-ugolovnom-sudoproizvodstve

[35] Art. 93, "The Criminal Procedural Code of Ukraine", zakon.rada.gov.ua, Accessed 25 April 2021, https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text

[36] Ibid

[37] Lawrence Siry, "Cloudy days ahead: Cross-border evidence collection and its impact on the rights of EU citizens," *New Journal of European Criminal Law* 10, 3 (2019): 231, https://doi.org/10.1177/2032284419865608

[38] Ibid

The civil procedure is also familiar with the collection of evidence concept. Thus, Yanrong Zhao analyzed[39] collection of evidence under US Federal Rules of Civil Procedure. The author stated that collection of evidences is ruled by the concept of "discovery" used in pre-trial proceedings. The discovery actually covers approached by which the parties "obtain and preserve the information regarding the action"[40]. According to Yanrong Zhao findings, the process of discovery aims to ensure the preservation of relevant information, to identify the issues disputed by the parties and to find admissible evidence on the issues in dispute[41]. He also notes that the scope of the discovery is quite broad and the parties entitled to collect any information related to the subject-matter of dispute, except the privileged information[42]. The privileged information includes privileged communication in personal or other relations and there is also the privilege against the self-incrimination which needs to be excluded from the scope of discovery. Oral and written dispositions as well as written interrogations between the parties and discovery of property may be used as means for evidence collection[43].

Miguel de la Mano had also outlined that during the collection of evidence in public enforcement cases competition authorities need to identify what data refers to the alleged breach and can prove the circumstances material for the case and also to identify if such information can be obtained during the reasonable time. He recommended to use special analytical methods, preliminary conversations with parties and to send drafts prior to official requests of information in order to facilitate the process[44].

By the analogy with the concepts discussed in this subchapter, it is possible to identify main characteristics that should be reviewed when describing the evidence collection from the legal standpoint. Attention needs to be driven to the persons or agencies authorized to collect evidence. The methods for obtaining evidence and their possible scope, with special interest tools for electronic evidence collection, need to be discussed. Procedural requirements to describe the fixation, seizure and preservation of evidence, as well as those aimed at ensuring the admissibility of evidence also require mentioning. At the last, the legal barriers or limitations such as privileged information, self-incrimination rules, confidentiality putting the possible evidence out of the scope of collection are to be addressed.

---

[39] Yanrong Zhao, "Evidence Collection in the German, American and Chinese Legal Systems: A Comparative Analysis," *Frontiers of Law in China*, 6 (2011), https://doi.org/10.1007/s11463-011-0118-4

[40] "Developments in the Law. Discovery," *Harvard Law Review* 74, 5 (1961): 942, https://doi.org/10.2307/1338748

[41] Rule 26, "Federal Rules of Civil Procedure", uscourts.gov, Accessed 25 April 2021, https://www.uscourts.gov/sites/default/files/federal_rules_of_civil_procedure_dec_1_2019_0.pdf

[42] Yanrong Zhao, "Evidence Collection in the German, American and Chinese Legal Systems: A Comparative Analysis," *Frontiers of Law in China*, 6 (2011): 52-53, https://doi.org/10.1007/s11463-011-0118-4

[43] Ibid, 53

[44] Miguel de la Mano, "A theory on the use of economic evidence in competition policy cases," presentation prepared for Association of Competition Economists Budapest, 28th November 2008, https://www.competitioneconomics.org/dyn/files/basic_items/139-file/RoundTable_DeLaMano.pdf

1.3. Collection of Evidence in Competition Law: Parallel Enforcements

The aim of this subchapter is to highlight that the competition enforcement in most jurisdictions consists of two parallel processes, namely the public and private enforcement[45]. The main actors of public enforcement are competition authorities which enforce statutory rules under the special powers[46] and aiming to restrict the anticompetitive practices as harmful for economy as a whole. Where the private actions refer to the individual claims of parties harmed by the infringement of competition rules. Private actors do not possess special powers related to competition enforcement[47].

During the discussion held in OECD on this issue, was concluded that private and public enforcement may supplement each other[48]. The private enforcement aims to curb the anticompetitive behavior by providing aggrieved parties the right to claim damages caused by such behavior, instead of fines provided by public enforcement, and, therefore making additional financial pressure on infringers. The public enforcement can provide private with additional evidence collected in course of investigative procedures, this most relevant in so called "follow-on actions"[49].

International Competition Network (ICN) in its report on Investigative Tools listed the following means of evidence collection by national competition authorities known on the moment of the report: "(i) on-site inspections in business premises; (ii) inspections in non-business premises; (iii) compulsory requests for information; (iv) voluntary interviews; (v) compulsory interviews; (vi) voluntary submission of information; and (vii) wiretaps or recording of conversations"[50]. The document of major importance for public enforcement in EU, namely the Directive (EU) 2019/1, recommended to all Member States to implement such powers in their investigations as: 1) inspection of business premises; 2) inspection of other premises; 3) requests of information; 4) interviews[51]. Such powers correspond to those that the European Commission

[45] Kai Hüschelrath and Sebastian Peyer, "Public and Private Enforcement of Competition Law - A Differentiated Approach," *ZEW - Centre for European Economic Research Discussion Paper*, 29 (2013): 1, http://dx.doi.org/10.2139/ssrn.2278839
[46] Ibid, 2
[47] Ibid, 5
[48] Directorate for Financial and Enterprise Affairs Competition Committee, "Executive Summary of the Roundtable On the Relationship Between Public and Private Antitrust Enforcement," *DAF/COMP/WP3/M(2015)1/ANN3/FINAL* (2015): 2, https://one.oecd.org/document/DAF/COMP/WP3/M(2015)1/ANN3/FINAL/en/pdf
[49] Ibid
[50] International Competition Network, ICN Agency Effectiveness Project on Investigative Process, *Investigative Tools Report* (ICN, 2013), 6, https://centrocedec.files.wordpress.com/2015/07/report-on-investigative-tools2013.pdf
[51] Art. 6-9, "Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market," EUR-Lex, Accessed 1 May 2021, http://data.europa.eu/eli/dir/2019/1/oj

has according to the Regulation (EC) No 1/2003[52], therefore the Commission can be used as an model institution for comparison. It appears also that the means of evidence collection in public enforcement are primarily embodied into the investigation powers of the authorities. Therefore, it will be logical to analyze the evidence collection in the light of investigation powers used by competition authorities to obtain evidences.

It is possible to find in the Directive (EU) 2019/1 some valuable recommendations for the Member States competition authorities. Thus, the discussed authorities have to be empowered to collect all information "related to the undertaking subject to the investigation, including in digital form, irrespective of the medium on which it is stored" regardless were the case opened in respect of breach of EU competition law or of national one[53]. Also it was noted that investigative powers "should be adequate to meet the enforcement challenges of the digital environment", including the right to obtain the related information from whatever device using special forensic instruments[54]. While using the inspections, as the mean of evidence collection, authorities should also be empowered to search "documents, files or data on devices which are not precisely identified in advance"[55]. These and other standards recommended for implementation by the Member States need to be analyzed considering the other than EU jurisdictions to found whether the practices are compatible with the EU ones.

Meanwhile, in private enforcement main difficulties and concerns as to evidence collection arise due to the absence of special powers of the parties to the proceedings to collect the evidence. Thus, during the discussions in OECD related panel[56], it was noted that civil proceedings that actually governs the evidence collection in private enforcement are to some level "unsuitable" to the private claims. It was also pointed out that generally rules of civil procedure require the parties to prove the breach of competition law, fault of undertaking, damages caused by the competition infringement and the causal link itself. However, it was noted that such procedures sets quite high standards of proof and too much burden is put on the parties, because the competition cases traditionally require intensive fact-finding without the corresponding powers and knowledge given to the parties to the proceedings[57].

---

[52] Chapter V, "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty," EUR-Lex, Accessed 1 May 2021, http://data.europa.eu/eli/reg/2003/1/oj

[53] Recital 4, Directive (EU) 2019/1

[54] Ibid, Recital 30

[55] Ibid, recital 32

[56] Directorate for Financial and Enterprise Affairs Competition Committee, "Executive Summary of the Roundtable On the Relationship Between Public and Private Antitrust Enforcement," *DAF/COMP/WP3/M(2015)1/ANN3/FINAL* (2015): 3, https://one.oecd.org/document/DAF/COMP/WP3/M(2015)1/ANN3/FINAL/en/pdf

[57] Ibid

Considering the fact that the evidence collection practice is more enhanced in public enforcement, the author decided to dedicate the major part of the following findings to the analysis of current practices of evidence collection in public enforcement cases. However, the problematic questions of private enforcement will also be outlined in the final chapter in order to make the research complete.

1.4. Legal Framework in Private Enforcement

Private and public enforcement of competition law, as it was discussed in the Subchapter 1.5, should be complementary to each other and aim to perform similar tasks, but with different methods. Thus, it was also established that evidence collection in private enforcement is embodied into the general rules of civil procedure, that are commonly treated as the "unsuitable" in competition cases. Therefore, it is necessary to assess the attempts to harmonize and facilitate the private enforcement and the results achieved.

History of the development of private enforcement of **EU** competition law in Member States can be traced from the decision *Courage Ltd* v *Bernard Crehan*[58]. In this case the UK Court of Appeal asked ECJ on preliminary ruling as to whether the national court is entitled to grant a relief and recover damages in cases where the person allege the breach of community law[59] (namely Article 81[60] EC). The claimant was trying to recover damages from tying practices used for the lease agreements[61]. The ECJ granted the right for damages, stating also that party can rely on "own unlawful actions" when claiming compensation[62].

Afterwards the discussed right found its place into the Recital 7 of Regulation (EC) 1/2003[63]. However, several reports show that the courts were reluctant to award damages and the practice of private enforcement were usually referred as "underdeveloped"[64]. The private enforcement in EU was often compared with the successful one in US, where on the moment of 2002 over than

[58] "Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others, Case C-453/99," EUR-Lex, Accessed 5 May 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999CJ0453
[59] Ibid, para. 16
[60] Current Article 101 TFEU
[61] Para. 3-7, "Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others, Case C-453/99," EUR-Lex, Accessed 5 May 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999CJ0453
[62] Ibid, para. 36
[63] Recital 7, "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty," EUR-Lex, Accessed 5 May 2021, http://data.europa.eu/eli/reg/2003/1/oj
[64] Georg Berrisch, Eve Jordan, and Rocio Salvador Roldan, "E.U. Competition and Private Actions for Damages, The Symposium on European Competition Law," *Northwestern Journal of International Law & Business* 24, 3 (2004): 586, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1582&context=njilb and Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules – Comparative Report* (Ashurst, 2004), 1, https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

ninety percent of competition cases were enforced by private parties [65]. In the US collection of evidence is performed on discovery stage[66] and governed by the Federal Rules of Civil Procedure. Therefore, if granting the right to claim damages for the breach of Community competition law was not enough to facilitate private enforcement, possibly the reasons of underdevelopment is to be found in the procedures and not the right itself.

In the light of the above mentioned problems, European Commission issued several acts of soft-law. The first one, Green Paper 2005, the Commission pointed out that it is common practice that valuable evidence are hold by the infringer itself or by competition authorities investigating the breach, therefore it is necessary to work on effective mechanism of the injured party access to that evidence[67]. It also was a proposal that the court shall possess the right to appoint expert instead of parties, in order to save funds and to avoid contradictory opinions[68]. The second one, White Paper 2008, upheld the previous findings and provided more unambiguous recommendations[69].

Finally, the major step for the harmonization of claim for damages rules and facilitation of private enforcement was the adoption of the Directive 2014/104/EU[70]. As the Pier Luigi Parcu and others stated, the Directive in fact codified a number of ideas proposed in White Paper 2008 and aimed at harmonizing rules for damages actions "in order to establish a level playing field among EU Member States"[71]. Christopher H. Bovis and Charles M. Clarke also shared such a view, adding also that national case law was codified as well in order to ensure "procedural and legal certainty" and seeking to facilitate both public and private enforcement[72]. These findings are in fact consistent with the text of Article 1 and Recital 4 of the Directive 2014/104/EU.

When analyzing the text of the discussed Directive it is possible to conclude that the right for full compensation of harm caused by the infringement of Article 101, 102 of TFEU was again declared[73], as well as the need for existence of "procedural rules ensuring the effective exercise of

---

[65] Georg Berrisch, Eve Jordan, and Rocio Salvador Roldan, "E.U. Competition and Private Actions for Damages, The Symposium on European Competition Law," *Northwestern Journal of International Law & Business* 24, 3 (2004): 591, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1582&context=njilb

[66] Aimee Goldstein, Elizabeth Morony, James Hosking and Sarah Keene "Private Antitrust Remedies", *Global Counsel Competition Handbook* (2001): 110, https://www.ibanet.org/Document/Default.aspx?DocumentUid=A947DAC8-CA97-45AE-9BCF-B4A64615F6D2

[67] Para. 2.1., "Green Paper - Damages actions for breach of the EC antitrust rules, SEC(2005) 1732," EUR-Lex, Accessed 5 May 2021, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005DC0672

[68] Ibid, para. 2.9

[69] "White paper on damages actions for breach of the EC antitrust rules," EUR-Lex, Accessed 5 May 2021, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008DC0165

[70] "Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union," EUR-Lex, Accessed 5 May 2021, http://data.europa.eu/eli/dir/2014/104/oj

[71] Pier Luigi Parcu, Giorgio Monti, Marco Botta, *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Northampton: Edward Elgar, 2018), 4.

[72] Christopher H. Bovis, Charles M. Clarke, "Private Enforcement of EU Competition Law," *Liverpool Law Review* 36 (2015): 54, https://doi.org/10.1007/s10991-015-9164-9

[73] Art. 1 and 3, Directive 2014/104/EU

that right" was highlighted[74]. It was stressed that parties seeking to obtain damages are under different procedural rules in different jurisdictions and the final result of proceeding may vary because of it[75], therefore the "principle of effectiveness and equivalence" shall be ensured for the effective exercise of the right for the full compensation[76].

Regarding the equivalent and effective exercise of this right following explanation is provided in the Directive 2014/104/EU: "This means that they should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the TFEU or less favourably than those applicable to similar domestic actions[77]". In *Manfredi* v *Lloyd Adriatico* case, where the claimant was trying to receive a repayment of price increase included into the price of "civil liability auto insurance"[78], the ECJ noticed that national courts may provide procedural rules in manner "not less favourable than those governing actions for damages based on an infringement of national competition rules[79]" and also "do not render practically impossible or excessively difficult the exercise of the right to seek compensation[80]". Eddy de Smijter and Denis O'Sullivan justifiably noted that court by giving such interpretation of principle intended to "achieve piecemeal minimum harmonization of national rules and procedures"[81]. Then it is possible to conclude that Directive 2014/104/EU in discussed provisions just consolidated the principle already established in *Manfredi* v *Lloyd Adriatico*.

The rules provided in the Directive 2014/104/EU regarding the disclosure of evidence are of the major relevance for this work, because disclosure constitute the basic tool of evidence collection in private enforcement of competition law. According to the Directive it is necessary to distinguish disclosure of evidence by defendant, claimant or third party (Article 5) from the disclosure of evidence contained in competition authorities file (Article 6). Granting of right to order disclosure is reasoned by the same logic embodied in the Recital 14 where it is stated: "The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant[82]". It was also

[74] Ibid, Recital 4, Art. 1
[75] Ibid, Recital 8
[76] Ibid, Recital 11, Art. 4
[77] Ibid, Recital 11
[78] Para. 2, "Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA, Joined cases C-295/04 to C-298/04," EUR-Lex, Accessed 5 May 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CJ0295
[79] Ibid, para. 72
[80] Ibid
[81] Eddy de Smijter, Denis O'Sullivan, "The Manfredi judgment of the ECJ and how it relates to the Commission's initiative on EC antitrust damages actions," *Competition Policy Newsletter*, 3 (2006): 26, https://ec.europa.eu/competition/speeches/text/2006_3_23_en.pdf
[82] Recital 14, "Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the

stressed in the Preamble that in conditions of lack of information parties shall have a right not to specify each individual item when requesting the disclosure and to claim the disclosure only of category of evidence[83].

Notwithstanding the fact that the courts shall grant disclosure of evidence, such disclosure cannot be unlimited. That is why the disclosure is regulated by the principle of proportionality[84]. Thus, in order to ensure that ordered disclosure is proportional national courts shall assess: 1) the justification of "request to disclose evidence"; 2) "the scope and cost of disclosure"; 3) whether the evidence requested contain confidential information and how it will be protected[85]. Xiaowen Tan noted in this regard that the "weigh up approach" was used by the legislator seeking balance in "the legitimate interests of all parties and third parties concerned"[86]. The same author also cited the *Commission* v *EnBW* decision when explaining that weighing up should be made between "the respective interests in favour of disclosure of such documents and in favour of the protection of those documents"[87]. When the proportionality is assessed regarding the disclosure of evidences contained in competition authorities file the court shall additionally look "whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents", whether the request concerns damages action and also "the need to safeguard the effectiveness of the public enforcement"[88]. The latter consideration for assessment implies among others the obligation of court to order the disclosure of evidence contained in competition authority file if there is no possibility to obtain these evidence form parties or any third party[89].

Not only the principle of proportionality limits the disclosure of evidence form competition authorities, but also so called "grey-list" and "black-list"[90] of documents to be disclosed. For example, leniency statements and settlement submissions are in the black-list and their disclosure cannot be ordered by court[91]. The logics behind such restriction is to be found in Recital 26, where it was explained that "undertakings might be deterred from cooperating with competition

---

Member States and of the European Union," EUR-Lex, Accessed 5 May 2021, http://data.europa.eu/eli/dir/2014/104/oj

[83] Ibid, Recital 15, Art. 5(2)

[84] Ibid, Art. 5(3), Recital 16

[85] Ibid, Art. 5(3)

[86] Xiaowen Tan, "The Rules of Evidence in Private Enforcement of the EU Competition Law" (doctoral dissertation, University of Helsinki, 2020), 53, http://urn.fi/URN:ISBN:978-951-51-5845-1

[87] Para. 107, "European Commission v EnBW Energie Baden-Württemberg AG, Case C-365/12 P," EUR-Lex, Accessed 5 May 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0365

[88] Art. 6(4), "Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union," EUR-Lex, Accessed 5 May 2021, http://data.europa.eu/eli/dir/2014/104/oj

[89] Ibid, Art. 6(10), Recital 29

[90] Stephen Wisking, Kim Dietzel and Molly Herron, "EU Overview," in *The Private Competition Enforcement Review*, Tenth Edition, Ilene Knable Gotts (UK: Law Business Research Ltd, 2017), 12, https://www.herbertsmithfreehills.com/file/19221/download?token=wiUL8Bfb

[91] Art. 6(6), Directive 2014/104/EU

authorities" if any of statements made by them exclusively to competition authorities in order to obtain a relief would cause a private civil action[92]. However, in *Pfleiderer AG* v *Bundeskartellamt*, where the applicant claimed an access to the competition files including leniency statements[93], the ECJ established that nothing precludes an applicant from the access to the leniency documents concerning the infringer[94]. Therefore, it is possible to conclude that Directive 2014/104/EU in relation to disclosure of leniency statements goes against the previously established court practice and states the new ruling.

The documents included into the gray-list include information prepared "specifically for the proceedings of a competition authority", "information that the competition authority has drawn up and sent to the parties in the course of its proceedings", "settlement submissions that have been withdrawn"[95], and cannot be ordered for disclosure until the competition authority closes the proceedings where such information was used[96]. Xiaowen Tan pointed out that such provision in fact contains not a restriction of disclosure, but a delay of disclosure and in practice national court will simply suspend the proceedings until the competition authority decides on case in public enforcement proceedings[97]. It is seen from the analysis of relevant provisions that disclosure of evidence from the competition authorities' files is under stricter requirements that are mainly influenced by the necessity not to interfere unduly into the public enforcement of EU competition law.

Unlike the Green Paper 2005, Directive 2014/104/EU is silent about such mean of evidence collection as expert opinion, that is useful when estimating the amount of damages to be claimed. The regulator only stated the main principles to be used when quantifying damages, that includes the principle of equivalence and effectiveness[98], similar to those that governs disclosure. However, it was stated that national courts may order the assistance of national competition authorities for quantifying the harm where it is appropriate[99]. Stephen Wisking, Kim Dietzel and Molly Herron actually pointed out regarding the use of experts that it seems to be "generally established practice", notwithstanding the fact that frequency of use differs between Member States. The same

[92] Ibid, Recital 26
[93] Para. 2, "Pfleiderer AG v Bundeskartellamt, Case C-360/09," EUR-Lex, Accessed 5 May 2021, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62009CJ0360
[94] Ibid, para 32
[95] Art. 6(5), Directive 2014/104/EU
[96] Ibid
[97] Xiaowen Tan, "The Rules of Evidence in Private Enforcement of the EU Competition Law" (doctoral dissertation, University of Helsinki, 2020), 56, http://urn.fi/URN:ISBN:978-951-51-5845-1
[98] Recital 46, "Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union," EUR-Lex, Accessed 5 May 2021, http://data.europa.eu/eli/dir/2014/104/oj
[99] Ibid, Art. 17(3)

authors also noticed[100] that such conclusion is already reflected in Practical guide on quantification of harm issued by the European Commission staff[101].

Peter Willis and Jonathan Speed noted that the right to claim damages caused by the breach of competition law in private litigation in **UK** was granted by the House of Lords in *Garden Cottage Foods* v. *Milk Marketing Board*[102]. As the mentioned decision was issued in 1984 it is possible to conclude that the UK started to develop private enforcement of competition law much earlier than it happened in EU. The same authors also mentioned that in 2002 the Competition Act 1998 was amended with Section 47A and Section 47B, which introduced follow-on damages claims and "limited opt-in collective claims" regarding the breach of competition law established by European Commission or UK competition authorities and heard by the established for this purposes Competition Appeal Tribunal[103].

Notwithstanding the Brexit process, UK in fact implemented provisions of Directive 2014/104/EU by issuing an amendment[104] to Competition Act 1998 with special Schedule 8A, referred in new article 47F. The UK finally exit the EU recently, however the mentioned provisions are in force. Peter Willis and Jonathan Speed concluded that "the current framework remains largely unchanged, except that in future, the UK will not provide for the private enforcement of EU competition law, or recognise decisions" of European Commission stating a breach of Community competition rules[105]. Same authors also made an opinion that English courts are "likely" to accept and decide on claims in respect of breach of EU competition law, because of the provided 6 years of limitation period[106].

As the Peter Scott, Mark Simpson and James Flet pointed out in UK all parties to civil proceedings are under the duty to provide disclosure of relevant documents[107] according to the

---

[100] Stephen Wisking, Kim Dietzel and Molly Herron, "EU Overview," in *The Private Competition Enforcement Review*, Tenth Edition, Ilene Knable Gotts (UK: Law Business Research Ltd, 2017), 13-14, https://www.herbertsmithfreehills.com/file/19221/download?token=wiUL8Bfb

[101] "Practical guide quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the functioning of the European Union, Commission Staff Working Document, 11.6.2013", ec.europa.eu, Accessed 5 May 2021, https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf

[102] Garden Cottage Foods Ltd v. Milk Marketing Board [1984] 1 AC 130

[103] Peter Willis and Jonathan Speed, "The Private Competition Enforcement Review: United Kingdom - England & Wales," *The Law Reviews - The Private Competition Enforcement Review* (24 March 2021), https://thelawreviews.co.uk/title/the-private-competition-enforcement-review/united-kingdom-england--wales

[104] "The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017," legislation.gov.uk, Accessed 5 May 2021, https://www.legislation.gov.uk/uksi/2017/385/contents/made

[105] Peter Willis and Jonathan Speed, "The Private Competition Enforcement Review: United Kingdom - England & Wales", *The Law Reviews - The Private Competition Enforcement Review* (24 March 2021), https://thelawreviews.co.uk/title/the-private-competition-enforcement-review/united-kingdom-england--wales

[106] Ibid

[107] Peter Scott, Mark Simpson and James Flet "England & Wales," in *The Private Competition Enforcement Review*, Ninth Edition, Ilene Knable Gotts (UK: Law Business Research Ltd, 2016), 145, https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/england--wales-chapter-of-the-eighth-edition-of-the-private-competition-enforcement-review.pdf

Sections 31.6 and 31.7 of the Civil Procedure Rules 1998[108]. Same authors also noted that such duty covers also the evidences created after the start of the court proceedings with exception made to the documents protected by privilege[109]. In theirs opinion well-established practice of disclosure is one of the reasons why England is seen as suitable jurisdiction for private damages actions[110].

There is also an opinion that Schedule 8A of Competition Act 1998 has not introduced new rules of disclosure due to the fact that the UK had already established practice of disclosure before the adoption of Directive 2014/104/EU and primarily aimed on providing exceptions to disclosure implementing the requirements placed into Article 6 and 7 of the mentioned directive[111].

In **Ukraine** the right for the compensation of damages incurred due to the breach of competition law emerged in 2001 with the adoption of Law On Protection of Economic Competition[112]. Namely, the Article 55 of mentioned law prescribed the right of persons to claim damages to the commercial court. However, the procedure of bringing the claim is general and performed according to the relevant provisions of Commercial Procedural Code of Ukraine[113]. That is the situation that Member States were in until the adoption of Directive 2014/104/EU.

The commercial court, having the jurisdiction over the claims for damages, in empowered to order a disclosure of evidence after the corresponding petition of one of the parties to the proceedings[114]. The party requesting a disclosure is obliged to sufficiently identify the requesting evidence as well as to show that requested evidence is actually able to prove the relevant circumstances. Further, the party only can be granted the disclosure if shows that all reasonable actions to obtain this evidence were taken and the circumstances proving that the evidence is actually in the possession of person from the disclosure is to be requested[115]. The commercial court can grant the disclosure before the actual claim is made only in exceptional circumstances[116]. There are no limitations of ordering the disclosure, because the relevant provisions were not designed exclusively for damages claims in cases of breach of competition law, therefore such limitations need to be assessed case-by-case. Generally, the party requesting a disclosure of evidence in Ukraine have to present detailed description of evidence and circumstances why they can only be

---

[108] "The Civil Procedure Rules 1998," legislation.gov.uk, Accessed 5 May 2021, https://www.legislation.gov.uk/uksi/1998/3132/contents

[109] Peter Scott, "England & Wales", in *The Private Competition Enforcement Review*, 145

[110] Ibid

[111] Peter Willis, "The Private Competition Enforcement Review: United Kingdom - England & Wales", https://thelawreviews.co.uk/title/the-private-competition-enforcement-review/united-kingdom-england--wales

[112] "Law On Protection of Economic Competition," zakon.rada.gov.ua, Accessed 05 May 2021, https://zakon.rada.gov.ua/laws/show/2210-14?lang=en#Text

[113] "Commercial Procedural Code of Ukraine," zakon.rada.gov.ua, Accessed 05 May 2021, https://zakon.rada.gov.ua/laws/show/1798-12?lang=en#n2097

[114] Ibid, Art. 81(1)

[115] Ibid, Art. 81(2)

[116] Ibid, Art. 81(5)

obtained with the assistance of court, that theoretically may constitute an obstacle for brining claims in private enforcement and even make it impossible in stand-alone actions.

The review of the underlying concepts allowed to establish that the concept of evidence is quite broad and the notion itself usually depends on the context. Where only admissible evidence may constitute an "evidence" in the understanding provided in legal science. In author's opinion the criminal science made a serious contribute to the development of concept of evidence collection. According to it, the means and procedure used for identification, fixation, seizure and preservation of evidence should be treated as the essence of the evidence collection stage.

It was also shown that subjects empowered to collect evidence in public enforcement of competition law have a wide range of tools allowing them to gather it directly from undertaking in breach or third persons. Where in private enforcement of competition law the subjects usually cannot act independently in the course of civil proceedings and have to ask the court to order the disclosure of relevant evidence form another party. Therefore, it is possible to assume that it is an imbalance between the evidence collection in private and public enforcement. The Directive 2014/104/EU together with preceding acts and decisions, in fact was an attempt to provide the equal level of requirements for disclosure of evidence throughout EU Member States. Where in the UK rules regarding disclosure in private competition damages actions were satisfactory for the claimants even before the adoption of Directive. In Ukraine there were no attempts to deal with the imbalance and private claimants are under the general rules of commercial procedure, which in author opinion set quite a high threshold to order the disclosure.

CHAPTER 2. REQUESTS FOR INFORMATION AND INTERVIEW

2.1. Requests for Information

In line with the ECN Working Group point of view, requests for information could be defined as the "any form of request addressed by a competition authority to an undertaking and/or association of undertakings and/or natural person to provide information in the context of an investigation"[117].

2.1.1. Scope and Binding Nature of the Request

The answer to the simple request addressed by the **Commission** is voluntary. Recommendatory nature of simple request is not directly prescribed in respective provisions[118] of Regulation (EC) No 1/2003. Rather, such a conclusion can be drawn by applying dispositive method of legal regulation[119] when analyzing the relevant provisions. To be precise, the concept of "everything is allowed that is not prohibited" is used. Nothing is said in Article 18(2) of Regulation about "obligation" of addressee to comply with Commissions request. Instead, there is a penalty for supplying incorrect or misleading information[120]. Whereas in case when Commission request information through decision the additional penalty is established for failing to supply the information within the required time-limit[121]. Therefore, the recipient of simple request for information could refuse to provide this information, but in case the recipient decided to answer to Commission request – the information must be correct.

Law practitioners express an opinion that Commission more commonly uses the simple information requests[122]. However, if the recipient refused to supply the information voluntary, Commission is likely to adopt the formal decision[123]. Most probably such point of view explained by the previous practice of the Commission under the Regulation 17/62[124] (predecessor of

---

[117] ECN Working Group Cooperation Issues and Due Process, *Investigative Powers Report* (2012), 28, https://ec.europa.eu/competition/ecn/investigative_powers_report_en.pdf

[118] Art. 18 (2), "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty," EUR-Lex, Accessed 25 April 2021, http://data.europa.eu/eli/reg/2003/1/oj

[119] Svetlana Vladimirovna Boshno, "Means and methods of legal regulation," *Law and modern states*, 3 (2014): 53, https://cyberleninka.ru/article/n/means-and-methods-of-legal-regulation

[120] Article 18(2), Article 23(1)(a), Regulation (EC) No 1/2003

[121] Ibid, Article 18(3), Article 23(1)(b)

[122] *Competition law investigations by the European Commission*, (Ashurst, 2020), 5, https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---competition-investigations-by-the-european-commission/

[123] Ibid

[124] "EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty," EUR-Lex, Accessed 10 May 2021, http://data.europa.eu/eli/reg/1962/17/oj

Regulation (EC) No 1/2003) which is not still in use. According to the Article 11 of the old regulation, which was additionally interpreted and clarified by the ECJ in *National Panasonic v Commission*[125], request for information was deemed as two-stage procedure, where the request for information by decision was possible only if no response was provided to regular request or such response was incomplete. The initial request for information presented the first-stage of the procedure, and essentially can be equated to current notion of simple request in Regulation (EC) No 1/2003.

Another concept describing scope is "necessity" of information requested in terms of Article 18 of Regulation (EC) No 1/2003. General Court explained in *SEP* v *Commission*[126] that Commission is entitled to request only information related to alleged breach of competition rules and which could be used in future investigation of alleged breach. Court also stressed that in fact the necessity have to be examined "according to the purpose of the inquiry, which must be stated in information request itself"[127]. It is seen that there are no rigid limits of scope of information to be requested and case-by-case assessment of necessity has to be performed.

In **UK** there is a need to distinguish formal and informal request for information as well. Accordingly, the answer to informal request of Competition and Markets Authority (CMA) is voluntary, meanwhile the response for the formal request is obligatory[128]. The scope of requested is limited to the information or documents which the CMA "considers relates to any matter relevant to the investigation[129]". Document in meaning of the Competition Act 1998 covers information recorded in any from[130]. It seems to be the standard, but at the same time extremely important requirement.

The Guidance[131] prepared by the CMA explains that authority regularly asks for such types of document and information as: 1) internal business reports; 2) copies of e-mails, and 3) other internal data[132]. It is also stated that CMA is empowered to ask information based on respondent`s knowledge or experience, if such information has no tangible expression. As well as investigating

[125] Para. 10, "National Panasonic (UK) Limited v Commission of the European Communities, Case 136/79," EUR-Lex, Accessed 25 April 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61979CJ0136
[126] "NV Samenwerkende Elektriciteits-Produktiebedrijven v Commission of the European Communities, Case T-39/90," EUR-Lex, Accessed 25 April 2021, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A61990TJ0039
[127] Ibid, para. 25
[128] *Competition law investigations by UK authorities*, (Ashurst, 2020), 7, https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---competition-law-investigations-by-uk-authorities/
[129] Sec. 26(1), "Competition Act 1998," legislation.gov.uk, Accessed 25 April 2021, https://www.legislation.gov.uk/ukpga/1998/41/section/2
[130] Ibid, Sec. 59
[131] "Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8," gov.uk, Accessed 25 April 2021, https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases
[132] Ibid, para. 6.4

authority is entitled to ask employees of undertaking for explanations, to their best knowledge, of each document or to ask where the document could be found[133].

It is the common practice[134] for the CMA to give advance notice of information request, if the request in question requires substantial amount of information to be prepared. In certain cases, the CMA may even send the prepared draft of request[135]. The regulator motivates this practice by necessity to give respondents the opportunity to manage their resources appropriately. In author`s opinion, such practice clearly indicates the integrity of the body, as well as the strong will for observance of the standard of proportionality.

The Antimonopoly Committee of **Ukraine** officials are empowered to get the information in form of written or oral explanations from parties to the case and third parties for the purpose of "comprehensive, complete and objective clarification of the actual circumstances of the case, the rights and obligations of the parties[136]". Correspondingly to such criteria, the scope of requested information is quite broad, but the information must be related to the case. It seems to be a quite standard requirement, nevertheless it is worth mentioning that the right of the Antimonopoly Committee of Ukraine to request the information is stated in different legal act as well[137]. Specifically, it is stated that the Committee is empowered to request the information from the broad range of persons during the consideration of applications, started investigations or during the inspections[138]. From the analysis of such provision is possible to conclude that the information requests are not clearly separated mean of evidence collection, because it could be used both independently like information request in terms of competition investigation and simultaneously during the inspections. Second point for consideration is that the scope of requested information broadened from the data related to the case (investigation) to the data related to the applications, the case and inspection. "Applications" can be of different types, for example application claiming the permission of concerted actions or of concentration[139] and application about violation of rights as the consequence of actions defined as competition infringements[140].

---

[133] Para. 6.4, "Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8," gov.uk, Accessed 25 April 2021, https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases

[134] Ibid, para. 6.7

[135] Ibid, para. 6.8

[136] Para. 23, "On approval of the Temporary rules of consideration of cases on violation of the antimonopoly legislation of Ukraine, z0090-94," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/z0090-94#Text

[137] Art. 7(5), "Law On the Antimonopoly Committee of Ukraine," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/3659-12#Text

[138] Ibid

[139] Art. 26, "Law On Protection of Economic Competition," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/2210-14?lang=en#Text

[140] Ibid, Art. 36

Requests of information in Ukraine`s practice are always mandatory in nature. This conclusion is made following the Article 22[1] of the Law On the Antimonopoly Committee of Ukraine, where the obligation of enterprises, legal persons, their employees, natural persons and others to provide the information following the request is written down. Here it is possible to find also the types of information, which include "documents, things or other information carriers, explanations, information with limited access and bank secrecy[141]". However, the scope in terms of necessity of information is again different, because it is stated that Committee is empowered to ask information necessary for the completing its responsibilities under the competition legislation[142]. Where the scope of requested information in terms of necessity might not differ too much between information related to the case, information related to the applications, and information needed for proper exercise of responsibilities, such repeated provisions are causing the legal uncertainty.

The court practice of the High Commercial Court of Ukraine[143] provided answers[144] related to specific concerns as for the scope of information requested. Thus, the Court again confirmed the right of the Antimonopoly Committee to request information with limited access and bank secrecy for establishing the competition infringement[145]. Refusal of the bank, to provide the information on the owners of shares, which nominally owned by the bank to the benefit of companies, was decided to be contrary to the competition rules[146]. The Court also found that banks are obliged to provide the information and copies of applications made by entrepreneurs in order to issue the certificate proving the absence of debts on loans[147]. The High Commercial Court of Ukraine also issued a decision corresponding with the findings of the current thesis stipulated in the previous paragraph. Namely, the Court explained that Ukrainian legislation does not contain an exhaustive list of circumstances in which the Antimonopoly Committee officials may require

[141] Art. 22[1], "Law On the Antimonopoly Committee of Ukraine," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/3659-12#Text
[142] Ibid
[143] The former name of the court, with the judicial reform functions of this court started to perform "The Commercial Cassation Court within the Supreme Court" according to Art. 37, "Law On the Judiciary and the Status of Judges, 1402-VIII", zakon.rada.gov.ua, Accessed 06 May 2021, https://zakon.rada.gov.ua/laws/card/en/1402-19
[144] "Review of case law of the High Commercial Court of Ukraine and the Supreme Court of Ukraine on the application of legislation on protection of economic competition, as of 31.12.2017," amc.gov.ua, Accessed 28 April 2021, http://www.amc.gov.ua/amku/doccatalog/document?id=142007&schema=main
[145] "Постанова ВГСУ від 20.09.2016 у справі № 924/1995/15," reyestr.court.gov.ua, Accessed 28 April 2021, https://reyestr.court.gov.ua/Review/61478321
[146] "Постанова ВГСУ від 20.12.2016 у справі № 910/10854/16," reyestr.court.gov.ua, Accessed 28 April 2021, https://reyestr.court.gov.ua/Review/63655877
[147] "Постанова ВГСУ від 23.12.2015 у справі № 918/459/15," reyestr.court.gov.ua, Accessed 28 April 2021, https://reyestr.court.gov.ua/Review/54597816

the information and, therefore, the legitimacy of information request does not depend on the fact whether requested data relates to the application addressed to Committee or to the case opened[148].

The Ukrainian Antimonopoly Committee investigative practice proves the frequency and importance of information requests as the mean of valuable evidences collection in cases concerning breach of competition law. For instance, in the Decision № 697-p[149] concerning *Philip Morris Sales and Distribution* and *others*, the Committee used the information obtained by the requests to establish to whom the product was distributed during the certain period of time[150], to establish the fact that the number of warehouses where the discussed product was stored increased substantially during the certain period of time[151], to establish the fact that certain amount of vacancies were opened in the discussed undertaking during the specific period[152]. As the result of these investigation the undertakings were recognized as entered into the agreement on anticompetitive concerted actions that prevented other undertakings to enter the market and were jointly fined at a level of 6 523 001 000 UAH[153] (approximately 175 469 000 EUR according to the rates on the date of decision).

The reviewed provisions and practice allows to state that requests of information in any way should not be considered as additional or less effective methods of obtaining evidence. Competition authorities are usually allowed to request any relevant information. In fact, such powers give an opportunity to obtain valuable information from customers, harmed competitors and state bodies which allows to reconstruct the events and assess the impact of the violation on the market. The difference was found related to the mandatory nature of request, where Commission and UK competition authorities use two stage procedures, the Ukrainian competition authority requests are always binding.

It is also possible to conclude that the scope of evidence collection in UK and Ukraine complies with the recommendation provided in Directive (EU) 2019/1[154] when the competition authorities shall possess the power to collect all the information relevant to the case, therefore limited only by subject matter of request and privileges (which be discussed further). However, notwithstanding the fact that Ukrainian competition authorities possess the full power to collect relevant information, there is no clear separation of information requests as the tool for obtaining

---

[148] "Постанова ВГСУ від 30.03.2016 у справі № 910/27130/15," reyestr.court.gov.ua, Accessed 28 April 2021, https://reyestr.court.gov.ua/Review/56843024

[149] "Рішення АМКУ від 10 жовтня 2019 р. № 697-р," amcu.gov.ua, Accessed 29 April 2021, https://amcu.gov.ua/npas/rishennya-697-r-vid-10102019

[150] Ibid, para. 32

[151] Ibid, para. 39

[152] Ibid, para. 45

[153] Ibid, operative part

[154] Recital 4, Art. 8, "Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market," EUR-Lex, Accessed 1 May 2021, http://data.europa.eu/eli/dir/2019/1/oj

the evidence and also the uncertainty regarding the stage of proceedings on which the request can be addressed to the respondent.

2.1.2. Procedural Requirements

In order the request to be legitimate, the **European Commission** must specify, in its request for information, the legal basis and the purpose of the request, identify what information is required and define time-limit for answer[155]. In *Société Générale* v *Commission*[156] ECJ explained that such requirements are extremely important for demonstrating the justification of the request, giving enterprises an opportunity to assess the scope of cooperation with Commission and safeguarding undertaking`s right of defense.

The regulator limits the scope of persons authorized to provide answers to information requests on behalf of the undertaking to: owners or their representatives, persons authorized to represent the company or organization by the constituent documents or by law, duly authorized lawyers[157].

Additional point for consideration is the fact that Commission is limited in range of persons to whom the request could be addressed – to undertakings and associations of undertakings[158]. Therefore, Commission could not address the request to natural persons or their representatives.

In **UK** the informal request is not under strict requirements and therefore can be addressed to any person, even if such person is not directly connected with the opened investigation or the alleged infringement[159]. Such practice is reasoned by need to receive valuable evidence from customers, producers or suppliers and not only form persons involved in alleged breach of competition rules.

On the other hand, formal request may be issued by the CMA only in connection with civil or criminal investigation, which it is empowered to open in line with the Section 25 of the Competition Act 1998. In UK irrespectively of the type of investigation opened (civil or criminal) the competition authority has to indicate clearly in the request: 1) "the subject matter and purpose

[155] Art. 18(2,3), "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty," EUR-Lex, Accessed 25 April 2021, http://data.europa.eu/eli/reg/2003/1/oj

[156] Para. 40, "Société Générale v Commission of the European Communities, Case T-34/93," EUR-Lex, Accessed 25 April 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993TJ0034

[157] Art. 18(4), Regulation (EC) No 1/2003

[158] Ibid, Art. 18(1)

[159] *Competition law investigations by UK authorities*, (Ashurst, 2020), 7, https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---competition-law-investigations-by-uk-authorities/

of the investigation[160]"; and 2) "the nature of the offences created[161]" by the failure to comply with the request. At its own discretion, the CMA may also stipulate in the request: 1) "the time and place at which any document is to be produced or any information is to be provided[162]"; 2) "the manner and form in which it is to be produced or provided[163]".

The Antimonopoly Committee of **Ukraine** may address requests to the quite broad range of persons, as was mentioned in previous subchapter. Among them are the different types of undertakings and organizations, state and municipal authorities, natural persons including the employees of undertaking and any third persons[164]. In case when the request cannot be physically transferred to the recipient it has to be published in the specific periodical edition and then the notification of publication placed into the official website[165] of the Antimonopoly Committee of Ukraine. When the ten days passed after the information was placed into such sources the information request is deemed to be delivered to the addressee[166]. Such a rule seems to be slightly old-fashioned, nevertheless it should promote transparency.

The High Commercial Court of Ukraine[167] emphasized that there are no specific rules in Ukrainian legislature or practice concerning procedure of delivery or handing over the informational request, so there is no obligation of the Committee officials to hand over the request personally[168]. In other case[169] the Court stated that the absence of some of the undertaking executives does not relief the undertaking form the duty to provide the request to competition authority.

It must be noted however that the provisions related to information request does not set the precise form or list of information to be stated by competition authorities, such as purpose of request and time limit for answer. This conclusion was actually confirmed in decision of the

---

[160] Sec. 26(3), "Competition Act 1998," legislation.gov.uk, Accessed 25 April 2021, https://www.legislation.gov.uk/ukpga/1998/41/section/2

[161] Ibid

[162] Sec. 26(5), "Competition Act 1998," legislation.gov.uk, Accessed 25 April 2021, https://www.legislation.gov.uk/ukpga/1998/41/section/2

[163] Ibid

[164] Art. 22[1], "Law On the Antimonopoly Committee of Ukraine," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/3659-12#Text

[165] http://www.amc.gov.ua

[166] Para. 23, "On approval of the Temporary rules of consideration of cases on violation of the antimonopoly legislation of Ukraine, z0090-94," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/z0090-94#Text

[167] Became "The Commercial Cassation Court within the Supreme Court" after refrom, See 184

[168] "Постанова ВГСУ від 24.10.2006 у справі № 8/376-О-А-05", quoted in "Review of case law of the High Commercial Court of Ukraine and the Supreme Court of Ukraine on the application of legislation on protection of economic competition, as of 31.12.2017," amc.gov.ua, 100, Accessed 28 April 2021, http://www.amc.gov.ua/amku/doccatalog/document?id=142007&schema=main

[169] "Постанова ВГСУ від 06.10.2015 у справі 910/7796/15-г," reyestr.court.gov.ua, Accessed 28 April 2021, https://reyestr.court.gov.ua/Review/51990048

Supreme Court[170]. There is only an Information letter[171] issued for the internal use by the officials of Antimonopoly Committee, stating that proper request shall contain legal basis, grounds, scope of requested information, procedure of answer and time limit. Therefore, it is a necessity to fill the gap in legislation and to include de-facto used rules into the law.

2.2. Interview

In compliance with Article 19 of Regulation (EC) No 1/2003 the **European Commission** has the right to obtain evidence by interviewing natural or legal persons. Based on the explanation provided in the Preamble[172], such powers were acquired by the Commission after the adoption of the Regulation in question. It is important to add that Commission is empowered to record statements made by persons interviewed[173]. The latter possibility seems an obvious one and in fact commonly used in other jurisdictions as well[174]. The Commission is not restricted to only in-personal interviews and can use a range of means, including telephone or videoconference[175].

Traditionally, the officials authorized by Commission to conduct an investigations are under obligation to ask only for information relating to the subject-matter of an investigation[176]. In practice there is "at least one case should be registered with a specific case number[177]" at the time of the interview in order to prove that questions related to the subject-matter of an investigation. However, the person making statements shall be informed that on basis of interview new cases could be opened[178]. There is an additional procedural requirement: in case when interview is going to take place "in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place[179]". Member state

[170] "Постанова Верховного Суду від 20.09.2018 у справі №915/17/18," reyestr.court.gov.ua, Accessed 1 May 2021, https://reyestr.court.gov.ua/Review/76623607

[171] "Information letter № 70/01 dated 13.06.2019 On requesting information by the bodies of the Antimonopoly Committee of Ukraine and application of liability for violations related to requesting information," amcu.gov.ua, Accessed 03 May 2021, https://amcu.gov.ua/npas/pro-zapituvannya-informaciyi-organami-antimonopolnogo-komitetu-ukrayini-ta-zastosuvannya-vidpovidalnosti-za-porushennya-povyazani-z-zapituvannyam-informaciyi

[172] Recital 25, "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty," EUR-Lex, Accessed 25 April 2021, http://data.europa.eu/eli/reg/2003/1/oj

[173] Ibid

[174] ECN Working Group Cooperation Issues and Due Process, *Investigative Powers Report* (2012), 41, https://ec.europa.eu/competition/ecn/investigative_powers_report_en.pdf

[175] Para. 47, "Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, (2011/C 308/06)," EUR-Lex, Accessed 26 April 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011XC1020%2802%29

[176] Art. 19(1), Regulation (EC) No 1/2003

[177] European Commission, *Antitrust Manual of Procedures* (Brussels, 2012), 79, para. 5, https://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf

[178] Ibid

[179] Art. 19(2), Regulation (EC) No 1/2003

competition authorities therefore could assist the Commission in conducting interview. Such assistance can be quite useful if the language barrier exists.

Under the EU legal regime, it is important to distinguish the interview, as the power to take statements according to the Article 19 of Regulation (EC) No 1/2003, form the possibility to ask questions during inspections according to Article 20(2)(e)[180]. The first one, which this Chapter is dedicated to, is voluntary in its nature[181] and the respondent can in any time refuse to answer the questions, even if they are not of self-incriminating nature. In contradiction to the interview as an independent mean of collecting evidence, during the inspection addressee is not entitled to refuse to answer the questions about facts or documents. Otherwise the person refused to answer shall be penalized. So, in practice it is important for both sides (the Inspectors and undertaking) to draw the difference between these two types and mainly it is a task of Inspector to warn the undertaking of legal basis and possible responsibility for non-compliance.

According to the Commission notice on best practices the person before providing any statements shall be informed about the legal basis of the interview, its voluntary nature and the interviewee right to consult a lawyer[182]. When the respondent is going to be represented by lawyer, the scope of legal advisor`s assistance has to be explained to respondent, including relation of assistance to any records or report of the statement[183]. The notice also to be made about the purpose of the interview and the fact that interview will be recorded. In practice, this will be done by providing a document explaining the procedure, which must be signed by the interviewee[184].

Among other practical insights contained in Antitrust Manual of Procedures[185], worth mentioning the fact that two or more persons shall conduct an interview. It is also recommended that at least one of the interviewers to be a representative of the Commission and there is "at least one senior case handler, if not a case manager, deputy head of unit or head of unit[186]" presented during the interview.

The Commission came to conclusion that it is allowed to ask self-incriminatory questions with the next reasoning: "Taking into account that the interviewee is not obliged to actively cooperate with the Commission and that no sanctions can be imposed in case of non-cooperation,

---

[180] ECN Working Group Cooperation Issues and Due Process, *Investigative Powers Report* (2012), 40, https://ec.europa.eu/competition/ecn/investigative_powers_report_en.pdf
[181] Ibid, 39
[182] Para. 48, "Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, (2011/C 308/06)," EUR-Lex, Accessed 26 April 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011XC1020%2802%29
[183] Art. 7(1)(d), "Commission Implementing Regulation (EU) 2018/292," EUR-Lex, Accessed 10 May 2021, http://data.europa.eu/eli/reg_impl/2018/292/oj
[184] Para. 48, Commission notice on best practices (2011/C 308/06)
[185] European Commission, *Antitrust Manual of Procedures* (Brussels, 2012) https://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf
[186] Ibid, 80, para. 10

in interviews it is permitted to ask self-incriminatory questions[187]". The author would like to oppose such a conclusion. Even if the interview is voluntary, such statements later can be used to open an investigation against the person.

According to the Section 26A of the Competition Act 1998: "The CMA may give notice to an individual who has a connection with a relevant undertaking requiring the individual to answer questions with respect to any matter relevant to the investigation[188]". As could be seen from cited legal provision **UK** competition authority is limited in interviewing only the persons having connection to a relevant undertaking and also limited by the scope of relevant investigation, that is to say the standard limitation. The "relevant undertaking" is defined in the Competition Act 1998 as "undertaking whose activities are being investigated as part of the investigation in question[189]". Individual who has connection with the undertaking is defined as someone who "is or was (i) concerned in the management or control of the undertaking, or (ii) employed by, or otherwise working for, the undertaking[190]". The CMA stated in its Guidance that the question whether individual is connected with undertaking or not shall be assessed on case-by-case basis. Specifically, it was noted that directors, partners, managers, employees, consultants, volunteers or shareholders are to be treated as connected to undertaking[191]. Presence or absence of remuneration shall not be treated as criteria in determining the connections with company[192].

Procedural requirement for conducting the interview in UK are pretty much the same as for conducting other investigative actions. Thus, the CMA is required to give a notice to the interviewee with description of subject-matter of investigation, details on the place and time of the interview, possible liability for provision of incorrect information and non-compliance with formal notice[193]. The CMA is also required to place into notice the information on statutory limitations prescribed in Section 30A(2)(3) of the Competition Act 1998 on use of statements made during the interview against the person.

It is explained in Guidance that the CMA in some cases empowered not to give an advance notice and to interview the person immediately after the formal notification of interview was made[194]. It is explained that such cases includes the ones when statements made by person "would enable… to prevent damage to a business or consumers" or when it is necessary for the "effective

---

[187] Ibid, 82, para. 23
[188] Sec. 26A(1), "Competition Act 1998," legislation.gov.uk, Accessed 27 April 2021, https://www.legislation.gov.uk/ukpga/1998/41/section/2
[189] Ibid, Sec. 26A(7)
[190] Ibid, Sec. 26A(6)
[191] Para. 6.14, "Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8," gov.uk, Accessed 26 April 2021, https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases
[192] Ibid
[193] Ibid, para. 6.15
[194] Ibid, para. 6.18

conduct of the investigation[195]". The latter usually consider cases when the interview has to be made in course of the inspection of premises[196]. There is again a situation where there is a fine line between the power to ask the questions during interview and power to ask for explanations of any relevant document. Both of them usually can be performed in course of inspection of premises, but notwithstanding are covered by different procedural requirements and guarantees given to the respondent.

It is also explained that the interview will be recorded by the CMA officials and the written note containing questions addressed and answers received is issued in some circumstances[197]. The respondent will be asked read through the transcript of record or note of interview and to confirm them[198], as well as the competition authority must send a copy of transcript or note to any "relevant undertaking with which the individual has a current connection[199]".

The person being interviewed possess the right to be represented by the legal advisor. The CMA notices that such legal advisor could simultaneously represent the undertaking under investigation, but generally it is not allowed to choose the legal advisor performing the functions of in-house lawyer for undertaking in question[200]. The following grounding was provided: "it is a risk that the presence [of in-house lawyer] … will prejudice the investigation, for example if their presence reduces the incentives on the individual being questioned to be open and honest[201]". Such reasoning looks quite justified and corresponds to the requirements established for communication between lawyer and the undertaking to be recognized as privileged one.

The Antimonopoly Committee of **Ukraine** is empowered to collect evidences using the "explanations of parties or third persons, explanations of officials and citizens[202]". Any of such explanations that "indicate the presence or absence of infringement[203]" need to be reflected in protocol. However, from the analysis of this provision and competition legal acts in a whole it is possible to conclude that there is no separate mean of evidence collection in Ukraine referred as "interview". This in fact contradicts the view established in Directive (EU) 2019/1 where the

[195] Ibid, para. 6.19
[196] Ibid
[197] Para. 6.20, "Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8," gov.uk, Accessed 26 April 2021, https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases
[198] Ibid
[199] Sec. 26A(2), "Competition Act 1998," legislation.gov.uk, Accessed 26 April 2021, https://www.legislation.gov.uk/ukpga/1998/41/section/2
[200] Para. 6.21, Guidance CMA8
[201] Ibid
[202] Art. 41(1), "Law On Protection of Economic Competition," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/2210-14?lang=en#Text
[203] Ibid

interview is understood as separate independent tool of evidence collection[204]. Therefore, to approach the standards set by European Commission, the clear separation need to be lied down.

It can be concluded that interviews by European Commission or UK competition authority can only be concluded in relation to the already opened case. The procedure requires to inform the individuals of necessary information regarding the interview, including legal basis, purpose, the procedure of fixation and possible liability. It was also established that Ukrainian competition authorities are deprived of this mean of evidence collection, that may negatively affect the investigation process according to Directive (EU) 2019/1.

Both information requests and interviews are the effective means of evidence collection, however more information of evidentiary value may be collected by using the requests. The interview, in the author's opinion, helps to obtain additional evidence in the form of explanations to those facts or documents obtained in the course of a previous investigation by competition authorities. However, both of these means are necessary to make the evidence base complete.

The fact that in Ukraine the requirements for information requests are not fully settled and there is no separate practice of collecting evidence in the form of interviews casts doubt on the compliance with the practice used by the European Commission and UK competition authority. At the same time, this does not mean that the Antimonopoly Committee of Ukraine is deprived of sufficient part of evidence to be collected. The key point is the need to make relevant legislation more logical and consistent.

[204] Recital 36, Art. 9, "Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market," EUR-Lex, Accessed 1 May 2021, http://data.europa.eu/eli/dir/2019/1/oj

CHAPTER 3. INSPECTIONS

3.1. Inspections of Business Premises

3.1.1. Scope of Inspection

The **European Commission**`s Inspectors are empowered to:

> (a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
> (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
> (c) to take or obtain in any form copies of or extracts from such books or records;
> (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
> (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers[205].

When entering the premises, land and means of transport of undertakings Inspectors do not have to check if the investigated undertaking actually owns the premises, only the actual use of premises by undertaking matters. Officials are entitled to move freely within the investigated premises[206].

The power of Inspectors to examine the books and other records related to the business includes the right to search for electronic information in the company`s servers, desktops and laptops, mobile devices and in all storage media such as hard-drivers or USB devices[207]. This right covers also the possibility to examine personal digital devices that are used for business purposes[208]. Officials regularly use built-in search tool or their special software referred as "Forensic IT tools", which allows to search, recover and copy data from electronic devices[209].

It must be noted that Explanatory note in fact provides with quite a lot practical insights of the evidence collection procedures performed by the Commission. Among them the explanation that inspectors can require representatives of undertaking to assist with "specific tasks such as temporary blocking of individual email accounts, temporarily disconnecting running computers from the network, removing and re-installing hard drives from computers and providing

[205] Article 20(2), "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty," EUR-Lex, Accessed 25 April 2021, http://data.europa.eu/eli/reg/2003/1/oj
[206] Para. 27, "Hoechst AG v Commission of the European Communities, Joined Cases 46/87 & 227/88," EUR-Lex, Accessed 25 April 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0046
[207] Para. 9-10, "Explanatory Note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003," ec.europa.eu, Accessed 25 April 2021, https://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf
[208] Ibid, para. 10
[209] Ibid

'administrator access rights'-support[210]". The Inspectors may also ask to use any of the undertaking`s hardware[211].

It is worth mentioning also that all possible evidence collected in course of inspection and selected for examination will be kept under the Inspectors control until the end of inspection in premises or until the forensic copy of data is made[212]. Such forensic copy must be treated as an "authentic duplicate" of the data found by the Inspectors and the examination of such authentic duplicate is equated to examination of original data[213]. The Inspectors are obliged to "completely wipe all Forensic IT tools on which company data have been stored[214]", except the undertaking`s hardware. The Commission provided the following explanation for the term "wipe": "The technical term for this wiping is 'sanitize'. The goal of sanitizing is to completely remove the data from a storage device in a way that the data cannot be reconstructed by any known technique[215]". In Gartner Glossary it is possible to find the similar definition of the discussed term with explanation that data wiping can be performed through external device or internally[216].

After one of the Commission`s investigations the question arose whether the Inspectors are entitled to examine books and other records related to the business out of the investigated business premises. The General Court gave an affirmative answer to this question in *Nexans France and Nexans* v *Commission*[217]. Namely, the General Court stated that Article 20(2)(b) of Regulation (EC) No 1/2003 does not provide that such examination must be carried out exclusively in the investigated business premises, otherwise the Commission probably would not complete the investigation in given timeframe. The General Court noticed as well that examination of books and other records should be treated as legal if "the same guarantees to undertakings under inspection as those required of the Commission when conducting an on-the-spot examination[218]" were ensured. The above mentioned decision was appealed to the ECJ, which unequivocally upheld the previous decision by the General Court on this matters and only added that discussed examination must be justified by the requirement of the effectiveness of the inspection or by avoidance of excessive interference in the operations of investigated enterprise[219]. It is possible to

[210] Para. 11, "Explanatory Note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003," ec.europa.eu, Accessed 25 April 2021, https://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf
[211] Ibid
[212] Ibid, para. 12
[213] Ibid
[214] Ibid, para. 13
[215] Ibid, 3
[216] "Gartner Glossary", Gartner, Inc. and/or its affiliates, Accessed 23 April 2021, https://www.gartner.com/en/information-technology/glossary/data-wiping
[217] "Nexans France and Nexans v European Commission, Case T-449/14," EUR-Lex, Accessed 25 April 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014TO0449%2801%29
[218] Ibid, para. 60
[219] Para. 87, "Nexans France and Nexans v European Commission, Case C-606/18 P," EUR-Lex, Accessed 25 April 2021, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0606

make a suggestion that relevant provisions of Article 20 (2)(b) of Regulation (EC) No 1/2003 were left deliberately open by the legislator in order to provide Commission with some level of flexibility during inspections. Nevertheless, the overuse of such or similar provisions is harmful and could lead to the legal uncertainty.

Business premises under the **Competition Act 1998** are defined as any premises or part of the premises that are not used as a living space[220]. The legislator therefore used the inversion method when providing such definition.

In UK when inspection with the simple written authorization is taking place, the CMA officers may perform any of the powers that the representatives of the Commission perform during inspections, except the power to seal the premises[221]. As the most of the information is stored electronically, it is stressed in the Guidance that CMA officials may require any such information to be produced in a form that allows to reproduce the information and to take it away[222]. Officials are also empowered to take any relevant measures for preservation and integrity of evidences.

The scope of the business premises inspections conducted in **Turkey** was reintroduced with the recent Amendment[223] to the Act No. 4054 On The Protection of Competition adopted 16.06.2020. Namely, the powers to examine all kinds of data including those kept on electronic devices were stated directly in the text of relevant article, where the previous redaction of article mentioned only power to examine "books, paperwork and documents"[224]. The other powers mirrors the previously discusses in other jurisdictions, except the possibility to perform examination of any assets of undertaking[225]. The latter power of competition authority is one that distinguish the scope of Turkish inspection from other discussed in this section.

Oğuzkan Güzel and Başak İrem Coşkun, in theirs review[226] of the Guidelines issued in connection with the new practices, mentioned that intense discussions were held in the Turkish legal community regarding the determination of scope, boundaries and legitimacy of inspections during which electronic evidences were examined[227]. Gönenç Gürkaynak, O. Onur Özgümüş, Firat

---

[220] Sec. 27(6), "Competition Act 1998," legislation.gov.uk, Accessed 27 April 2021, https://www.legislation.gov.uk/ukpga/1998/41/section/2

[221] Para. 6.27, "Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8," gov.uk, Accessed 27 April 2021, https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases

[222] Ibid, para. 6.28

[223] "Law No. 7246 on the Amendment of Law No. 4054, 24.06.2020, 31165," resmigazete.gov.tr, Accessed 28 April 2021, https://www.resmigazete.gov.tr/eskiler/2020/06/20200624-1.htm

[224] Oğuzkan Güzel, Başak İrem Coşkun, "Guideline on the Expanding Power of On-Site Inspection (Digital Search Power) is Published by the Competition Authority," *Turkish Lawblog* (2020) https://turkishlawblog.com/read/article/255/guideline-on-the-expanding-power-of-on-site-inspection-digital-search-power-is-published-by-the-competition-authority

[225] Art. 15, "The Act No. 4054 On The Protection of Competition," rekabet.gov.tr, Accessed 28 April 2021, https://www.rekabet.gov.tr/en/Sayfa/Legislation/act-no-4054

[226] Oğuzkan Güzel, Guideline on the Expanding, *Turkish Lawblog* (2020)

[227] Ibid

Eğrilmez and Melih Yağcı also noticed[228] that the Competition Board[229] decisions on *Gediz/Aydem*[230] and *Chemotherapy Drugs*[231] already specified that the national competition authority is entitled to search the electronic environment during the on-site inspections, even before the relevant Amendment was made.

The Competition Board described in the Guidelines that the authorized officials will inspect the every possible digital environment using "keyword search tools" of the undertakings or "forensic IT software and hardware that allow qualified searches in digital data"[232]. The primary purpose of using advanced forensic tools is the ability to search for data effectively and retrieve the data deleted from digital devices, while maintaining the originality and integrity of undertakings operational system[233]. Oğuzkan Güzel and Başak İrem Coşkun tried to motivate the use of special forensic IT tools and simultaneously to draw distinction between "examination" and "analysis" of data, stating that tangible documents (papers, notices) are to be examined where the electronic data considering its variety and formats (e-mails, digital records, social media communications) needs to be analyzed due to the enormous volume[234].

The Competition Board also explained the issue with mobile devices, stating that the discussed devices are subject to "quick review" by the officials to reveal if the devices contain the data related to undertaking[235]. If the gadgets contain the related data, they will be analyzed using forensic IT tools, while devices containing only personal information cannot be searched[236] and are therefore out of the scope of inspection. In this regard Gönenç Gürkaynak and others noticed[237] that the discussed above approach for inspecting mobile devices is not new for the Turkish competition enforcement because it was already established in *Koçak Petrol*[238] and *Nuhoğlu*

[228] Gönenç Gürkaynak et al., "Turkey: Recently Published Guidelines Of The Turkish Competition Authority On Examination Of Digital Data During On-site Inspections," *Mondaq* (2020), https://www.mondaq.com/turkey/antitrust-eu-competition-/995208/recently-published-guidelines-of-the-turkish-competition-authority-on-examination-of-digital-data-during-on-site-inspections-

[229] Competition Board is the department of Turkish Competition Authority responsible for competition enforcement and decision-making according to Article 27 of the Act No. 4054 On The Protection of Competition

[230] Para. 1034, "Rekabet Kurulu Karari, 18-36/583-284, 01.10.2018," rekabet.gov.tr, Accessed 10 May 2021, https://www.rekabet.gov.tr/Karar?kararId=7276e920-23a5-4d66-9b0f-c5d9381d7c88

[231] Para. 204, "Rekabet Kurulu Karari, 20-01/14-06, 02.01.2020," rekabet.gov.tr, Accessed 10 May 2021, https://www.rekabet.gov.tr/Karar?kararId=a65d3256-dc84-4846-88ea-aa11c5e9895a

[232] Para. 3, "Guidelines on the Examination of Digital Data during On-Site Inspections, 20-45/617, 08.10.2020," rekabet.gov.tr, Accessed 28April 2021, https://www.rekabet.gov.tr/Dosya/guidelines/guidelines-on-the-examination-of-digital-data-during-on-site-inspections1-20201120154515821-pdf

[233] Ibid

[234] Oğuzkan Güzel, Başak İrem Coşkun, "Guideline on the Expanding Power of On-Site Inspection (Digital Search Power) is Published by the Competition Authority," *Turkish Lawblog* (2020) https://turkishlawblog.com/read/article/255/guideline-on-the-expanding-power-of-on-site-inspection-digital-search-power-is-published-by-the-competition-authority

[235] Para. 4, Guidelines on the Examination, 20-45/617, 08.10.2020, rekabet.gov.tr

[236] Ibid

[237] Gönenç Gürkaynak et al., Turkey: Recently Published Guidelines, *Mondaq* (2020)

[238] "Rekabet Kurulu Karari, 09-34/837-M, 05.08.2009," rekabet.gov.tr, Accessed 10 May 2021, https://www.rekabet.gov.tr/Karar?kararId=9110bfce-8666-480d-95b9-56dfdb7ca744

İnşaat[239] decisions by the Competition Board. The above mentioned authors had also pointed out that duty to cooperate fully and actively with the competition authorities is as well established in Turkish competition practice[240] and could include among others the duty to give the admin rights to officials, provide remote access, isolate computers and servers from network, limit user access to corporate account or duty to restore the data[241]. Author find a conclusion of Can Yildiz, that explanations provided in Guidelines are generally accepted and the Guidelines serves for official clarification of issue[242], to be completely justified.

It is deemed highly important to mention that the Turkish competition authority presented a general sequencing during the digital data examination by the inspectors, which is useful for understanding of digital evidence collection procedure. Namely, there are five consecutive stages: 1) gathering of data; 2) indexing of data; 3) inspection of data; 4) copying of data; 5) deletion of data[243]. During the first stage data falling under the scope of investigation is collected through physical or logical means. During the second stage digital data is to be transferred to the forensic IT work station and indexed. During the third stage the indexed data is inspected by the experts. On the fourth stage data which presents an evidential nature is extracted from the undertakings hardware, copied and the copy is to be send to the competition authority office. On the final stage the data is wiped from IT forensic tools[244].

In **Ukrainian** practice of competition enforcement, the power of the Antimonopoly Committee to inspect the premises[245] and the power of Committee officials to seizure written and physical evidence including documents, things or other information carriers[246] are logically separated and placed into different paragraphs of legal acts. At the same time, it is not specified in the law that the power to seizure evidence should be directly connected to the power to inspect premises, nevertheless it should be understood as implied rule and could be extracted from further

---

[239] "Rekabet Kurulu Karari, 17-42/669-297, 21.12.2017," rekabet.gov.tr, Accessed 10 May 2021, https://www.rekabet.gov.tr/Karar?kararId=df853766-92e1-47f9-b5ba-d5d2b36181e6

[240] See the "Rekabet Kurulu Karari, 20-03/31-14, 09.01.2020," rekabet.gov.tr, Accessed 10 May 2021, https://www.rekabet.gov.tr/Karar?kararId=b7085aec-faf9-4023-8be7-3cb7801cbcf2

[241] Gönenç Gürkaynak et al., "Turkey: Recently Published Guidelines Of The Turkish Competition Authority On Examination Of Digital Data During On-site Inspections," *Mondaq* (2020), https://www.mondaq.com/turkey/antitrust-eu-competition-/995208/recently-published-guidelines-of-the-turkish-competition-authority-on-examination-of-digital-data-during-on-site-inspections-

[242] Can Yildiz, "Turkey: Competition Board's Guideline On The Examination Of Digital Data During On-Site Inspections," *Mondaq* (2020), https://www.mondaq.com/turkey/antitrust-eu-competition-/1008532/competition-board39s-guideline-on-the-examination-of-digital-data-during-on-site-inspections

[243] Para. 9, "Guidelines on the Examination of Digital Data during On-Site Inspections, 20-45/617, 08.10.2020," rekabet.gov.tr, Accessed 28April 2021, https://www.rekabet.gov.tr/Dosya/guidelines/guidelines-on-the-examination-of-digital-data-during-on-site-inspections1-20201120154515821-pdf

[244] Ibid

[245] Art. 7(4), "Law On the Antimonopoly Committee of Ukraine," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/3659-12#Text

[246] Art. 7(7), Law On the Antimonopoly Committee of Ukraine, and Art. 44, "Law On Protection of Economic Competition," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/2210-14?lang=en#Text

provisions[247]. As well as Antimonopoly Committee officials are entitled to request the information during the inspections, as it was discussed in previous chapter. While in other reviewed jurisdictions competition authorities were entitled to ask the explanations during inspections as to the facts and documents, but such explanations do not fall under the scope of power to request information.

As for the premises that can be inspected it is stated that Antimonopoly Committee can "inspect business entities, associations, state bodies, bodies of local self-government, bodies of administrative and economic management and control[248]". It is not stipulated or explained if the officials possess the right to inspect registered offices, or premises where business entity can factually be functioning, as well as there no requirement of ownership of such premises. In author`s opinion this rule shall be interpreted in broad sense and Antimonopoly Committee actually possess the right to inspect the places where the main activity of undertaking is held, notwithstanding the registered office and owner of the premises, because there is no reference to "business premises" of undertaking, only reference to undertaking itself.

Concerning the type of evidences that may be collected it is stated that the Antimonopoly Committee represented by its officials may seizure "written or physical evidences… that could be evidences or evidential source for the case[249]". This broad criterion is common and objective. According to the Article 7(5) of the Law On the Antimonopoly Committee of Ukraine the information requested during inspections may be confidential, but it does not prevent officials from collecting it.

The approximate list of documents, written or oral explanations which may be asked during the inspection, is to be found in Regulations adopted for inspection purposes. Such information may include among other:

1) "information on the organizational structure" of undertaking an all relevant contacts";
2) "minutes of the general meeting";
3) "incoming and outgoing documentation" and any records;
4) "lists of all undertakings… in which the undertaking owns shares";
5) "lists of all undertakings… established for the purpose of carrying out supply or sales activities";
6) "lists of shareholders";
7) "information on the volume of produced and sold products";
10) "list of consumers by types of products with indication of their location, information on the volume and range of products supplied to major consumers";
11) "information on suppliers and supplies";

[247] Para. 38, "On Regulations on the procedure for conducting inspections of observance of the legislation on protection of economic competition," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/z0139-02#Text
[248] Art. 7(4), "Law On the Antimonopoly Committee of Ukraine," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/3659-12#Text
[249] Ibid, Art. 7(7)

12) "information materials that are constantly or periodically sent (received) by the inspected undertaking"[250].

As well as, the competition officials are authorized to collect data from the "computers of undertaking, magnetic carriers" and making copies of such data[251]. However, there are no explanations to be found of procedure for inspecting digital devices. Therefore, it is not possible to establish whether the special treatment will be provided to personal devices or special software will be used and if there are guaranties of safety and integrity of undertakings data after the inspection in place.

It is also important to note that there are two types of inspections of business premises in Ukraine, specifically the scheduled and unscheduled inspections. The scheduled one is carried out for review of compliance with competition laws on the regular basis and have to be conducted not more than once a year[252]. The unscheduled inspection is conducted in specific cases, including investigation of breach of completion laws[253]. Nevertheless, the scope of powers to collect evidences remains the same for both of the types and is limited only by purpose of the inspection[254].

It is possible to conclude that the competition authorities in reviewed jurisdictions possess the broad powers to inspect the business premises, including the possibility to require explanations of facts or documents and to require the representatives of undertaking to cooperate actively. The scope of documents or devices that can be reviewed during the inspection is very broad as well, therefore the criteria of relevance to investigation again to be applied.

Additional importance is attributed to the acts explaining the digital evidence collection process in the light of technologies development. Where it was chosen not to amend the Regulation (EC) No 1/2003 in this regard and to rely on explanations of the ECJ, Turkey has actually changed the text of respective law. It was also established that Turkey in terms of digital means of evidence collection tried to get closer to the practices used by European Commission in its investigations. The additional attention in course of digital evidence gathering is also driven to safeguarding the data collected and separate from those of personal nature. The inspectors are authorized to copy only the relevant and obliged to wipe all the information later.

[250] Para. 38, "On Regulations on the procedure for conducting inspections of observance of the legislation on protection of economic competition," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/z0139-02#Text
[251] Ibid, para. 45
[252] Ibid, para. 3 and 4
[253] Ibid, para. 8
[254] Ibid, para. 38

3.1.2. Procedural Requirements

The **European Commission** officials possess the right to conduct inspection whether by presenting a written authorization specifying the subject matter, purpose of the inspection and potential penalties or by presenting the formal decision of the Commission ordering the inspection which contain similar specifications[255]. The undertaking suspected in breach of competition law could refuse to enter the Commission representatives acting under simple written authorization, but cannot prevent the inspection ordered by decision. Inspections conducted unannounced by the decision of Commission are known as "dawn raids"[256].

As was described in previous chapter, the ECJ found that the obligation of Inspectors to specify the subject matter and purpose of the inspection is of fundamental importance in order "to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence[257]". This ruling was firstly introduced in *Hoechst AG* v *Commission* and later upheld in *Roquette Frères SA* v *Directeur général de la concurrence,* and *Commission*[258].

Under the **UK** legal regime, the CMA officer is obliged to produce at least two working days` written notice warning occupier about the inspection prior to actual enter into the business premises[259]. Such notice also has to specify the subject-matter of investigation and the liability in case of non-compliance.

However, there are some exceptions when the prior notice is not required for entry. It is not required to produce a notice when there is a "reasonable suspicion" that premises are occupied by the alleged offender or in case when CMA representative cannot deliver the notice, despite the reasonable steps were taken to deliver such notification[260].

---

[255] Article 20(3)(4), "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty," EUR-Lex, Accessed 25 April 2021, http://data.europa.eu/eli/reg/2003/1/oj

[256] e.g. Helene Andersson, *Dawn Raids Under Challenge. Due Process Aspects on the European Commission's Dawn Raid Practices* (Hart Publishing, 2018)

[257] Para. 29, "Hoechst AG v Commission of the European Communities, Joined Cases 46/87 & 227/88," EUR-Lex, Accessed 25 April 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0046

[258] Para. 47, "Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities, Case C-94/00," EUR-Lex, Accessed 25 April 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CJ0094

[259] Sec. 27(2), "Competition Act 1998," legislation.gov.uk, Accessed 27 April 2021, https://www.legislation.gov.uk/ukpga/1998/41/section/2

[260] Ibid, Sec. 27(3)

In line with the established practice, inspections conducted by the CMA during the working hours[261]. The CMA officers shall provide the proof of identity, written authorization, document describing the relevant investigation and sanctions for failure to cooperate with officers. As well as separate document need to be shown setting the powers of CMA officials and notifying of right to have a legal advisor[262].

According to the Article 15 of the Act No. 4054 On The Protection of Competition, **Turkish** competition authority provides the inspection of business premises through the officially employed experts. The appointed experts must hold the "authorization certificate" issued by the Competition Board and stipulating the subject-matter and the purpose of inspection as well as penalties imposed for provision of incorrect information[263]. Also important to point out that in circumstances when the inspection of business premises is "hindered" or "likely to be hindered" competition officials will carry out such inspection through the decision of criminal court[264]. Therefore, it is also possible to distinguish both inspections under simple written authorization and inspections ordered by decision in Turkey`s competition enforcement.

In **Ukraine** the procedural pre-condition for the unscheduled inspection of undertaking is the fact that application has been made alleging the breach of competition law or the relevant case had already been started[265]. Competition officials cannot perform the scheduled inspection without the 10 days prior written notification of undertaking[266], where the unscheduled inspection is to be conducted without notification[267]. Both types of inspections are to be conducted on the basis of order of the Head of Antimonopoly Committee of Ukraine or the Head of territorial department[268]. There is no need in decision by court authorizing the inspection, even when the assistance of police in needed to enter the premises[269]. Therefore, it cannot be said that inspection of business premises could be conducted by simple written authorization, stating the power of officials to conduct inspection, the formal order is always needed. Nevertheless, the authorization by court of the inspection is not required.

---

[261] Para. 6.35, "Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8," gov.uk, Accessed 27 April 2021, https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases

[262] Ibid

[263] Art. 15, "The Act No. 4054 On The Protection of Competition," rekabet.gov.tr, Accessed 28 April 2021, https://www.rekabet.gov.tr/en/Sayfa/Legislation/act-no-4054

[264] Ibid

[265] Art. 7(4), "Law On the Antimonopoly Committee of Ukraine," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/3659-12#Text

[266] Para. 6, "On Regulations on the procedure for conducting inspections of observance of the legislation on protection of economic competition," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/z0139-02#Text

[267] Ibid, para. 8

[268] Ibid, para. 4 and 8

[269] Art. 7(8), Law On the Antimonopoly Committee of Ukraine

When entering the premises, the Antimonopoly Committee official has to produce also the plan of inspection and power of attorney delegating related powers to the certain official[270]. The plan, approved by the official who issued the order for the inspection, must contain the purpose of inspection, range of issued to be clarified in course of inspection and dates when it will be conducted[271]. The requirements of officials and testimonials or explanations of representatives of undertaking made orally will be recorded into the protocol[272].

Therefore, it is possible to conclude that in all the reviewed jurisdictions procedure requires inspectors to produce formal written document describing the scope and subject matter of the inspection. Where Commission, UK and Turkey competition authorities are able to collect evidence in the course of inspection under simple authorization stating their powers or by the formal decision of body or court when there are obstacles in conducting the inspection, in Ukraine all inspections are provided according to the special order.

3.2. Inspection of Non-Business Premises

3.2.1. Scope of Inspection

During the inspection of other than business premises the **Commission** officials are empowered to enter such non-business premises, land and means of transport, "including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned[273]". On author`s opinion evidence collection by entering the other than business premises is lying on the border of administrative and of criminal powers. The fact that such broad powers given to the Commission, which in itself is not the investigative body of criminal character, is motivated by the previous "experience" when important evidences were stored in the homes of directors or other people working for undertaking[274].

Under the Regulation (EC) No 1/2003, the Inspectors are also entitled to examine the books and other records found in non-business premises, as well as to take copies or extracts of them[275]. These right are slightly limited comparing to the rights of Inspectors during search in business

[270] Para. 31, "On Regulations on the procedure for conducting inspections of observance of the legislation on protection of economic competition," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/z0139-02#Text
[271] Ibid, para. 32
[272] Ibid, para. 39, and Art.22[1](5), Law On the Antimonopoly Committee of Ukraine
[273] Article 21(1), "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty," EUR-Lex, Accessed 25 April 2021, http://data.europa.eu/eli/reg/2003/1/oj
[274] Ibid, Recital 25
[275] Ibid, Article 21(4), Article 20(2)(b)(c)

premises. To be precise, officials cannot use the powers provided in Article 20(2)(d)(e) that includes right to seal any premises and books or records and right to ask for explanations of facts or documents[276].

In UK the possibility to enter non-business premises under the Competition Act 1998 applies to the premises "that are used as a dwelling and are - (a)premises also used in connection with the affairs of an undertaking or association of undertakings; or (b)premises where documents relating to the affairs of an undertaking or association of undertakings are kept[277]".

The warrant, as a pre-condition for conducting inspections of non-business premises, authorizes the CMA officials to search the premises in order to find possible evidence described in the warrant, take copies and extract form them[278].

Traditionally, the UK`s competition authorities can move freely throughout the premises and search for different kinds of digital devices containing the possible evidence. Unlike the inspection under simple written authorization, the powers to inspect premises under the warrant are broader. Namely, the CMA have the right to take out of the premises any original documents covered by warrant for purposes of preserving as well as copies of documents and of electronic devices for purposes of analysis[279]. In this respect important to note that the national competition authority of UK is entitled to retain the document taken out of premises no more than three month[280]. As well as the CMA will return the documents if they fail to meet the relevance requirement[281].

From the analysis of relevant legal acts, it becomes clear that the Antimonopoly Committee of **Ukraine** is not empowered "to inspect" the other than business premises of undertakings. Simultaneously, the competition authority has the power to collect evidences regardless of their location[282]. The criteria set for the seizure of evidences is the same as discussed in subchapter on inspection of business premises – anything that could be evidence or evidential source for the case[283]. Such criteria also fall within the scope established by the Directive (EU) 2019/1 in Recital 32. The types of evidence that could be obtained is not limited. Therefore, national competition authorities of Ukraine can collect evidences from private premises, but legally such actions do not

[276] Article 20(2)(d)(e), "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty," EUR-Lex, Accessed 25 April 2021, http://data.europa.eu/eli/reg/2003/1/oj

[277] Sec. 28A(9), "Competition Act 1998," legislation.gov.uk, Accessed 27 April 2021, https://www.legislation.gov.uk/ukpga/1998/41/section/2

[278] Ibid, Sec. 28A(2)(b)

[279] Para. 6.33, "Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8," gov.uk, Accessed 27 April 2021, https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases

[280] Sec. 28A(8), Competition Act 1998

[281] Para. 6.34, Guidance CMA8

[282] Art. 41(2), "Law On Protection of Economic Competition," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/2210-14?lang=en#Text

[283] Ibid, Art. 44(1)

fall within the scope of inspection. There is another difference form the approach used and recommended by European Commission.

Therefore, it can be concluded that only private premises having a connection with undertaking or is known to contain the searched evidence can be entered for the purposes of evidence collection.

3.2.2. Procedural Requirements

Under the **EU jurisdiction** it is possible to conduct the inspection in other than business premises only after the formal decision by the Commission[284]. Nevertheless, the Commission cannot proceed to such inspection independently from Member States. Two conditions are to be observed:

1) Commission shall approve the decision ordering the inspection in non-business premises only after consultations with national competition authority of those state in whose territory the inspection is to be conducted[285];

2) The officials authorized for inspection by decision cannot proceed until the "prior authorization from the national judicial authority of the Member State concerned[286]" is issued.

Such pre-conditions for conducting inspections are able to show that these is the exceptional mean for collection evidence by the Commission, therefore an additional control from the side of national authorities is needed.

The latter conclusion is indirectly confirmed by the range of issues that national judicial authorities may question and examine. Specifically, Member States authorities may examine the "authenticity" of the Commission decision and "control… that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested[287]". As could be seen from the provision cited, legislator foreseen grounds for the extensive assessment of Commission decision by national authorities. Essentially, the proportionality of the Commission actions to the alleged breach of competition law and to the "weight" of the evidence supposed to be found in course of inspection are assessed.

---

[284] Article 21(1), "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty," EUR-Lex, Accessed 25 April 2021, http://data.europa.eu/eli/reg/2003/1/oj

[285] Ibid, Article 21(2)

[286] Ibid, Article 21(3)

[287] Ibid

However, the Regulation (EC) No 1/2003 provides for a limitation on a number of issues that may be questioned by the national judicial authority. Thus, "the necessity for the inspection[288]" cannot be challenged as well as national court cannot "demand" to "be provided with information in the Commission's file[289]". Thereby, it is possible to conclude that the courts are somewhat limited in their right for judicial review, but it cannot be said that they are completely deprived of such right.

We consider important to notice, that the Commission is under additional material requirements when issuing a decision ordering an inspection of other premises. These material requirements are also set in the relevant provisions of Regulation (EC) No 1/2003. Namely, there must be established that "reasonable suspicion exists" that evidences related to subject-matter of the inspection are being kept in the other than business premises[290]. As well as the other condition to be met – alleged evidences must "prove a serious violation of Article 81 or Article 82[291] of the Treaty[292]". Serious violations usually constitute a cartel-type infringement, meaning that individuals representing the undertakings were acting intentionally violating the competition rules and, therefore, were intentionally trying to hide the possible evidence.

"Reasonable suspicion" is the concept more common to the criminal law and procedure[293]. This concept had actually evolved in U.S. court practice[294]. As the Dennis J. Buffone has pointed out, the concept evolved by reason that not all interactions between police and citizens involved enough grounds to use probable cause standard[295]. According to *Terry* v. *Ohio*, the milestone case in which this concept was firstly realized, "the reasonableness of any particular search and seizure must be assessed in light of the particular circumstances against the standard of whether a man of reasonable caution is warranted in believing that the action taken was appropriate[296]". Respectively, it is than possible to refer to averaged objective standard of "reasonable man" or "man of reasonable caution" when solving the issue with presence of reasonable suspicion.

In **UK** competition authority had to claim the warrant for investigation of business or other premises from either The High Court in England and Wales or Northern Ireland, the Court of

---

[288] Article 21(3), "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty," EUR-Lex, Accessed 25 April 2021, http://data.europa.eu/eli/reg/2003/1/oj

[289] Ibid

[290] Ibid, Article 21(1)

[291] Currently Articles 101, 102 correspondingly

[292] Article 21(1), Regulation (EC) No 1/2003

[293] "Legal Information Institute," Cornell Law School, Accessed 21 April 2021, https://www.law.cornell.edu/wex/reasonable_suspicion

[294] "Terry v. Ohio 392 U.S. 1 (1968)," supreme.justia.com, Accessed 21 April 2021, https://supreme.justia.com/cases/federal/us/392/1/

[295] Dennis J. Buffone, "Traffic Stops, Reasonable Suspicion, and the Commonwealth of Pennsylvania: A State Constitutional Analysis," *University of Pittsburgh Law Review* 69, 2 (2007): 331, https://lawreview.law.pitt.edu/ojs/index.php/lawreview/article/view/115/115

[296] Page 21-22, Terry v. Ohio 392 U.S. 1 (1968)

Session in Scotland, or the Competition Appeal Tribunal[297]. It is likely that CMA will seek a warrant were it has reasonable suspicions that evidences can be destroyed or somehow harmed in case of the request of information would have been made[298]. According to the Guidance tendency of using mentioned powers commonly reveals in cartel cases.

When the CMA is conducting investigations with warrant it has to be shown before the entry into the premises and shall contain among other things: 1) names of the CMA officers authorized for inspection; 2) description of related investigation; 3) possible liability for failure to comply with the legitimate actions of competition authorities[299].

The procedural condition for the Antimonopoly Committee of **Ukraine** to obtain the evidence from the living premises or other private premises owned by the natural persons is the decision of the Commercial court[300]. The other condition is that such retrieval of evidence shall take place during the working time. Only those evidence can be seizured that were not given by undertaking voluntary, their location could be identified and there is a risk of destruction of evidences[301]. If these conditions are met – the court gives its approval and issues a decision empowering the competition officials to seizure certain evidences. The fact of seizure of evidence must be reflected in protocol with the identification of the official who has performed the seizure and list of seizured evidences[302]. If the person refuses to sign the protocol, competition authority official need to note fact of the refusal in the protocol and propose the person to provide explanations and motives of refuse. As well as the copy of the protocol need to be transferred to the person whose belongings were seizured[303] for the preservance of procedural guarantees.

It became obvious that the decision to enter non-business premises is always subject to prior authorization by the judicial body in order to examine whether the interference into the private life of individuals is proportional to the role of evidence to be obtained and that there are circumstances showing that such evidence is actually kept in this premises.

Generally, the criteria of necessity governing the scope of collection of evidence during the inspections is justified according to the author's opinion. Requirement to state before the inspection the exact list of evidence that need to be obtained will undermine the effectiveness of evidence collection and put an excessive burden on the officials. The possibility of judicial review

[297] Para. 6.29, "Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8," gov.uk, Accessed 27 April 2021, https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases
[298] Ibid, para. 6.30
[299] Ibid, para. 6.36
[300] Art. 44(5), "Law On Protection of Economic Competition," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/2210-14?lang=en#Text
[301] Ibid, Art. 44(1)
[302] Ibid, Art. 44(5)
[303] Ibid

of actions or decisions of competition authorities shall strike the balance if undertaking will treat some of the evidence as non-relevant. As well as additional preliminary authorization by the judicial body of inspection in non-business premises shall ensure the proportionality of interference in privacy to the value of possible evidence received. The author thinks that process of digital evidence collection during inspection actually requires special procedures, because of the several peculiarities including but not limited to the use of special Forensic IT tools, need to regulate the scope of devices and servers that can be accessed during inspections as well as special rules on fixation and preservation of digital data.

CHAPTER 4. LIMITATIONS

It must be noted that collection of evidence in public enforcement is limited not only by scope that is decided on the basis of relevance, but also by the special limitations. Most common limitations are: legal professional privilege, privilege against self-incrimination, confidentiality.

4.1. Legal Professional Privilege

The basic document[304] regulating **European Commission** investigation powers is silent as for legal professional privilege limitations. Therefore, the main source of understanding this concept under the EU jurisdiction are court decisions. In fact, The General Court and ECJ referred to this question several times.

Firstly, the ECJ in *AM&S* v *Commission* recognized the concept of legal professional privilege by saying that "Regulation No 17[305] must be interpreted as protecting… the confidentiality of written communications between lawyer and client[306]" and explaining that such privilege emanates from the broader right – right of the defence[307]. The ECJ also stated that protection of such communications must cover "all written communications exchanged after the initiation of the administrative procedure" as well as "earlier written communications which have a relationship to the subject-matter of that procedure[308]". However, the court noticed that such privileged communication must come from fully independent legal advisor, in other words a lawyer who is not bound to the client by relationship of employment[309].

Later in *Akzo* v *Commission* by the General Court, approved after the appeal by the ECJ[310], the scope of protected communications was slightly extended. Basically, the General Court held: "… preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, may none the less be covered by LPP[311], provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence. On the other hand, the mere fact that a document has been

[304] Meaning the Regulation (EC) No 1/2003
[305] The predecessor of Regulation (EC) No 1/2003
[306] Para. 22, "AM & S Europe Limited v Commission of the European Communities, Case 155/79," EUR-Lex, Accessed 25 April 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61979CJ0155
[307] Ibid, para. 23
[308] Ibid
[309] Ibid, para. 21
[310] "Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, Case C 550/07 P," EUR-Lex, Accessed 25 April 2021, https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62007CJ0550
[311] LPP – Legal Professional Privilege

discussed with a lawyer is not sufficient to give it such protection[312]". Akzo`s representatives also tried to prove before the General Court that in majority of Member States communications with in-house lawyer are covered by legal professional privilege, but unsuccessfully. The court stated that situation has not sufficiently changed from the time of *AM&S v Commission* decision and privilege to advice of in-house lawyer is still not granted in several Member States (namely France, Italy, Luxembourg, Finland, Austria)[313]. The court also stressed that independent lawyer for purposes of communication with client privilege have to be properly qualified and subject to appropriate rules of ethics[314].

In case when investigated party insists that the document is privileged, such document have to be challenged. Until the moment when status of document is clarified, Commission is not entitled to access the content of questioned document. During the inspection questioned document have to be placed in a sealed envelope and will be kept safe until the certain decision is reached[315].

Unlike the EU legal regime, in **UK** the protection of privileged communications from disclosure emanates directly from the legal act[316]. According to relevant provision, communication "between a professional legal adviser and his client, or made in connection with… legal proceedings and for the purposes of those proceedings[317]" to be granted a status of privileged. The position of legal advisor is not mentioned in the definition of privileged communication and this is not accidental, according to established practice communication with the in-house lawyer falls within the scope of privileged communication in UK[318]. If during the inspection dispute arise as to the status of communications, the CMA official may place them into the sealed envelope or package until the dispute is decided[319].

In **Turkey** the right for protection of privileged information is well recognized[320]. The protection will gain the information that constitutes correspondence between a client and

[312] Para. 123, "Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities, Joined Cases T-125/03 and T-253/03," EUR-Lex, Accessed 25 April 2021, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62003TJ0125
[313] Ibid, para. 154
[314] Ibid, para. 147
[315] *Competition law investigations by the European Commission*, (Ashurst, 2020) https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---competition-investigations-by-the-european-commission/
[316] Sec. 30, "Competition Act 1998," legislation.gov.uk, Accessed 27 April 2021, https://www.legislation.gov.uk/ukpga/1998/41/section/2
[317] Ibid, Sec. 30(2)
[318] *Competition law investigations by UK authorities*, (Ashurst, 2020) https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---competition-law-investigations-by-uk-authorities/
[319] Para. 7.3, "Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8," gov.uk, Accessed 27 April 2021, https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases
[320] Para. 12, "Guidelines on the Examination of Digital Data during On-Site Inspections, 20-45/617, 08.10.2020," rekabet.gov.tr, Accessed 28April 2021, https://www.rekabet.gov.tr/Dosya/guidelines/guidelines-on-the-examination-of-digital-data-during-on-site-inspections1-20201120154515821-pdf

independent lawyer "aimed at the exercise of the client`s right to defense"[321]. On the other hand, the correspondence that is not directly related to the exercise of the right to defense, or correspondence involving advice on concealing or committing a competition law infringement, or correspondence with lawyer employed to the undertaking (in-house lawyer) falls out of the scope of privileged information and, therefore, will not be protected[322].

Oğuzkan Güzel and Başak İrem Coşkun noted that right for legal professional privilege was repeatedly stipulated in Competition Board decisions as a highly important, for instance in the *Dow* Decision[323]. According to the latter the legal professional privilege must be granted: "to relieve the consultancy persons from the worry that the information obtained and the correspondence will come out without their consent, and to provide all the information they have to their lawyers and to ensure that their defence rights can be used in real terms[324]".

In **Ukraine** there is no reference in competition legislation to the right of privileged communication between lawyer, does not matter if it is in-house lawyer or independent, and its client. However, there is the right the effect of which is close to the protection of legal professional privilege. According to the Law On the Bar and Legal Practice there is a notion of advocacy secrecy which includes: "any information that has become known to an advocate, assistant advocate, trainee lawyer, a person who is in an employment relationship with an advocate, about the client, as well as issues on which the client… approached an advocate… the content of advice, consultations, explanations of the advocate, the documents drawn up by him, the information stored on electronic media, and other documents and information[325]". There is a corresponding duty of an advocate and above mentioned persons to maintain the advocacy secrecy. Therefore, advice, consultations, explanations and the documents drawn up by advocate are privileged information and could be disclosed after written application of client[326]. However, such privilege is somehow reversed to the legal professional privilege reviewed in other jurisdiction, because the client does not have duty to maintain the advocate secrecy and also could not rely on the advocate secrecy if such information is requested by the Antimonopoly Committee of Ukraine. The

[321] Para. 12, "Guidelines on the Examination of Digital Data during On-Site Inspections, 20-45/617, 08.10.2020," rekabet.gov.tr, Accessed 28April 2021, https://www.rekabet.gov.tr/Dosya/guidelines/guidelines-on-the-examination-of-digital-data-during-on-site-inspections1-20201120154515821-pdf
[322] Ibid
[323] "Rekabet Kurulu Karari, 15-42/690-259, 02.12.2015," rekabet.gov.tr, Accessed 10 May 2021, https://www.rekabet.gov.tr/Karar?kararId=4f48e79e-e03a-4427-b477-3d2fa17557ac
[324] Oğuzkan Güzel, Başak İrem Coşkun, "Guideline on the Expanding Power of On-Site Inspection (Digital Search Power) is Published by the Competition Authority," *Turkish Lawblog* (2020) https://turkishlawblog.com/read/article/255/guideline-on-the-expanding-power-of-on-site-inspection-digital-search-power-is-published-by-the-competition-authority
[325] Art. 22(1), "Law On the Bar and Legal Practice," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/5076-17?lang=en#Text
[326] Ibid, Art. 22(2)

privilege will only apply if such information is under the advocate`s control and requested by the competition authorities from him or his assistant, trainee, employees.

In practice there were cases when both Antimonopoly Committee and advocate abused the right for legal professional privilege. Form the Decision № 689-p[327] of Antimonopoly Committee it becomes obvious that advocate abused the right of legal professional privilege when denied to provide competition authorities with information motivating the refuse by the statement that the information requested belongs to advocate secrecy. Nevertheless, the Committee showed that the requested information was not covered by the scope of advocate secrecy and was related only to customer-provider of services relations. The discussed advocate, as an entrepreneur, was a customer of service providing access to government registers and no evidences proving that such service provider was the client of the advocate were not found during the proceedings[328].

The other interesting decision[329] regarding the privileged information was adopted by the Commercial court of Kharkiv region. In this case the Antimonopoly Committee of Ukraine in course of investigation of competition infringement asked advocate to provide the tender agreement prepared for the client. The advocate refused to comply with the requirements of competition authorities as the documents were covered by the advocacy secrecy. The court agreed with advocate position after reviewing the legal service provision agreement, where the scope of legal services provided by advocate was quite broad and included among others the preparation and safeguarding the contracts for the tender procedures. Finally, the court stated that territorial department of Antimonopoly Committee of Ukraine breached the guarantees of advocate practice[330], and, therefore the evidences cannot be collected in such a way. The competition authority abused their power to collect evidences mainly on reasons that the required evidences was impossible to obtain from the undertaking in breach, nevertheless competition authorities have to respect the advocate secrecy and not to undermine the credibility of public authorities.

It is important to note as well that advocate cannot be in-house lawyer and his position is closer to notion of independent lawyer who is required to meet several qualification requirements such as obtaining higher legal education and passing the qualification exam[331]. The advocates in

[327] "Рішення АМКУ від 06 грудня 2018 р., № 689-р," amcu.gov.ua, Accessed 28 April 2021, https://amcu.gov.ua/npas/rishennya-689-r-vid-06122018
[328] Ibid, para 37
[329] "Рішення Господарського суду Харківської області від 05.04.2021, у справі № 922/1865/20," reyestr.court.gov.ua, Accessed 28 April 2021, https://reyestr.court.gov.ua/Review/96243108
[330] Ibid
[331] Art. 6(1), "Law On the Bar and Legal Practice," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/5076-17?lang=en#Text

Ukraine are also covered by the Rules on advocate ethics[332] setting the principles of advocate ethics and mandatory for each person having the right to provide advocate practice.

It can be concluded, that the scope of legal professional privilege in reviewed jurisdictions sufficiently differ. Where during the Commission investigations the advice of in-house lawyer will not be treated as privileged documentation and can be studied and seizure, in UK such advice fall under the scope. In Ukraine there is a reverse approach, where only documents held by external lawyer who provided the legal assistance will be privileged, therefore the competition authorities during the inspections of undertaking are not limited to collect the documents provided by lawyer if they are kept in undertaking premises.

4.2. Privilege Against Self-Incrimination

Unlike the legal professional privilege, an indication of privilege against self-incrimination is contained directly in the text of the Regulation (EC) No 1/2003. Namely, legislator refers to this question in Recital 23, stating that "undertakings cannot be forced to admit that they have committed an infringement[333]". But it also contains reservation stating that undertakings are nevertheless required to answer questions factual questions and provide documents, even if this information contributes to the establishment of a violation of competition law[334].

This privilege was also confirmed by the ECJ in the *Orkem* v *Commission*. The ECJ had stated the following: "Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove[335]".

It was noticed in the Manual of Antitrust Procedures, prepared for the Directorate-General for Competition internal use, that in practice sometimes difficult to draw the precise distinction between self-incriminating questions and lawful questions[336]. It is recommended for Inspectors to assess the nature of question, which seems to be self-incriminating, from the subjective perspective of the addressee and not from the objective perspective (perspective of average and reasonable

---

[332] See "Rules on advocate ethics," zakon.rada.gov.ua, Accessed 10 May 2021, https://zakon.rada.gov.ua/rada/show/n0001891-17#Text

[333] Recital 23, "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty," EUR-Lex, Accessed 25 April 2021, http://data.europa.eu/eli/reg/2003/1/oj

[334] Ibid

[335] Para. 35, "Orkem v Commission of the European Communities, C-374/87," EUR-Lex, Accessed 25 April 2021, https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:61987CJ0374

[336] European Commission, *Antitrust Manual of Procedures* (Brussels, 2012), 73, https://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf

respondent)[337]. The Inspector should ensure if the undertaking representative can answer the question "truthfully without an admission of guilt[338]".

The **UK** as well recognizes[339] privilege against self-incrimination based on the right to a fair trial embodied in Article 6 of the European Convention on Human Rights and implemented by the Human Rights Act[340] 1998.

As the Fuley Tetyana justifiably noted[341] the right of person "not to be liable of the refusal to provide testimony or explanations about yourself[342]" stated in the Constitution of **Ukraine**, was specified and broadened in the The Criminal Procedural Code of Ukraine Article 18, where it is stated that "no person may be compelled to admit his guilt in committing a criminal offense or be compelled to give explanations, testimonies, which may give rise to suspicion, accusation of committing a criminal offense by the person[343]". So, the right of self-incrimination is well established in Ukrainian legal framework, moreover the Ukraine is the party to the ECHR, where these guaranties are also provided. However, the competition infringements, even the cartel-type are decriminalized[344], therefore the persons are not protected by provisions referring to criminal offences. However, there is strong practice established by the European Court on Human Rights. For example, in case *Funke* v *France* the Court stated that special features of some of the fields of law cannot justify the incriminating questions addressed to person alleged of infringement equal to the criminal offence in its nature[345].

It could be concluded that privilege from self-incrimination is well recognized, however limits on the self-incrimination questions cannot be clearly identified and need to be assessed from case to case.

---

[337] European Commission, *Antitrust Manual of Procedures* (Brussels, 2012), 73, https://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf

[338] Ibid

[339] Para. 7.4, "Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8," gov.uk, Accessed 27 April 2021, https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases

[340] See "Human Rights Act 1998," legislation.gov.uk, https://www.legislation.gov.uk/ukpga/1998/42/contents

[341] Tetyana Fuley, "Freedom from self-incrimination as the principle of criminal proceedings," *Word of National School of Judges* 2, 3 (2013): 108, http://nsj.gov.ua/files/1445846397cln_2013_2_15.pdf

[342] Art. 63, "The Constitution of Ukraine," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text

[343] Art. 18(1), "The Criminal Procedural Code of Ukraine," zakon.rada.gov.ua. Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text

[344] See Section VII of The Criminal Code of Ukraine, and "About the introduction of criminal liability for violation of the antimonopoly legislation, E-Petition, № 22/076212-еп," petition.president.gov.ua, Accessed 30 April 2021, https://petition.president.gov.ua/petition/76212

[345] Para. 44, "Case of Funke v. France, no 10828/84," hudoc.echr.coe.int, Accessed 30 April 2021, http://hudoc.echr.coe.int/eng?i=001-57809

4.3. Confidentiality and Disclosure

It is important to note that in process of evidence collection, **European Commission** is under the duty of confidentiality and non-disclosure of information obtained during the investigation. Such duty referred in Regulation (EC) No 1/2003 as "professional secrecy" considers all information collected in course of investigation, cooperation with Member States and hearings[346]. Nevertheless, this fact usually does not prevent the Commission from the use and study of such sensitive information for the purposes of investigation[347]. There is an exception to this rule that the European Court of Justice formulated in *Hoffmann-La Roche & Co. AG* v *Commission*. The court ruled the following: "… but it does not nevertheless allow it [Commission][348] to use, to the detriment of the undertakings involved in a proceeding referred to in Regulation No 17[349], facts, circumstances or documents which it cannot in its view disclose if such a refusal of disclosure adversely affects that undertaking's opportunity to make known effectively its views on the truth or implications of those circumstances, on those documents or again on the conclusions drawn by the Commission from them[350]". In other words, the Commission could not rely on such evidences that could not be disclosed to an undertaking in question if such non-disclosure significantly deprives the undertaking of the ability to objectively assess the situation.

Section 237 of the **Enterprise Act 2002** prevents the disclosure of information related to the affairs of an individual or to any business or undertaking[351]. The time for the protection is either the life of individual or the "life" of undertaking[352]. In practice the CMA will not treat the information as confidential only based on statement of person that such information is of confidential nature. The sufficient explanations are to be provided by person: "regarding the nature of information, the harm that could be caused, the likelihood of harm and the magnitude of harm[353]". The CMA also requires to provide a second, non-confidential version of information[354] simultaneously with the request claiming the confidential nature of information.

---

[346] Art. 28, "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty," EUR-Lex, Accessed 25 April 2021, http://data.europa.eu/eli/reg/2003/1/oj

[347] *Competition law investigations by the European Commission*, (Ashurst, 2020) https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---competition-investigations-by-the-european-commission/

[348] Authors` Remarque

[349] The predecessor of Regulation (EC) No 1/2003

[350] Para. 14, "Hoffmann-La Roche & Co. AG v Commission of the European Communities, Case 85/76," EUR-Lex, Accessed 25 April 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61976CJ0085

[351] Sec. 237(1), "Enterprise Act 2002," legislation.gov.uk, Accessed 21 April 2021, https://www.legislation.gov.uk/ukpga/2002/40/section/188

[352] Ibid, Sec. 237(2)

[353] Competition and Markets Authority, *Transparency and Disclosure: Statement of the CMA's policy and approach* (UK, 2014), para. 4.12, https://www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-and-approach

[354] Ibid, para 4.13

Britain competition authority mentioned also that the information already in public domain or that can be easily inferred from publicly available information and the commercial information related to business which is more than two years old[355] are usually disregarded as not confidential. On the other hand, commercial information which: 1) is less than two years old, 2) information that could adversely affect the competition if disclosed, 3) information related to the strategy, and 4) responses to surveys that could adversely affect the undertaking or individual if disclosed[356] – will be the approximate list of information which may receive the status of confidential.

The Antimonopoly Committee of **Ukraine** when requesting information during the inspection or in connection with the case is not limited to request confidential information, bank and commercial secrecy as well[357]. However, as the information is confidential, certain steps need to be taken to safeguard it. According to Ukrainian regulations there are two possible ways to perform this task. One way is to submit such information in a sealed separate envelope, where each page of document has the wording "confidential information" on it. The submitter also has to indicate the category of confidential information, its character and explain the reasons why this information should belong to confidential[358] and, therefore, not to be disclosed to third parties. Another way is simply to indicate what information is confidential, listing the relevant documents or their part[359], without putting the information in separate envelope with special marks on documents.

Notwithstanding the general obligation of non-disclosure, The Antimonopoly Committee of Ukraine can disclose the information in order to provide information to "investigative bodies" and to court or when the information do not meet the confidentiality requirements[360]. However, the term "investigative bodies" is the not the most correct, as there are no such bodies according to the relevant legislation. The process of criminal investigation is officially called "досудове слідство[361]" and is defined like "the form of pre-trial investigation ("досудового розслідування") in which crimes are investigated[362]". And the body[363] empowered to conduct the criminal investigation are referred as the "body of pre-trial investigation" ("орган досудового

[355] Competition and Markets Authority, *Transparency and Disclosure: Statement of the CMA's policy and approach* (UK, 2014), para. 4.15, https://www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-and-approach
[356] Ibid, para. 4.16
[357] Art. 22[1](1), "Law On the Antimonopoly Committee of Ukraine," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/3659-12#Text
[358] Para. 18, "On approval of the Temporary rules of consideration of cases on violation of the antimonopoly legislation of Ukraine, z0090-94," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/z0090-94#Text
[359] Art. 22[1](4), Law On the Antimonopoly Committee of Ukraine
[360] Art. 22[1](3), Law On the Antimonopoly Committee of Ukraine
[361] Art. 3(6), "The Criminal Procedural Code of Ukraine," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text
[362] Ibid
[363] Ibid, Art. 38

розслідування"). Therefore, it is necessary to change the term used in the Article $22^1(3)$ – "органи слідства", investigative bodies, into the term officially used in the Criminal Procedural Code of Ukraine - "орган досудового розслідування", body of pre-trial investigation. The author recognize that such provision could simply contain the technical mistake and that the sense of the provision is almost unharmed, if not to say that not distorted at all, as the term can be understood impliedly. Nevertheless, the author is convinced that the legislative acts must be as accurate as possible, when it goes to the terms, especially terms referred to in several legal acts.

The other possible exception from the rule of non-disclosure, referred in previous paragraph, is the case when the information itself does not meet the criteria of confidentiality. Such criteria is set in the Law on the Access to the Public Information. Namely, the access to information could be limited in the interest of protection of reputation or rights of individuals where the "disclosure of information can cause the substantial damage to this interests" and "the harm from the promulgation of such information exceeds the public interest in its acquiring"[364]. Regarding the complexity of questions related with the acknowledging of information as confidential and for the purpose of granting the confidentiality right to persons, there is an obligation[365] of Antimonopoly Committee or its territorial departments officials to consult person on this issues[366].

Summarizing the above-mentioned, it can be said that the confidential nature of evidence generally does not prevent competition authorities from collecting it and only imposing additional obligation for treatment of such evidence. However, the undertaking always has to prove the confidential nature of information, and may consult with competition authorities on matters of confidentiality. Additionally, the technical mistake was found in Article 22^1 of the Law On the Antimonopoly Committee of Ukraine.

Analyzing the findings of this Chapter it can be stated that, notwithstanding some differences in scope of limits imposed by legal professional privilege in reviewed jurisdictions, the discussed limitations do not sufficiently deprive competition authorities of important evidence. Legal privilege covers only documents related to the exercise of right to defense, that may of course contain a set of sensitive or incriminating information, but such information may also be obtained from the analysis of another documents or facts. Privilege from self-incrimination reflects the right to a fair trial, but does not prevent collection of documents from which infringement and fault can be established. As well as confidential information or bank secrecy also do not prevent competition authorities from gathering evidence containing such information.

---

[364] Art. 6(2), "Law on the Access to the Public Information," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/2939-17#Text

[365] Art. $22^1(5)$, "Law On the Antimonopoly Committee of Ukraine," zakon.rada.gov.ua, Accessed 28 April 2021, https://zakon.rada.gov.ua/laws/show/3659-12#Text

[366] Ibid

CHAPTER 5. COLLECTION OF EVIDENCE IN PRIVATE ENFORCEMENT

According to the Article 21(1), the Directive 2014/104/EU must have been transposited by the Member States until the 27 December 2016. In fact, it was made and according to the analysis performed by Pier Luigi Parcu and his co-authors the implementation was made in two ways: 1) by amending the existing regulations, namely the Civil Code and the Code of Civil Procedure (on example of France) or competition laws in force (on example of Germany); 2) by adopting a separate new regulation, as the "*lex specialis* only applicable to damages actions for breaches of EU competition law" (on example of majority of Central and Eastern European countries)[367]. Another important moment highlighted by the same authors is the fact that Member States "extended the scope of the Directive beyond EU competition law", setting the same level of treatment towards the damages claims concerning the violation of national competition law[368].

In the UK, as it was mentioned above, private enforcement was developing actively even before the EU started its way of building private enforcement of competition law. Symbolic in this regard is the fact that the first utmost important case for evolution of private enforcement actions in the EU (meaning the *Courage Ltd* v *Bernard Crehan*) was addressed for preliminary ruling from the UK Court of Appeal. There is also a special procedure of discovery evolved exclusively under the common law concepts.

In Ukraine private enforcement formally became possible after the adoption of the special competition law in 2001, which contained among others the possibility of an injured party to claim the damages.

In the current subchapter the author will make an attempt to access the judicial practice, if there is some and to look whether such practice provides us with solutions to complexity of evidence collection by private parties. It was also decided to deliver the practical considerations regarding the evidence collection in light of the means that can be used for such collection, as it was made in the course of research of evidence collection in public enforcement. Namely such means include the disclosure of evidence by parties, third parties or competition authorities and the expert opinions.

[367] Pier Luigi Parcu, Giorgio Monti, Marco Botta, *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Edward Elgar, 2018), 6-7
[368] Ibid, 7

5.1. Disclosure of Evidence

In **Germany** the question of disclosure of evidence was considered before the implementation of provisions of the Directive 2014/104/EU. Thus, in 2014 the Federal Constitutional Court of Germany (*Bundesverfassungsgerichts*) issued an order[369] where dismissed the claim made by the former participants of cartel of European elevator manufacturers. In this case the Berlin Regional Court (*Landgericht Berlin*) ordered the disclosure of investigation files held by the prosecutor, including *inter alia* the information delivered by the defendant in course of the leniency procedures before the European Commission[370]. The former cartel participants failed with this claim in Constitutional Court, because it was established that the prosecutor was not under any specific obligations to protect the confidential information in discussed situation[371]. However, the Constitutional Court delivered a valuable principle which the civil courts must adhere when ordering a disclosure of sensitive information, namely: "… the court requesting access to files balances the affected interests, taking into account the legitimate interests of the complainants, and thus examines whether information from the requested investigation files may be used in civil proceedings – and thus for different purposes"[372]. The Constitutional Court also added that the access to files of authorities anyway cannot be unlimited[373]. Notwithstanding the fact that the courts in this case were on side of claimants for damages, making efforts for affording them to have the real possibility to prove the claim, such practice goes against with the approach used by the Directive 2014/104/EU protecting the leniency applications. The author make an assumption that the controversial *Pfleiderer AG* v *Bundeskartellamt*[374] decision could influenced such position of court at moment of order issue.

Sebastian Jungermann pointed out that with the implementation of Directive 2014/104/EU the great changes were introduced into the Act against Restraints of Competition[375] (*GWB*). The amendment made it possible to obtain the disclosure for defendants as well as for claimants, however the disclosure of leniency statements and settlement submissions was limited in line with

[369] "BVerfG, Beschluss der 3. Kammer des Ersten Senats vom 06. März 2014 - 1 BvR 3541/13," bverfg.de, Accessed 05 May 2021, http://www.bverfg.de/e/rk20140306_1bvr354113.html
[370] Bundesverfassungsgericht, "Constitutional complaints against the use of the public prosecutor's investigation files in a civil action not admitted for decision," Press Release No. 32/2014, 03 April 2014, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-032.html;jsessionid=1823AA3B99E0EC63F51AFF7486DECAE9.2_cid386
[371] Ibid
[372] Ibid
[373] Ibid
[374] "Pfleiderer AG v Bundeskartellamt, Case C-360/09," EUR-Lex, Accessed 5 May 2021, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62009CJ0360
[375] "Act against Restraints of Competition," gesetze-im-internet.de, Accessed 5 May 2021, https://www.gesetze-im-internet.de/englisch_gwb/

the Directive[376]. The same author also noticed that the documents under the control of independent lawyer cannot be seized and disclosed[377] according to the Section 33g(6) of the GWB. Wolfgang Wurmnest added that the discussed amendment in fact "established a system for the production of evidence and information in antitrust proceedings"[378] in Sections 89b to 89e of the GWB.

Jens-Uwe Franck in his recent publication wrote that currently in Germany there are two options allowing plaintiffs to obtain evidence, before the actual proceedings has started[379]. The first one is "to request access to the fining decisions of a competition authority" using the Section 406e of the German Code of Criminal Procedure (*Strafprozessordnung*)[380]. The second one, according to the mentioned author, is to apply the Section 33g of GWB, entitling to request the decision issued by European Commission or national competition authority form the undertaking in breach, in conjunction with section 89b (5) of GWB, which allows the court to ensure the access to such decisions by the so called "preliminary injunction"[381].

It was just the case in Düsseldorf Higher Regional Court decision, where the plaintiff asked the court to grant the preliminary injunction in relation to the decision of the European Commission with all the confidential information included[382]. The court in this decision unambiguously confirmed the right for preliminary injunction ordering the access to competition authority decision and explained that such option become available due to the amendment made to GWB in course of transposition of Directive 2014/104/EU[383]. However, the claimants were not granted the supply of preliminary injunctions, because the court noticed that the damages were born "in the period between 17 January 1997 and 18 January 2011 as determined in the commission decision requested", and therefore out of the temporal scope of application of provision related to preliminary injunction, which covers only the damages arisen after 26 December 2016[384]. The Court also added that in cases where the damages are going to be claimed in relation to cartel-type infringement the injured party is entitled to obtain evidence on the condition that the urgency

[376] Sebastian Jungermann, "The Private Competition Enforcement Review: Germany," *The Law Reviews - The Private Competition Enforcement Review* (2021), https://thelawreviews.co.uk/title/the-private-competition-enforcement-review/germany
[377] Ibid
[378] Wolfgang Wurmnest, "German Private Enforcement: an overview of competition law," *e-Competitions German Private Enforcement,* Art. N° 97611 (2021), https://assets.uni-augsburg.de/media/filer_public/21/7f/217fa830-d638-404b-afd5-498c5c2a274c/article-97611.pdf
[379] Jens-Uwe Franck, "Private Enforcement of EU Competition Law in Germany," (2019): 35, Country report (Chapter 5) in *Private Enforcement of European Competition and State Aid Law*, Ferdinand Wollenschläger, Wolfgang Wurmnest and Thomas M.J. Möllers, (Wolters Kluwer, 2020), https://ssrn.com/abstract=3728716
[380] Ibid
[381] Ibid
[382] Para. 3, "OLG Düsseldorf, Beschluss vom 03.04.2018 - VI-W (Kart) 2/18," openjur.de, Accessed 5 May 2021, https://openjur.de/u/2161305.html
[383] Ibid, para. 26, 30
[384] Ibid, para. 36, 38

"required for granting temporary legal protection"[385]. However, in present case the year passed form the moment when the European Commission issued a decision till the moment when the plaintiff actually suited the action for damages and additional two month form the suit until the request for preliminary injunction. Therefore, the court have not recognized such actions to be correspondent to notion of "urgency"[386]. Nevertheless, it must be noted that the possibility to request a preliminary injunction form the court before the proceedings part started is in line with the principle of effectiveness promoted in Directive 2014/104/EU.

In **France** the practice corresponding to the requirements provided in Directive 2014/104/EU started to emerge before the actual implementation of the Directive as well. Thus, the Paris Court of Appeal ruled[387] in favor of claimant requesting the disclosure of evidence form competition authority file held by defendant regarding the investigation on *SA Eco-Packaging*, notwithstanding that the investigation was closed with the commitments made by the undertaking in breach. Adhering to the request of claimant in damages action the Paris Commercial Court ordered a disclosure of "the relevant elements of the investigation file" in non-confidential version, namely the number of minutes of hearings and observations made in relation to the investigation[388]. The reasoning was based on idea that the secrecy of investigation cannot overrule the need of the parties to the civil proceedings to establish the relevant facts on the basis of disclosed evidence, which therefore must lead to the full exercise of the right to claim damages. However, the Court of Appeal pointed out that it is the task of the court to assess the justification of request for disclosure and relevance of requested evidence for the case[389]. It must be noted that the disclosure of commitments also became prohibited with the implementation of Directive 2014/104/EU and can be asked only in exceptional cases form competition authority and only in part relevant for establishing the certain fact.

In general, the law practitioners admit "an increase in the number of cases brought before the courts" after the implementation of Directive 2014/104/EU and also informed that approximately ten follow-on action were brought to the Paris Commercial Court before the March 2019[390].

[385] Ibid, para. 51
[386] Para. 65, "OLG Düsseldorf, Beschluss vom 03.04.2018 - VI-W (Kart) 2/18," openjur.de, Accessed 5 May 2021, https://openjur.de/u/2161305.html
[387] "Cour d'appel Paris, 24 Sep 2014, SA Eco-emballage No 12/06864," doctrine.fr, Accessed 5 May 2021, https://www.doctrine.fr/d/CA/Paris/2014/R16F8BE9B9B40D5FDBE80
[388] Ibid
[389] Ibid
[390] Chantal Arens, "Introductory remarks," presented at 4th Private Enforcement Conference: The Current State of Private Enforcement in The EU and France, Paris, 28 March 2019. https://www.concurrences.com/en/conferences/4th-private-enforcement

Quite interesting founding was made by the *Corte di Cassazione* in **Italy** in *Comi* v *Carget*[391] case. Firstly, the court concluded that the principle of burden of proof shall not be applied "mechanically" in damages cases, and procedural rules of evidence should be adjusted and interpreted in light of "information asymmetry existing between the parties in terms of access to evidence, in particular in stand-alone damages actions"[392]. Secondly, the court delivered the following rule influenced by the Directive 2014/104/EU: "… judges are required to make appropriate use of the means of investigation available to them under the procedural rules. In particular, they are required to interpret broadly the conditions laid down in the Civil Procedure Code for the use of documentary submissions, requests for information and technical advice…"[393]. Therefor it is seen that Italian courts are willing to apply the procedural autonomy in such a way, which will ensure the claimants can actually collect the reasonable evidence.

The similar principle was confirmed by the **Swedish** Patent and Market Court of Appeal in recent decision on *Visita* v *Booking*[394]. The claim to Patent and Market Court was a follow-on claim, after the Booking made his voluntary commitments in public enforcement case related to MFN clauses used in Booking standard contracts with hotels[395]. Namely, the court upheld the findings that the Member States were not empowering EU bodies to rule on procedural matters, that is why procedural autonomy is achieved in most of the cases. And such autonomy, on the opinion of the court, shall be applied to the national actions based on Community law as well[396]. However, the Court of Appeal also ruled that in this certain case it was not enough for *Visita* to show only several economic theories on basis of which the assumptions were made, such assumptions have to be made on basis of the facts of the case. The court added that plaintiff can prove the actual negative effect on market by presenting the investigation that the discussed practices were "applied on the market for such a long time… that it is reasonable to assume that any anti-competitive effects have arisen"[397]. The parties to this case in fact relied on expert opinions in case of *Booking*, written evidence including agreements, statements from financial experts, market research and on legal opinion from professor in case of *Visita*[398]. Therefore, such

[391] "Corte di cassazione, Sentenza 4 giugno 2015, n. 11564," eius.it, Accessed 05 May 2021, https://www.eius.it/giurisprudenza/2015/145

[392] David Ashton, *Competition Damages Actions in the EU: Law and Practice*, Second Edition (Edward Elgar Publishing Limited, 2018), para. 4.33.

[393] Ibid, para 4.34

[394] "Svea Hovrätt Patent- och marknadsöverdomstolen, DOM 2019-05-09, Mål nr PMT 7779-18," domstol.se, Accessed 5 May 2021, https://www.domstol.se/globalassets/filer/domstol/patentochmarknadsoverdomstolen/avgoranden/2019/pmt-7779-18.pdf

[395] Katharina Voss, "The Interaction Between Public and Private Enforcement of EU Competition Law: a Case Study of the Swedish Booking Cases," *Yearbook of Antitrust and Regulatory Studies* 13, 21 (2020): 58-59, https://yars.wz.uw.edu.pl/images/yars2020_13_21/YARS_13_21_Voss.pdf

[396] Bilaga A, 29, Svea Hovrätt Patent, Mål nr PMT 7779-18

[397] Ibid, Sid 18

[398] Ibid, bilaga A, 23-24

evidential requirements presented by Court of Appeal will guide the claimants in evidence collection during the future similar cases in Sweden.

In the end of 2020 the European Commission issued a Report[399] on implementation of the Directive 2014/104/EU in Member States, where the authors were quite optimistic as to results of implementation. Namely, it was stated that most of the states implemented the provisions on disclosure made by parties or third parties "literally or almost literally" and that the related amendments were the landmark one for their legal systems[400]. It was also noted that restrictions on disclosure of certain type of documents by competition authorities are also in palace and are "expected" to establish the "fine balance" between the private and public enforcement across the EU[401]. The Commission staff also relied on the Jean-François Laborde research[402], where he reviewed the damages actions based on cartel infringement cases and found that from 239 cases "57 % followed an infringement decision of a national competition authority, 40% followed a Commission decision, and only 2% were stand-alone actions"[403], that proves the value of competition authorities decision made in public enforcement proceedings and the fact that such decisions were disclosed to parties helping them to base their claims on relevant facts.

Peter Willis and Jonathan Speed noted that according to the *National Grid* v. *ABB*[404] the parties to the private enforcement actions in **UK** can order a disclosure "of specific categories of documents", including the competition authority files even before the start of respective proceedings[405]. It is worth mentioning that such option became possible in Germany as well with the new amendment to competition law discussed above. Peter Scott and his colleagues pointed out several important moments considered in this case as well, namely that disclosure was ordered by the High Court notwithstanding the appellation pending in the ECJ regarding the Commission decision stating the infringement, and that the integrity of proceedings in ECJ would not be destructed because the High Court will monitor the observance of confidentiality of documents

[399] European Commission, "Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union," Commission Staff Working Document SWD(2020), 14.12.2020, https://ec.europa.eu/competition/antitrust/actionsdamages/report_on_damages_directive_implementation.pdf

[400] Ibid, 6

[401] Ibid

[402] Jean-François Laborde, "Cartel damages actions in Europe: How courts have assessed cartel overcharges," *Concurrences* N° 4-2019, Art. N° 92227 (November 2019), quoted in European Commission, "Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU," Commission Staff Working Paper SWD(2020), 14.12.2020, 7, https://ec.europa.eu/competition/antitrust/actionsdamages/report_on_damages_directive_implementation.pdf

[403] Ibid

[404] "National Grid Electricity Transmission Plc v. ABB Ltd & Ors [2012] EWHC 869 (Ch)," casemine.com, Accessed 5 May 2021, https://www.casemine.com/judgement/uk/5a8ff76460d03e7f57eac082

[405] Peter Willis, Jonathan Speed, "The Private Competition Enforcement Review: United Kingdom - England & Wales", *The Law Reviews - The Private Competition Enforcement Review* (2021), https://thelawreviews.co.uk/title/the-private-competition-enforcement-review/united-kingdom-england--wales

disclosed between the parties[406]. However, the court ordered disclosure only form 2 of the 23 defendants in this case[407].

In light of previous paragraph, it must be noted that confidentiality in leniency proceedings is nevertheless more valuable in the eyes of the Court of Appeal. Thus, in case of *Emerald Supplies* v. *British Airways*[408], the court of first instance ordered a disclosure of full version of Commission decision in cartel case with all the confidential information, motivating such order by the fact that during four years the European Commission have not drafted the non-confidential version of mentioned decision which cause an "unreasonable delays" for the plaintiffs to bring a suit[409]. The Court of Appeal in fact did not agree[410] with such interpretation and ordered to wait until the European Commission will deliver the non-confidential version of decision, motivating it by the need to uphold the third parties right of defence[411].

Further, as the Peter Scott and others mention, that the order for disclosure made before the start of actual proceedings shall nevertheless take place only in "exceptional circumstances" with the main purpose "to avoid litigation" according to the *Trouw UK* v. *Mitsui*[412]. The court in fact proved it in *Hutchison 3G* v. *O2*[413], where the plaintiff requested before the proceedings a disclosure of wide range of documents, that on his opinion can prove the anti-competitive practices on the market of mobile operators[414]. However, the court denied such request because it was over "the scope of standard disclosure" and "would have been disproportionately expensive"[415].

It is important to note that the distinction in UK has to be made between the High Court that is ordering disclosure and the specialized Competition Appeal Tribunal (CAT). The latter, according to the review of Peter Scott and co-authors, is opened for "more flexible procedure"[416]. However, the CAT is able to refuse disclosure if the requesting party will not show that disclosure "necessary, relevant and proportionate to determine the issues"[417]. That was a case in *Claymore*

---

[406] Peter Scott, Mark Simpson and James Flet "England & Wales," in *The Private Competition Enforcement Review*, Ninth Edition, Ilene Knable Gotts (UK: Law Business Research Ltd, 2016), 145-146, https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/england--wales-chapter-of-the-eighth-edition-of-the-private-competition-enforcement-review.pdf

[407] Ibid, 146

[408] "Emerald Supplies Limited and others v. British Airways PLC [2014] EWHC 3513 (Ch)," casemine.com, Accessed 5 May 2021, https://www.casemine.com/judgement/uk/5b46f2162c94e0775e7f211e

[409] Peter Scott et al., "England & Wales," in *The Private Competition Enforcement Review*, 149

[410] "Air Canada & Ors v Emerald Supplies Limited & Ors [2015] EWCA Civ 1024," bailii.org, Accessed 5 May 2021, https://www.bailii.org/ew/cases/EWCA/Civ/2015/1024.html

[411] Peter Scott et al., "England & Wales," in *The Private Competition Enforcement Review*, 149

[412] Trouw UK Ltd v Mitsui & Co Plc [2007] EWHC 863 (Comm)

[413] "Hutchison 3G UK Ltd v. O2 (UK) Ltd [2008] EWHC 55 (Comm)," bailii.org, Accessed 5 May 2021, https://www.bailii.org/ew/cases/EWHC/Comm/2008/55.html

[414] Peter Scott et al., "England & Wales," in *The Private Competition Enforcement Review*, 146

[415] Ibid

[416] Ibid, 147

[417] Ibid

Dairies v. *OFT*[418], where the plaintiff asked to disclose the information form cartel investigation files of competition authority, including the confidential one[419].

In **Ukraine** the practice of private competition enforcement cannot be called intensively developed, however there are some high-profile cases. Serhiy Shklyar and Olha Bulayeva, competition practicing lawyers, pointed out 17 private actions in total at the moment of September 2019, where in 10 of them the decision granting the compensation was issued[420]. From the most serious cases are the *Nibulon* v. *Ukrzaliznytsya*[421] and *MAU* v. *AMIC Aviation International*[422].

In *Nibulon* v. *Ukrzaliznytsya* the plaintiff, who is the major agricultural company, sued the state monopoly company in rail sector following the decision of Antimonopoly Committee of Ukraine. The mentioned state rail company (*Ukrzaliznytsya*) abused the dominance by establishing the price for internal carriage of grain cargoes to certain station (*Mykolaiv-Vantazhniy*) as the price for carriage of goods for export, therefore the claimant was seeking to obtain the compensation as the difference in legitimate price and price imposed by infringer[423]. The case was reviewed in courts of all levels. During these proceedings the courts ordered a disclosure of evidence twice. First time the court ordered from competition authority to disclose case materials related to competition breach[424]. Second time the court ordered a disclosure of evidence form the defendant, namely of transfer acts, inventory order, inventory descriptions, lists and consolidated deeds of property inventory. The court stated that the claimant when requesting the evidence complied fully with the procedural rules for disclosure and stated the specific description of requested evidences and their evidential value, "the grounds on which it follows that the relevant person has this evidence, the measures taken by the applicant to obtain this evidence independently and evidence of the taking of such measures"[425]. The author assumes that the relevant knowledge about the requested documents was obtained directly from the investigation files of competition authority,

---

[418] "Claymore Dairies Limited and Arla Foods UK PLC v Office of Fair Trading, 1008/2/1/02, 2004, CAT 16," catribunal.org, Accessed 5 May 2021, https://www.catribunal.org.uk/sites/default/files/Jdg1008Claymore240904.pdf

[419] Peter Scott, Mark Simpson and James Flet "England & Wales," in *The Private Competition Enforcement Review*, Ninth Edition, Ilene Knable Gotts (UK: Law Business Research Ltd, 2016), 147, https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/england--wales-chapter-of-the-eighth-edition-of-the-private-competition-enforcement-review.pdf

[420] Serhiy Shklyar, Olha Bulayeva, "Compensation for breaches of competition: national and global trends in private enforcement," *Юридична Газета online* 37, 691 (2019), https://yur-gazeta.com/publications/practice/antimonopolne-konkurentne-pravo/vidshkoduvannya-zbitkiv-za-porushennya-konkurenciyi-nacionalni-ta-svitovi-tendenciyi-private-enforce.html

[421] "Постанова Верховного Суду від 03.07.2018 у справі № 910/4425/16," reyestr.court.gov.ua, Accessed 5 May 2021, https://reyestr.court.gov.ua/Review/75081972

[422] "Рішення Господарського Суду міста Києва від 15.01.2019 у справі № 910/12634/18," reyestr.court.gov.ua, Accessed 5 May 2021, https://reyestr.court.gov.ua/Review/79288730

[423] Постанова Верховного Суду 03.07.2018, № 910/4425/16

[424] "Ухвала Господарського Суду міста Києва від 12.04.16 у справі № 910/4425/16," reyestr.court.gov.ua, Accessed 5 May 2021, https://reyestr.court.gov.ua/Review/57127997

[425] "Ухвала Київського апеляційного господарського суду від 12.04.2018 у справі № 910/4425/16," reyestr.court.gov.ua, Accessed 5 May 2021, https://reyestr.court.gov.ua/Review/75769715

requested earlier, because the documents requested second time are dated 2015, year when the public enforcement case was pending and the knowledge of the claimant of the requested documents was rather precise.

In *MAU* v. *AMIC Aviation International* the national aviation company claimed compensation form the company that supplies fuel and refueling aircrafts for the unjustified rise in fuel prices. This claim for damages as well followed the decision of Antimonopoly Committee of Ukraine establishing the breach of competition law. However, there were no awards related to disclosure of evidence during the proceedings. During the hearing stage the defendant requested disclosure of evidence, but the disclosure was refused by court. The court only stated that such request does not meet the procedural requirements and that the stay of proceedings in case if disclosure will have been ordered would affect the right to a fair trial, including *inter alia* the requirement for trial during the reasonable time[426]. The court in this case does not give any other detailed considerations on reason of refusal and content of request for disclosure. Nevertheless, the author of this work making a suggestion that some political motives could be present in such decision. Such suggestion was made concerning the fact that the defendant in this case (*AMIC Aviation International*) in the moment when mentioned agreement of supply of fuel was named "*Lukoil Aviation Ukraine*", where the *Lukoil* is known to be the Russian businessmen`s owned company[427].

There was also quite a recent case[428] between the shipping company "*Ukrrichflot*" and already mentioned rail company "*Ukrzaliznytsya*" where the Commercial Court awarded damages to the shipping company. This action was also started on follow-on basis. However, the decision has still not been executed, because of appeals it is currently pending in Supreme Court of Ukraine. No disclosure was requested from the parties or the competition authorities, notwithstanding the fact that claimant proved the infringement of basis of competition authority decision. There was only a demand ordering the Commercial Court to disclose materials of the relevant case to give the appellant to examine it and base appeal on the requested materials[429].

It can be concluded that there is a lack of judicial practice at the moment to establish the direct influence of implementation of Directive 2014/104/EU on the effectiveness of evidence collection in Member States. However, it is possible to observe the general increase of private

---

[426] "Рішення Господарського Суду міста Києва від 15.01.2019 у справі № 910/12634/18," reyestr.court.gov.ua, Accessed 5 May 2021, https://reyestr.court.gov.ua/Review/79288730

[427] LUKOIL (LKOH), "MarketScreener," Surperformance, Accessed 5 May 2021, https://www.marketscreener.com/quote/stock/LUKOIL-6491736/company/

[428] "Рішення Господарського Суду міста Києва від 23.09.2020 у справі № 910/9243/20," reyestr.court.gov.ua, Accessed 5 May 2021, https://reyestr.court.gov.ua/Review/92036620

[429] "Ухвала Верховного Суду від 09.02.2021 у справі №910/9243/20," reyestr.court.gov.ua, Accessed 5 May 2021, https://reyestr.court.gov.ua/Review/94770127

enforcement actions in the EU. It is also possible to note that most of the damages claims in Member States, UK and Ukraine are follow-on actions. In author's opinion, the effective remedy that will support stand-alone actions will be the obligation of defendant in damages actions to declare the list of evidence under his control that relates to the subject matter of dispute.

On the example of Germany and France it is seen that Directive 2014/104/EU in fact limited the evidence collection for the protection of interests of public enforcement, because before the implementation court granted access to leniency statements and commitments in cases where damage from cartel infringement was claimed. The possibility to request a preliminary injunction from the court in Germany is in line with the principle of effectiveness promoted in Directive 2014/104/EU. The Italian court has stressed that the principle of procedural autonomy especially shall be used by the court in stand-alone actions. In Ukraine quite high standards for ordering the disclosure are used.

5.2. Expert Opinion

In the recent Jean-François Laborde study (third edition)[430], where the author in scientific manner analyzed 144 of damages cases throughout the EU jurisdictions related to cartel infringement, it was found that in 28 from 144 cases in total the court appointed expert for the purposes of proving damages or quantifying the harm. From this number, 20 cases were registered in France, 6 in Hungary, 1 in Denmark and 1 in Netherlands[431]. Therefore, it is apparent that courts using this option to facilitate the private enforcement notwithstanding it was not directly stipulated in the Directive 2014/104/EU.

The interesting precedent recently took place in Germany[432], where the court for the first time refused to use the expert opinion for quantification of harm. As the Marcio da Silva Lima pointed out, the court decided that the approach used by the expert in his analysis was inappropriate for the case in question and used the Section 287 of German Code of Civil Procedure in conjunction with all the relevant evidence in the case to estimate the damages without using expert. The same author notes, that the court draw special attention to the duration of cartel and the market

[430] Jean-François Laborde, "Cartel damages actions in Europe: How courts have assessed cartel overcharges (2018 ed.)," *Law & Economics, Concurrences*, 1 (2019), https://www.laborde-advisory.com/PDF/2019-02-27%20Cartel%20damages%20actions%20in%20Europe%20-%20How%20Courts%20have%20assessed%20cartel%20overcharges%20(2018%20edition).pdf

[431] Ibid, para. 34

[432] "Landgericht Dortmund, Urteil vom 30.09.2020 - 8 O 115/14 (Kart)," openjure.de, Accessed 5 May 2021, https://openjur.de/u/2300173.html

share covered by members of the cartel when assessing the amount of damages[433]. Such practice certainly will lead to the facilitation of private enforcement according to the Directive 2014/104/EU, however it remains a question how many courts and judges are qualified enough to make such decisions as discussed above.

The problem of concurrent expert opinions can be seen on example of recent decision of the Audiencia Provincial of Madrid, which reviewed two decisions of courts of first instance regarding damages awarded due to the envelope cartel activity. As the Paloma Martínez-Lage Sobredo noted, the mentioned court decided to rely on the expert opinion of defendants that was obviously providing with the less amount of damages compared to the expert opinion ordered by claimants and upheld in first instance[434]. Specifically, the court explained that it substantially agrees with the estimation made by plaintiff`s expert, however the court of first instance has not duly examined the expert opinions presented by the defendant`s experts. The court draw attention to the technical methods applied to quantification and stated that defendant`s expert opinion most closely estimated the average impact of the cartels and was based on most authorized studies. It was stressed that the chosen opinion was primarily based on quantification methods provided in Practical guide[435] issued by the European Commission[436].

Peter Willis and Jonathan Speed argue[437] that such mean as expert opinion is quite widespread in UK private damages actions. The experts are usually called by parties and not ordered by the court. As the mentioned authors note the new practice of examination of expert witnesses, called "hot-tub arrangements"[438], was used in *Streetmap* v. *Google*[439] by the first time. This practice essentially means that the experts with dissenting opinions will be invited to simultaneous cross-examination by representatives of the parties and by judge, not one by one, which on the opinion of the authors will contribute to simplification of comparison of different

[433] Marcio da Silva Lima, "Quantification of cartel damages – first German Court recourses to freehand estimation," *Bird & Bird News Center*, (2020), https://www.twobirds.com/en/news/articles/2020/germany/quantification-of-cartel-damages

[434] Paloma Martínez-Lage Sobredo, "Spain: The Audiencia Provincial of Madrid overturns the first instance judgments which granted damages quantified by the claimants and grants damages but based on the lower alternative quantification contained in a defendant's expert report (Cámara de Comercio, Obras Misionales Pontificias)," *Concurrences* N° 2-2020, Art. N° 94435 (2020), https://www.concurrences.com/en/review/issues/no-2-2020/case-comments/p-m-l-s-%EF%81%AE-94435

[435] "Practical guide quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the functioning of the European Union, Commission Staff Working Document, 11.6.2013", ec.europa.eu, Accessed 5 May 2021, https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf

[436] "Audiencia Provincial of Madrid, 3 Feb. 2020, Cámara de Comercio, nº 165/19," poderjudicial.es, Accessed 5 May 2021, https://www.poderjudicial.es/search/AN/openDocument/6277ec87da863dc8/20200311

[437] Peter Willis, Jonathan Speed, "The Private Competition Enforcement Review: United Kingdom - England & Wales", *The Law Reviews - The Private Competition Enforcement Review* (2021), https://thelawreviews.co.uk/title/the-private-competition-enforcement-review/united-kingdom-england--wales

[438] Ibid

[439] "Streetmap.EU Ltd v Google Inc. & Ors [2016] EWHC 253 (Ch)," bailii.org, Accessed 5 May 2021, https://www.bailii.org/ew/cases/EWHC/Ch/2016/253.html

opinions[440]. However, such examination may require an extra time and concentration from the judge. The good example is the *BritNed* v. *ABB*[441] case where the judge spend over two days cross-examining the expert witnesses[442]. This case was massively construed on the examination by judge of expert opinions, the judge was examining the reliability of each of the approaches in terms of the methods of calculations of overcharge used for the specific product[443].

In Ukraine, however, in any of the reviewed in previous subchapter cases[444] the judges do not perform such an extensive analysis as the judge in the UK court done recently. Neither the parties, neither the court were relying on any kind of economical expertise. The decisions were made on facts and calculations retrieved from competition authority decision. The method used for calculation is based on the difference between the reasonable costs if there were no infringement and the factual loss incurred by the reason of breach of competition rules.

From the analysis of the expert opinions in private claims for damages it becomes apparent that competition cases often involve complicated economical questions as well as the expertise needed to estimate and prove the actual damages. It takes a lot of time from judges to analyse the information provided by the claimants in such cases. The practices of cross-examination of experts used in UK may be the solution for more effective evaluation of concurrent opinions. Another possible solution might be an establishment of a separate competition court or tribunal empowered to decide on damages actions as well. However, Dominik Wolski in his study argues that it is almost impossible to draw the causation between the knowledge of judges in specialized courts with some positive effect on private enforcement[445].

It is possible to say regarding the findings of final Chapter, that prohibition to disclose leniency statements and commitments under the Directive 2014/104/EU sufficiently limited the scope of evidence collected by private claimants. However, such limitation is objectively justified by the needs of public enforcement proceedings. The author also argues that the disclosure of evidence in reviewed jurisdictions is more efficient for the follow-on actions, where the party can order the disclosure of non-confidential version of infringement decision by competition authorities and find the description of another evidence in such decision.

---

[440] Peter Willis, The Private Competition Enforcement Review: United Kingdom

[441] "BritNed Development Limited v. ABB [2019] EWCA Civ 1840," casemine.com, Accessed 5 May 2021, https://www.casemine.com/judgement/uk/5e423ab02c94e0394d733381

[442] Ibid, para. 75

[443] Ibid, para. 111

[444] "Постанова Верховного Суду від 03.07.2018 у справі № 910/4425/16," https://reyestr.court.gov.ua/Review/75081972, and "Рішення Господарського Суду міста Києва від 15.01.2019 у справі № 910/12634/18," https://reyestr.court.gov.ua/Review/79288730, and "Рішення Господарського Суду міста Києва від 23.09.2020 у справі № 910/9243/20," https://reyestr.court.gov.ua/Review/92036620

[445] Dominik Wolski, "Can an Ideal Court Model in Private Antitrust Enforcement Be Established?," *Yearbook of Antitrust and Regulatory Studies* 11, 18 (2018): 147, https://yars.wz.uw.edu.pl/images/yars2018_11_18/115.pdf

CONCLUSIONS

1. The evidence collection in public enforcement is governed by a set of rules made specifically for the competition law, where the evidence collection in private enforcement cases is governed by the general rules of civil procedure which may be unsuitable for these purpose. The latter consideration was one of the driving forces in the EU to implement the Directive 2014/104/EU.

2. The scope of evidence collection through information requests and inspections is governed by the concept of "relevance" or "necessity" of requested information or examined evidence. Having in mind the variety of types of evidence requested or examined it is impossible to draft an exhaustive list of types and the requirement of necessity is objectively justified. However, differences were identified within the researched jurisdiction, regarding the determination of necessity. In the UK relevance is decided in relation to the certain investigation, European Commission assesses the relevance in light of alleged breach and purpose of request or inspection, where in Ukraine the relevance can be assessed in relation to the investigation, application or functions of competition authority.

3. The procedure requires the individuals or undertakings to be informed of the legal basis, purpose and procedure of competition authority actions as well as the grounds and extent of possible liability when the information request, interview or inspection are performed in order to show legitimacy and necessity of such actions. Additional authorization from the judicial body is required in all reviewed jurisdictions in case of inspection of non-business premises due to the fact that there is an interference with privacy.

4. Unlike in other reviewed jurisdictions, in Ukraine the information requests are not clearly separated from power to ask explanations in the course of inspection. The procedural requirements regarding the content of information requests are not embodied into the legal acts, only in internal document of the Antimonopoly Committee having non-binding force. It was also established that Ukrainian competition authorities are deprived of interview as the mean of evidence collection. Taking this into account, it can be argued that Ukrainian practice could not meet the requirements set in the Directive (EU) 2019/1.

5. Limitations imposed by legal professional privilege on scope of evidence that can be gathered sufficiently differs in reviewed jurisdictions. The Commission will not treat the documents prepared by or seeking the advice from the in-house lawyer as privileged documentation and can study and seize them, in the UK such documents fall under the scope. In Ukraine there is a reverse approach, where only documents held by external lawyer who provided the legal assistance will be privileged, the documents under control of undertaking anyway will

not enjoy the privilege. It was also concluded that in practice difficulties can arise for inspectors to draw a clear distinction between allowed and self-incriminating questions.

6. It remains unclear if the Directive 2014/104/EU made the evidence collection in damages actions more effective, however the general facilitation of private enforcement may indirectly prove the increase in effectiveness. Germany and France were limited in scope of the disclosure in order to protect the interests of public enforcement, compared to the practice established before the implementation of Directive 2014/104/EU. It was also shown that the disclosure is ordered by parties primarily in follow-on actions, therefore the current means of evidence collection may still be inappropriate for stand-alone damages actions. The solution to this problem may be the obligation of the defendant in damages cases to declare the list of evidence under his control.

7. Expert opinions are commonly used as the evidence proving the damages and amount of damages. However, the problem of evaluation of concurrent expert opinions often arise in proceedings and may take additional resources from the judge. The practices of cross-examination of experts used in the UK may be the solution for more effective evaluation of concurrent opinions.

RECOMMENDATIONS

1. There is a need to draw a clear distinction between the power of the Antimonopoly Committee of Ukraine to request information as an independent mean of evidence collection and the power to ask explanations on facts or documents during the inspection. In this regard it is recommended to exclude the wording "conducting inspections and in other cases provided by law" / "проведенні перевірки та в інших передбачених законом випадках" from the Point 5 of Part 1 of Article 7 of the Law On the Antimonopoly Committee of Ukraine and therefore to state the Article in following redaction:

"5) when considering applications and cases of violation of the legislation on protection of economic competition to require from economic entities, associations, bodies of power, bodies of local self-government, bodies of administrative and economic management and control, their officials and employees, other natural and legal persons information, including with limited access;" / "5) при розгляді заяв і справ про порушення законодавства про захист економічної конкуренції вимагати від суб'єктів господарювання, об'єднань, органів влади, органів місцевого самоврядування, органів адміністративно-господарського управління та контролю, їх посадових осіб і працівників, інших фізичних та юридичних осіб інформацію, в тому числі з обмеженим доступом;".

2. It is recommended that the requirements to the content of request of information set in Paragraph 1.5 of Information letter № 70/01 On requesting information by the bodies of the Antimonopoly Committee of Ukraine and application of liability for violations related to requesting information dated 13.06.2019, namely the requirement to state the legal basis of the request, scope, procedure and time limit for submission of information and the liability in case of non-submission, submission of incomplete or inaccurate information, are to be stated in binding legal act in order to promote legal certainty.

3. Having in mind the peculiarities of methods and techniques used for collection of digital evidence during inspection, the need of special treatment to personal devices and the need to safeguard the integrity of copied information it is recommended to the Competition and Markets Authority of the UK and to the Antimonopoly Committee of Ukraine to adopt acts of recommendatory or binding nature explaining the procedures used for digital evidence collection.

LIST OF BIBLIOGRAPHY

Legal Acts

EU

1. "Consolidated version of the Treaty on the Functioning of the European Union." EUR-Lex. Accessed 20 April 2021. http://data.europa.eu/eli/treaty/tfeu_2012/oj

2. "Commission Implementing Regulation (EU) 2018/292 of 26 February 2018 laying down implementing technical standards with regard to procedures and forms for exchange of information and assistance between competent authorities according to Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse." EUR-Lex. Accessed 10 May 2021. http://data.europa.eu/eli/reg_impl/2018/292/oj

3. "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty." EUR-Lex. Accessed 1 May 2021. http://data.europa.eu/eli/reg/2003/1/oj

4. "Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union." EUR-Lex. Accessed 8 May 2021. http://data.europa.eu/eli/dir/2014/104/oj

5. "Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market." EUR-Lex. Accessed 8 May 2021. http://data.europa.eu/eli/dir/2019/1/oj

Estonia

6. "Code of Civil Procedure, Passed 20.04.2005, RT I 2005." riigiteataja.ee. Accessed 28 April 2021. https://www.riigiteataja.ee/en/eli/513122013001/consolide

Germany

7. "Act against Restraints of Competition." gesetze-im-internet.de. Accessed 5 May 2021. https://www.gesetze-im-internet.de/englisch_gwb/

8. "Code of Civil Procedure." gesetze-im-internet.de. Accessed 28 April 2021. https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html

Turkey

9. "Law No. 7246 on the Amendment of Law No. 4054, 24.06.2020, 31165." resmigazete.gov.tr. Accessed 28 April 2021. https://www.resmigazete.gov.tr/eskiler/2020/06/20200624-1.htm

10. “The Act No. 4054 On The Protection of Competition.” rekabet.gov.tr. Accessed 28 April 2021. https://www.rekabet.gov.tr/en/Sayfa/Legislation/act-no-4054

UK

11. “Competition Act 1998.” legislation.gov.uk. Accessed 21 April 2021. https://www.legislation.gov.uk/ukpga/1998/41/section/2

12. “Enterprise Act 2002.” legislation.gov.uk. Accessed 21 April 2021. https://www.legislation.gov.uk/ukpga/2002/40/section/188

13. “The Civil Procedure Rules 1998.” legislation.gov.uk. Accessed 5 May 2021. https://www.legislation.gov.uk/uksi/1998/3132/contents

14. “The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.” legislation.gov.uk. Accessed 5 May 2021. https://www.legislation.gov.uk/uksi/2017/385/contents/made

Ukraine

15. “Commercial Procedural Code of Ukraine.” zakon.rada.gov.ua. Accessed 05 May 2021. https://zakon.rada.gov.ua/laws/show/1798-12?lang=en#n2097

16. “Law On Protection of Economic Competition.” zakon.rada.gov.ua. Accessed 06 May 2021. https://zakon.rada.gov.ua/laws/show/2210-14?lang=en#Text

17. “Law on the Access to the Public Information.” zakon.rada.gov.ua. Accessed 28 April 2021. https://zakon.rada.gov.ua/laws/show/2939-17#Text

18. “Law On the Antimonopoly Committee of Ukraine.” zakon.rada.gov.ua. Accessed 28 April 2021. https://zakon.rada.gov.ua/laws/show/3659-12#Text

19. “Law On the Bar and Legal Practice.” zakon.rada.gov.ua. Accessed 28 April 2021. https://zakon.rada.gov.ua/laws/show/5076-17?lang=en#Text

20. “Law On the State Program for Adaptation of Ukrainian Legislation to the Legislation of the European Union.” zakon.rada.gov.ua. Accessed 8 May 2021. https://zakon.rada.gov.ua/laws/show/1629-15?lang=en#Text

21. “On approval of the Temporary rules of consideration of cases on violation of the antimonopoly legislation of Ukraine, z0090-94.” zakon.rada.gov.ua. Accessed 28 April 2021. https://zakon.rada.gov.ua/laws/show/z0090-94#Text

22. “On Regulations on the procedure for conducting inspections of observance of the legislation on protection of economic competition.” zakon.rada.gov.ua. Accessed 28 April 2021. https://zakon.rada.gov.ua/laws/show/z0139-02#Text

23. “The Civil Procedure Code of Ukraine.” zakon.rada.gov.ua. Accessed 28 April 2021. https://zakon.rada.gov.ua/laws/show/1618-15#Text

24. “The Constitution of Ukraine.” zakon.rada.gov.ua. Accessed 28 April 2021. https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text

25. “The Criminal Procedural Code of Ukraine.” zakon.rada.gov.ua. Accessed 25 April 2021. https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text

US

26. “Federal Rules of Civil Procedure.” uscourts.gov. Accessed 25 April 2021. https://www.uscourts.gov/sites/default/files/federal_rules_of_civil_procedure_dec_1_2019_0.pdf

27. “Federal Rules of Evidence.” law.cornell.edu. Accessed 28 April 2021. https://www.law.cornell.edu/rules/fre

International

28. “Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part.” kmu.gov.ua. Accessed 8 May 2021. https://www.kmu.gov.ua/storage/app/media/uploaded-files/ASSOCIATION%20AGREEMENT.pdf

29. “The Rules of Procedure and Evidence reproduced from Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A.” icc-cpi.int. Accessed 28 April 2021. https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf

Soft Law

30. “Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, (2011/C 308/06).” EUR-Lex. Accessed 26 April 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011XC1020%2802%29

31. “Explanatory Note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003.” ec.europa.eu. Accessed 25 April 2021. https://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf

32. “Green Paper - Damages actions for breach of the EC antitrust rules, SEC(2005) 1732.” EUR-Lex. Accessed 5 May 2021. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005DC0672

33. “Information letter № 70/01 dated 13.06.2019 On requesting information by the bodies of the Antimonopoly Committee of Ukraine and application of liability for violations related to requesting information.” amcu.gov.ua. Accessed 03 May 2021. https://amcu.gov.ua/npas/pro-zapituvannya-informaciyi-organami-antimonopolnogo-komitetu-ukrayini-ta-zastosuvannya-vidpovidalnosti-za-porushennya-povyazani-z-zapituvannyam-informaciyi

34. “White paper on damages actions for breach of the EC antitrust rules.” EUR-Lex. Accessed 5 May 2021. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008DC0165

Case Law

CJEU

35. “AM & S Europe Limited v Commission of the European Communities, Case 155/79.” EUR-Lex. Accessed 25 April 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61979CJ0155

36. “Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others, Case C-453/99.” EUR-Lex. Accessed 5 May 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999CJ0453

37. “European Commission v EnBW Energie Baden-Württemberg AG, Case C-365/12 P.” EUR-Lex. Accessed 5 May 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0365

38. “Hoechst AG v Commission of the European Communities, Joined Cases 46/87 & 227/88.” EUR-Lex. Accessed 25 April 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0046

39. “Hoffmann-La Roche & Co. AG v Commission of the European Communities, Case 85/76.” EUR-Lex. Accessed 25 April 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61976CJ0085

40. “National Panasonic (UK) Limited v Commission of the European Communities, Case 136/79.” EUR-Lex. Accessed 25 April 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61979CJ0136

41. “Nexans France and Nexans v European Commission, Case C-606/18 P.” EUR-Lex. Accessed 25 April 2021. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0606

42. “Orkem v Commission of the European Communities, C-374/87.” EUR-Lex. Accessed 25 April 2021. https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:61987CJ0374

43. “Pfleiderer AG v Bundeskartellamt, Case C-360/09.” EUR-Lex. Accessed 5 May 2021. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62009CJ0360

44. “Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities, Case C-94/00.” EUR-Lex. Accessed 25 April 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CJ0094

45. “Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA, Joined cases C-295/04 to C-298/04.” EUR-Lex. Accessed 5 May 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CJ0295

General Court

46. “Nexans France and Nexans v European Commission, Case T-449/14.” EUR-Lex. Accessed 25 April 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014TO0449%2801%29

47. “NV Samenwerkende Elektriciteits-Produktiebedrijven v Commission of the European Communities, Case T-39/90.” EUR-Lex. Accessed 25 April 2021. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A61990TJ0039

48. “Société Générale v Commission of the European Communities, Case T-34/93.” EUR-Lex. Accessed 25 April 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993TJ0034

ECHR

49. “Case of Funke v. France, no 10828/84.” hudoc.echr.coe.int. Accessed 30 April 2021. http://hudoc.echr.coe.int/eng?i=001-57809

France

50. “Cour d'appel Paris, 24 Sep 2014, SA Eco-emballage No 12/06864.” doctrine.fr. Accessed 5 May 2021. https://www.doctrine.fr/d/CA/Paris/2014/R16F8BE9B9B40D5FDBE80

Germany

51. “BVerfG, Beschluss der 3. Kammer des Ersten Senats vom 06. März 2014 - 1 BvR 3541/13.” bverfg.de. Accessed 05 May 2021. http://www.bverfg.de/e/rk20140306_1bvr354113.html

52. “Landgericht Dortmund, Urteil vom 30.09.2020 - 8 O 115/14 (Kart).” openjure.de, Accessed 5 May 2021. https://openjur.de/u/2300173.html

53. “OLG Düsseldorf, Beschluss vom 03.04.2018 - VI-W (Kart) 2/18.” openjur.de. Accessed 5 May 2021. https://openjur.de/u/2161305.html

Italy

54. “Corte di cassazione, Sentenza 4 giugno 2015, n. 11564.” eius.it. Accessed 05 May 2021. https://www.eius.it/giurisprudenza/2015/145

Spain

55. “Audiencia Provincial of Madrid, 3 Feb. 2020, Cámara de Comercio, nº 165/19.” poderjudicial.es. Accessed 5 May 2021. https://www.poderjudicial.es/search/AN/openDocument/6277ec87da863dc8/20200311

Sweden

56. “Svea Hovrätt Patent- och marknadsöverdomstolen, DOM 2019-05-09, Mål nr PMT 7779-18.” domstol.se. Accessed 5 May 2021. https://www.domstol.se/globalassets/filer/domstol/patentochmarknadsoverdomstolen/avgoranden/2019/pmt-7779-18.pdf

UK

57. “Air Canada & Ors v Emerald Supplies Limited & Ors [2015] EWCA Civ 1024.” bailii.org. Accessed 5 May 2021. https://www.bailii.org/ew/cases/EWCA/Civ/2015/1024.html

58. “BritNed Development Limited v. ABB [2019] EWCA Civ 1840.” casemine.com. Accessed 5 May 2021. https://www.casemine.com/judgement/uk/5e423ab02c94e0394d733381

59. “Claymore Dairies Limited and Arla Foods UK PLC v Office of Fair Trading, 1008/2/1/02, 2004, CAT 16.” catribunal.org. Accessed 5 May 2021. https://www.catribunal.org.uk/sites/default/files/Jdg1008Claymore240904.pdf

60. “Emerald Supplies Limited and others v. British Airways PLC [2014] EWHC 3513 (Ch).” casemine.com. Accessed 5 May 2021. https://www.casemine.com/judgement/uk/5b46f2162c94e0775e7f211e

61. Garden Cottage Foods Ltd v. Milk Marketing Board [1984] 1 AC 130

62. “Hutchison 3G UK Ltd v. O2 (UK) Ltd [2008] EWHC 55 (Comm).” bailii.org. Accessed 5 May 2021. https://www.bailii.org/ew/cases/EWHC/Comm/2008/55.html

63. “National Grid Electricity Transmission Plc v. ABB Ltd & Ors [2012] EWHC 869 (Ch).” casemine.com. Accessed 5 May 2021. https://www.casemine.com/judgement/uk/5a8ff76460d03e7f57eac082

64. “Streetmap.EU Ltd v Google Inc. & Ors [2016] EWHC 253 (Ch).” bailii.org. Accessed 5 May 2021. https://www.bailii.org/ew/cases/EWHC/Ch/2016/253.html

65. Trouw UK Ltd v Mitsui & Co Plc [2007] EWHC 863 (Comm)

Ukraine

66. “Постанова ВГСУ від 06.10.2015 у справі 910/7796/15-г.” reyestr.court.gov.ua. Accessed 28 April 2021. https://reyestr.court.gov.ua/Review/51990048

67. “Постанова ВГСУ від 23.12.2015 у справі № 918/459/15.” reyestr.court.gov.ua. Accessed 28 April 2021. https://reyestr.court.gov.ua/Review/54597816

68. “Постанова ВГСУ від 30.03.2016 у справі № 910/27130/15.” reyestr.court.gov.ua. Accessed 28 April 2021. https://reyestr.court.gov.ua/Review/56843024

69. “Постанова ВГСУ від 20.09.2016 у справі № 924/1995/15.” reyestr.court.gov.ua. Accessed 28 April 2021. https://reyestr.court.gov.ua/Review/61478321

70. “Постанова ВГСУ від 20.12.2016 у справі № 910/10854/16.” reyestr.court.gov.ua. Accessed 28 April 2021. https://reyestr.court.gov.ua/Review/63655877

71. “Постанова Верховного Суду від 03.07.2018 у справі № 910/4425/16.” reyestr.court.gov.ua. Accessed 5 May 2021. https://reyestr.court.gov.ua/Review/75081972

72. “Постанова Верховного Суду від 20.09.2018 у справі №915/17/18.” reyestr.court.gov.ua. Accessed 1 May 2021. https://reyestr.court.gov.ua/Review/76623607

73. “Рішення Господарського Суду міста Києва від 15.01.2019 у справі № 910/12634/18.” reyestr.court.gov.ua. Accessed 5 May 2021. https://reyestr.court.gov.ua/Review/79288730

74. “Рішення Господарського Суду міста Києва від 23.09.2020 у справі № 910/9243/20.” reyestr.court.gov.ua. Accessed 5 May 2021. https://reyestr.court.gov.ua/Review/92036620

75. “Рішення Господарського Суду Харківської області від 05.04.2021, у справі № 922/1865/20.” reyestr.court.gov.ua. Accessed 28 April 2021. https://reyestr.court.gov.ua/Review/96243108

76. “Ухвала Верховного Суду від 09.02.2021 у справі №910/9243/20.” reyestr.court.gov.ua. Accessed 5 May 2021. https://reyestr.court.gov.ua/Review/94770127

77. “Ухвала Господарського Суду міста Києва від 12.04.16 у справі № 910/4425/16.” reyestr.court.gov.ua. Accessed 5 May 2021. https://reyestr.court.gov.ua/Review/57127997

78. “Ухвала Київського апеляційного господарського суду від 12.04.2018 у справі № 910/4425/16.” reyestr.court.gov.ua. Accessed 5 May 2021. https://reyestr.court.gov.ua/Review/75769715

US

79. “Terry v. Ohio 392 U.S. 1 (1968).” supreme.justia.com. Accessed 21 April 2021. https://supreme.justia.com/cases/federal/us/392/1/

Decisions of Competition Authorities

Turkey

80. “Rekabet Kurulu Karari, 09-34/837-M, 05.08.2009.” rekabet.gov.tr. Accessed 10 May 2021. https://www.rekabet.gov.tr/Karar?kararId=9110bfce-8666-480d-95b9-56dfdb7ca744

81. “Rekabet Kurulu Karari, 15-42/690-259, 02.12.2015.” rekabet.gov.tr. Accessed 10 May 2021. https://www.rekabet.gov.tr/Karar?kararId=4f48e79e-e03a-4427-b477-3d2fa17557ac

82. “Rekabet Kurulu Karari, 17-42/669-297, 21.12.2017.” rekabet.gov.tr. Accessed 10 May 2021. https://www.rekabet.gov.tr/Karar?kararId=df853766-92e1-47f9-b5ba-d5d2b36181e6

83. “Rekabet Kurulu Karari, 18-36/583-284, 01.10.2018.” rekabet.gov.tr. Accessed 10 May 2021. https://www.rekabet.gov.tr/Karar?kararId=7276e920-23a5-4d66-9b0f-c5d9381d7c88

84. “Rekabet Kurulu Karari, 20-01/14-06, 02.01.2020.” rekabet.gov.tr. Accessed 10 May 2021. https://www.rekabet.gov.tr/Karar?kararId=a65d3256-dc84-4846-88ea-aa11c5e9895a

85. “Rekabet Kurulu Karari, 20-03/31-14, 09.01.2020.” rekabet.gov.tr. Accessed 10 May 2021. https://www.rekabet.gov.tr/Karar?kararId=b7085aec-faf9-4023-8be7-3cb7801cbcf2

Ukraine

86. “Рішення АМКУ від 06 грудня 2018 р., № 689-р.” amcu.gov.ua. Accessed 28 April 2021. https://amcu.gov.ua/npas/rishennya-689-r-vid-06122018

87. “Рішення АМКУ від 10 жовтня 2019 р. № 697-р.“ amcu.gov.ua. Accessed 29 April 2021. https://amcu.gov.ua/npas/rishennya-697-r-vid-10102019

Reports and Guidelines

88. Competition and Markets Authority. *Transparency and Disclosure: Statement of the CMA’s policy and approach*. UK, 2014. https://www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-and-approach

89. *Competition law investigations by the European Commission*. Ashurst, 2020. https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---competition-investigations-by-the-european-commission/

90. *Competition law investigations by UK authorities*. Ashurst, 2020. https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---competition-law-investigations-by-uk-authorities/

91. ECN Working Group Cooperation Issues and Due Process. *Investigative Powers Report*. 2012. https://ec.europa.eu/competition/ecn/investigative_powers_report_en.pdf

92. European Commission. *Antitrust Manual of Procedures*. Brussels, 2012. https://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf

93. European Commission, “Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.” Commission Staff Working Document SWD(2020), 14.12.2020. https://ec.europa.eu/competition/antitrust/actionsdamages/report_on_damages_directive_implementation.pdf

94. “Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8.” gov.uk. Accessed 25 April 2021. https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases

95. “Guidelines on the Examination of Digital Data during On-Site Inspections, 20-45/617, 08.10.2020.” rekabet.gov.tr. Accessed 28 April 2021. https://www.rekabet.gov.tr/Dosya/guidelines/guidelines-on-the-examination-of-digital-data-during-on-site-inspections1-20201120154515821-pdf

96. International Competition Network, ICN Agency Effectiveness Project on Investigative Process. *Investigative Tools Report*. ICN, 2013. https://centrocedec.files.wordpress.com/2015/07/report-on-investigative-tools2013.pdf

97. “Practical guide quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the functioning of the European Union, Commission Staff Working Document, 11.6.2013.” ec.europa.eu. Accessed 5 May 2021. https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf

98. Waelbroeck, Denis, Donald Slater and Gil Even-Shoshan. *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules – Comparative Report*. Ashurst, 2004. https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

Books

99. Ashton, David. *Competition Damages Actions in the EU: Law and Practice*. Second Edition. Edward Elgar Publishing Limited, 2018.

100. Parcu, Pier Luigi, Giorgio Monti, Marco Botta. *Private Enforcement of EU Competition Law: The Impact of the Damages Directive.* Northampton: Edward Elgar, 2018.

101. Stephen, James Fitzjames. *The Indian Evidence Act (I. of 1872) with an Introduction on the Principles of Judicial Evidence.* London: Macmillan and Company, 1872.

102. Whish, Richard and David Bailey. *Competition law*. Oxford: Oxford University Press, 2015.

103. Шейфер, С. А. *Следственные действия. Система и процессуальная форма*. Москва: Юрлитинформ, 2001. http://library.nlu.edu.ua/POLN_TEXT/UP/SHEYFER_2001.pdf

Chapter in book

104. Franck, Jens-Uwe. “Private Enforcement of EU Competition Law in Germany.” (2019), Country report (Chapter 5). in *Private Enforcement of European Competition and State Aid Law*,

Ferdinand Wollenschläger, Wolfgang Wurmnest and Thomas M.J. Möllers. Wolters Kluwer, 2020. https://ssrn.com/abstract=3728716

105. Lynch, Michael. "Vernacular visions of viral videos: speaking for evidence that speaks for itself." In *Legal rules in practice: in the midst of law's life*, Baudouin Dupret, Julie Colemans and Max Travers, 182-204. New York: Routledge, 2021.

106. Scott, Peter, Mark Simpson and James Flet. "England & Wales." in *The Private Competition Enforcement Review*, Ninth Edition, Ilene Knable Gotts, 122-158. UK: Law Business Research Ltd, 2016. https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/england--wales-chapter-of-the-eighth-edition-of-the-private-competition-enforcement-review.pdf

107. Wisking, Stephen, Kim Dietzel and Molly Herron. "EU Overview." in *The Private Competition Enforcement Review*, Tenth Edition, Ilene Knable Gotts, 1-22. UK: Law Business Research Ltd, 2017. https://www.herbertsmithfreehills.com/file/19221/download?token=wiUL8Bfb

Dissertations

108. Tan, Xiaowen. "The Rules of Evidence in Private Enforcement of the EU Competition Law." Doctoral dissertation, University of Helsinki, 2020. http://urn.fi/URN:ISBN:978-951-51-5845-1

Articles

109. Berrisch, Georg, Eve Jordan, and Rocio Salvador Roldan. "E.U. Competition and Private Actions for Damages, The Symposium on European Competition Law." *Northwestern Journal of International Law & Business* 24, 3 (2004): 585-600. https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1582&context=njilb

110. Boshno, Svetlana Vladimirovna. "Means and methods of legal regulation." *Law and modern states*, 3 (2014): 47-54. https://cyberleninka.ru/article/n/means-and-methods-of-legal-regulation

111. Bovis, Christopher H., Charles M. Clarke. "Private Enforcement of EU Competition Law." *Liverpool Law Review* 36 (2015): 49-71. https://doi.org/10.1007/s10991-015-9164-9

112. Buffone, Dennis J. "Traffic Stops, Reasonable Suspicion, and the Commonwealth of Pennsylvania: A State Constitutional Analysis." *University of Pittsburgh Law Review* 69, 2 (2007): 331-366. https://lawreview.law.pitt.edu/ojs/index.php/lawreview/article/view/115/115

113. "Developments in the Law. Discovery." *Harvard Law Review* 74, 5 (1961): 940-1072. https://doi.org/10.2307/1338748

114. Forrester, Ian S. “Due process in EC competition cases: A distinguished institution with flawed procedures.” European Law Review 34 (2009): 817-843. https://www.biicl.org/files/5749_forrester_25-06-11_biicl_1.pdf

115. Fuley, Tetyana. “Freedom from self-incrimination as the principle of criminal proceedings.” *Word of National School of Judges* 2, 3 (2013): 107-115. http://nsj.gov.ua/files/1445846397cln_2013_2_15.pdf

116. Gavrilin, S.A. “Collecting of Proofs in Criminal Legal Proceedings.” *Bulletin of the Moscow University of the Ministry of Internal Affairs of Russia*, 10 (2012): 163-168. https://cyberleninka.ru/article/n/sobiranie-dokazatelstv-v-ugolovnom-sudoproizvodstve

117. Goldstein, Aimee, Elizabeth Morony, James Hosking AND Sarah Keene. “Private Antitrust Remedies.” *Global Counsel Competition Handbook* (2001): 107-123 https://www.ibanet.org/Document/Default.aspx?DocumentUid=A947DAC8-CA97-45AE-9BCF-B4A64615F6D2

118. Güzel, Oğuzkan, Başak İrem Coşkun. “Guideline on the Expanding Power of On-Site Inspection (Digital Search Power) is Published by the Competition Authority.” *Turkish Lawblog*, (2020). https://turkishlawblog.com/read/article/255/guideline-on-the-expanding-power-of-on-site-inspection-digital-search-power-is-published-by-the-competition-authority

119. Gürkaynak, Gönenç, O. Onur Özgümüş, Firat Eğrilmez, AND Melih Yağcı. “Turkey: Recently Published Guidelines Of The Turkish Competition Authority On Examination Of Digital Data During On-site Inspections.” *Mondaq*, (2020). https://www.mondaq.com/turkey/antitrust-eu-competition-/995208/recently-published-guidelines-of-the-turkish-competition-authority-on-examination-of-digital-data-during-on-site-inspections-

120. Haack, Susan. “Epistemology Legalized: Or, Truth, Justice, and the American Way.” *American Journal of Jurisprudence* 49, 12 (2004): 43-61. https://ssrn.com/abstract=682642

121. Ho, Hock Lai. “The Legal Concept of Evidence.” *The Stanford Encyclopedia of Philosophy* (2015). https://plato.stanford.edu/archives/win2015/entries/evidence-legal/

122. Hüschelrath, Kai and Sebastian Peyer. “Public and Private Enforcement of Competition Law - A Differentiated Approach.” *ZEW - Centre for European Economic Research Discussion Paper*, 29 (2013): 1-32. http://dx.doi.org/10.2139/ssrn.2278839

123. Jungermann, Sebastian. “The Private Competition Enforcement Review: Germany.” *The Law Reviews - The Private Competition Enforcement Review* (2021) https://thelawreviews.co.uk/title/the-private-competition-enforcement-review/germany

124. Laborde, Jean-François. “Cartel damages actions in Europe: How courts have assessed cartel overcharges (2018 ed.).” *Law & Economics, Concurrences*, 1 (2019). https://www.laborde-

advisory.com/PDF/2019-02-27%20Cartel%20damages%20actions%20in%20Europe%20-%20How%20Courts%20have%20assessed%20cartel%20overcharges%20(2018%20edition).pdf

125. Lima, Marcio da Silva. "Quantification of cartel damages – first German Court recourses to freehand estimation." *Bird & Bird News Center*, (2020). https://www.twobirds.com/en/news/articles/2020/germany/quantification-of-cartel-damages

126. Loevinger, Lee. "Facts, Evidence and Legal Proof." *Case Western Reserve Law Review* 9, 2 (1958): 154-175. https://scholarlycommons.law.case.edu/caselrev/vol9/iss2/7

127. Shklyar, Serhiy, Olha Bulayeva. "Compensation for breaches of competition: national and global trends in private enforcement." *Юридична Газета online* 37, 691 (2019). https://yur-gazeta.com/publications/practice/antimonopolne-konkurentne-pravo/vidshkoduvannya-zbitkiv-za-porushennya-konkurenciyi-nacionalni-ta-svitovi-tendenciyi-private-enforce.html

128. Siry, Lawrence. "Cloudy days ahead: Cross-border evidence collection and its impact on the rights of EU citizens." *New Journal of European Criminal Law* 10, 3 (2019): 227-250. https://doi.org/10.1177/2032284419865608

129. Smijter, de Eddy, Denis O'Sullivan. "The Manfredi judgment of the ECJ and how it relates to the Commission's initiative on EC antitrust damages actions." *Competition Policy Newsletter*, 3 (2006): 23-26. https://ec.europa.eu/competition/speeches/text/2006_3_23_en.pdf

130. Sobredo, Paloma Martínez-Lage. "Spain: The Audiencia Provincial of Madrid overturns the first instance judgments which granted damages quantified by the claimants and grants damages but based on the lower alternative quantification contained in a defendant's expert report (Cámara de Comercio, Obras Misionales Pontificias)." *Concurrences* N° 2-2020, Art. N° 94435 (2020). https://www.concurrences.com/en/review/issues/no-2-2020/case-comments/p-m-l-s-%EF%81%AE-94435

131. Terry T., Henry. "The Theory of Evidence." *The Yale Law Journal* 13, 4 (1904): 190-193. https://www.jstor.org/stable/783301

132. Voss, Katharina. "The Interaction Between Public and Private Enforcement of EU Competition Law: a Case Study of the Swedish Booking Cases." *Yearbook of Antitrust and Regulatory Studies* 13, 21 (2020): 55-70. https://yars.wz.uw.edu.pl/images/yars2020_13_21/YARS_13_21_Voss.pdf

133. Willis, Peter, Jonathan Speed. "The Private Competition Enforcement Review: United Kingdom - England & Wales." *The Law Reviews - The Private Competition Enforcement Review* (2021) https://thelawreviews.co.uk/title/the-private-competition-enforcement-review/united-kingdom-england--wales

134. Wolski, Dominik. “Can an Ideal Court Model in Private Antitrust Enforcement Be Established?.” *Yearbook of Antitrust and Regulatory Studies* 11, 18 (2018): 115-152. https://yars.wz.uw.edu.pl/images/yars2018_11_18/115.pdf

135. Wurmnest, Wolfgang. “German Private Enforcement: an overview of competition law.” *e-Competitions German Private Enforcement*, Art. N° 97611 (2021) https://assets.uni-augsburg.de/media/filer_public/21/7f/217fa830-d638-404b-afd5-498c5c2a274c/article-97611.pdf

136. Yildiz, Can. “Turkey: Competition Board's Guideline On The Examination Of Digital Data During On-Site Inspections.” *Mondaq*, (2020). https://www.mondaq.com/turkey/antitrust-eu-competition-/1008532/competition-board39s-guideline-on-the-examination-of-digital-data-during-on-site-inspections

137. Zhao, Yanrong. “Evidence Collection in the German, American and Chinese Legal Systems: A Comparative Analysis.” *Frontiers of Law in China*, 6 (2011): 52-53. https://doi.org/10.1007/s11463-011-0118-4

Conference papers

138. Arens, Chantal. “Introductory remarks.” presented at 4th Private Enforcement Conference: The Current State of Private Enforcement in The EU and France, Paris, 28 March 2019. https://www.concurrences.com/en/conferences/4th-private-enforcement

139. Directorate for Financial and Enterprise Affairs Competition Committee. “Executive Summary of the Roundtable On the Relationship Between Public and Private Antitrust Enforcement.” *DAF/COMP/WP3/M(2015)1/ANN3/FINAL* (2015): 2. https://one.oecd.org/document/DAF/COMP/WP3/M(2015)1/ANN3/FINAL/en/pdf

140. Mano, Miguel de la. “A theory on the use of economic evidence in competition policy cases.” presentation prepared for Association of Competition Economists Budapest, 28th November 2008. https://www.competitioneconomics.org/dyn/files/basic_items/139-file/RoundTable_DeLaMano.pdf

News

141. Bundesverfassungsgericht. “Constitutional complaints against the use of the public prosecutor’s investigation files in a civil action not admitted for decision.” Press Release No. 32/2014, 03 April 2014. https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-032.html;jsessionid=1823AA3B99E0EC63F51AFF7486DECAE9.2_cid386

142. Терентьєв, Юрій. “Ми використовуємо актуальний міжнародний досвід для забезпечення високих стандартів доказування в наших справах.“ amcu.gov.ua. Accessed 25

April 2021. https://amcu.gov.ua/news/mi-vikoristovuemo-aktualniy-mizhnarodniy-dosvid-dlya-zabezpechennya-visokikh-standartiv-dokazuvannya-v-nashikh-spravakh-yuriy-terentev

Websites

143. "Gartner Glossary." Gartner, Inc. and/or its affiliates. Accessed 23 April 2021. https://www.gartner.com/en/information-technology/glossary/data-wiping

144. "Legal Information Institute." Cornell Law School. Accessed 21 April 2021. https://www.law.cornell.edu/wex/reasonable_suspicion

145. LUKOIL (LKOH), "MarketScreener," Surperformance, Accessed 5 May 2021, https://www.marketscreener.com/quote/stock/LUKOIL-6491736/company/

Others

146. "About the introduction of criminal liability for violation of the antimonopoly legislation, E-Petition, № 22/076212-еп." petition.president.gov.ua. Accessed 30 April 2021. https://petition.president.gov.ua/petition/76212

147. *Competition Investigations in Europe*. Bryan Cave, 2014. https://www.bclplaw.com/images/content/5/4/v2/54419/Competition-Investigations-in-Europe.pdf

148. "Review of case law of the High Commercial Court of Ukraine and the Supreme Court of Ukraine on the application of legislation on protection of economic competition, as of 31.12.2017." amc.gov.ua. Accessed 28 April 2021. http://www.amc.gov.ua/amku/doccatalog/document?id=142007&schema=main

ABSTRACT

The study presents a research of specifics of evidence collection in public and private enforcement of competition law, analyzing the specifics through the means of evidence collection in terms of scope, procedural requirements, limitations and peculiarities. Study is based on legislation, soft-law and case law of Member States, UK, Turkey, Ukraine as well as those regulating activity of European Commission.

Keywords: evidence, collection of evidence, request of information, inspection, disclosure of evidence.

SUMMARY

SPECIFICS OF EVIDENCE COLLECTION IN CASES CONCERNING BREACHES OF COMPETITION LAW

The **aim** of this study was to analyze theory and practice of evidence collection in public and private competition enforcement in chosen jurisdictions in order to identify the methods and procedures used, compare them within researched jurisdictions and show possible strengths and weaknesses of existing practices. The following **objectives** were performed to achieve the aim:

- identification and description the underlying concepts and legislation;

- analysis and comparison of the evidence collection through information requests and interviews performed by European Commission, UK and Ukraine competition authorities;

- analysis and comparison of the evidence collection through inspections performed by European Commission, UK, Turkey and Ukraine competition authorities.

- analysis and comparison of the limitations preventing from collection of certain types of evidence or imposing additional treatment to collected evidence in practice of European Commission, UK and Ukraine competition authorities.

- discussion of the current judicial practice of evidence collection in private enforcement throughout Member States, UK and Ukraine.

In the **first chapter** the phenomenon of evidence was discussed in scientific and legal context and the concept of collection of evidence was defined through the analogy with criminal and civil procedures. The assumption was made that the collection of evidence in public enforcement is more enhanced that in private. The **second chapter** revealed the differences in Ukrainian practice that may affect negatively the evidence collection. Namely, the request of information is not distinguished clearly form other means of collection, the substantial requirements for content of request are observed on practice but not reflected in binding act, there are no interviews as independent tool. The **third chapter** justifies the use of necessity criteria for determining the scope of collected evidence, shows the peculiarities of digital evidence collection during inspections, establishes that non-business premises inspections need to be authorized by court. In the **fourth chapter** sufficient differences were identified regarding the evidences covered by legal professional privilege, where Commission excludes in-house lawyers' advice the UK protects such advice, in Ukraine there is a privilege only regarding documents under control of advocate which meet the requirements of advocate secrecy. The **fifth chapter** suggests that the facilitation of private enforcement in EU is mainly connected with follow-on actions, where the means for evidence collection may not be appropriate for stand-alone actions. In Ukraine the requirements for disclosure order may also be excessive for stand-alone actions.