



COMPETITION APPEAL TRIBUNAL

PRACTICE DIRECTION 1/2024

DISCLOSURE – MANAGEMENT OF CONFIDENTIAL INFORMATION

Introduction

1. Rule 101(3) of the Tribunal’s Rules permits the establishment of confidentiality rings, whereby documents which contain sensitive information¹ are restricted in their distribution to specified individuals (usually external or in-house legal representatives or other external advisors or experts).
2. Confidentiality rings have become progressively more complex and onerous to manage. For example, they frequently include “inner” and “outer” rings. Moreover, large numbers of documents are typically disclosed within an outer ring without compliance with Rule 101(1), which requires² specific reasons (both as to the nature of the sensitivity of the information contained in the documents and the adverse effect of disclosure) to be given for each request for confidential treatment of a document.
3. As a consequence, large volumes of documents in a case may be subject to unparticularised claims to confidentiality, thereby restricting those documents from review by client representatives and inhibiting the ability of advisers to take instructions. This also causes difficulties in hearings, particularly when oral evidence is being given.
4. This Practice Direction sets out the general approach that the Tribunal will expect to be taken in relation to managing these issues. It will apply to all cases before the Tribunal where the first case management conference (CMC) in the case takes place after the date on which this Practice Direction is published.
5. That approach permits a degree of pragmatism, recognising that confidentiality issues can be addressed at different stages of cases in different circumstances, while still recognising the need for compliance with the requirements of Rule 101(1), especially where non-compliance is likely to provide a tactical advantage to a party or to interfere with the efficient conduct of hearings.

The starting point: Rule 102

6. Rule 102 requires a party who is provided with a document in Tribunal proceedings only to

¹ By which is meant information described in paragraph 1(2) of Schedule 4 of the Enterprise Act 2002, namely: information the disclosure of which would...be contrary to the public interest; commercial information the disclosure of which would or might...significantly harm the legitimate business interests of the undertaking to which it relates; or information relating to the private affairs of an individual the disclosure of which would or might... significantly harm his or her interests.

² Through the cross reference in Rule 101(2) to paragraph 1(2) of Schedule 4.

use that document for the purposes of the proceedings. While the Tribunal recognises that, in some circumstances, the sensitivity of the information contained in some documents may warrant a higher degree of protection, the express prohibition contained in Rule 102 is the starting point when considering any additional protection that may need to be afforded to disclosed documents. Moreover, the risk that documents may unconsciously be used for collateral purposes is a factor that explicitly needs to be borne in mind by a party's legal representatives when considering what disclosure particular client representatives can or should see and whether further protection, such as a confidentiality ring, may be required. Client representatives should be informed in terms of the significance of Rule 102; and client representatives should be under no illusion as to the importance that the Tribunal attaches to compliance with Rule 102 by all parties.

7. Accordingly, the Tribunal's starting point will be that, at least for the purposes of disclosure by the parties, the protection afforded by Rule 102 equates to an "outer" confidentiality ring, and that the creation, use and content of a formal confidentiality ring will have to be justified. The Tribunal will, at an early stage in any proceedings, be prepared to consider fortifying the protection conferred by Rule 102 in an appropriate case³.

8. On the other hand, where the potential disclosure of information can be shown to be likely to have direct and material adverse consequences with regard to the public interest, legitimate business interests or the private affairs of an individual, confidentiality is likely to be needed to be protected, and the question will be whether a Rule 102 restriction is sufficient in this regard.

9. Additional measures, such as the selective use of a confidentiality ring or other orders governing the use of a particular document or class of documents⁴, may be needed to protect sensitive documents from production to clients (because the nature and/or content of the document means that protection under Rule 102 is insufficient) or third parties as a result of references to the document in pleadings or open court. To justify such protection, the requirements of Rule 101(1) will need to be met. If such direct and material adverse consequences cannot be quickly and concisely articulated, additional protection beyond that provided by Rule 102 will be correspondingly harder to justify.

Additional protection: the parties' duty to give early consideration

10. The Tribunal will expect the parties to give early consideration to the confidentiality issues that are likely to arise in the case (and therefore whether additional protection will be necessary), by reference, amongst other things, to (i) the nature of the case, and also (ii) the particular sensitivity of the information contained in specific documents or classes of documents that the parties will be disclosing or expect to have disclosed to them.

(i) The nature of the case

11. The nature of the case may be relevant to the level of protection a sensitive document or set of documents may require. For example:

- (a) In Competition Act 1998 and other regulatory appeals, there is likely to be information from third parties, including competitors or business counterparts of the appellant, which legitimately requires protection through a confidentiality ring. There may also be information the competition authority or regulator holds, disclosure of which may be contrary to the public interest. However, the disclosure given in such cases is often (but

³ For an example of the way in which the Tribunal can fortify the protection given by Rule 102, see the form of order, including penal notices, which was made in the *Sportradar* litigation: Order of the President dated 8 September 2022 in (1) Sportradar AG (2) Sportradar UK Limited v (1) Football DataCo Limited (2) Betgenius Limited (3) Genius Sport Group Limited (Case nos. 1342/5/7/20; 1409/5/7/21(T); 1410/5/7/21(T)).

⁴ For example, an order that use of specific documents in a hearing does not automatically give rise to a loss of protection under Rule 102.

not always) relatively light and sensitive information is not usually provided to interveners. Bearing in mind the problems that can arise in conducting hearings, it is incumbent on the competition authority or regulator involved to think carefully about claims for confidentiality in an appeal and to be prepared to justify those with specific reasons. See *BGL Holdings v CMA*, [2021] CAT 33 and [2022] CAT 11; *Meta Platforms Inc v. Competition and Markets Authority*, [2022] CAT 26 at [145]ff.

(b) In proceedings involving claims for damages, it may be that more complicated issues of commercial sensitivity arise between parties, whether as between claimants and defendants or between multiple parties of either sort. These may, in particular, give rise to competition concerns where the documents contain, for example, information on commercial strategy, costs or margins. This category of case may require more elaborate protection for sensitive information. There may also be questions of third party confidentiality arising from the disclosure of regulatory investigation material (this is similar to the issue highlighted in 11(a) above, with the added complication that the competition authority or regulator may not be a party to the proceedings and the disclosing party may have no direct relationship with the owner of the confidential information. Such a situation therefore needs careful management).

(c) In collective proceedings, commercial sensitivity is unlikely to be a basis for withholding disclosure to a Class Representative, given that they will be subject to the prohibition on the use of documents for purposes other than the proceedings. It may however be necessary to identify documents which should not be disseminated more widely – such as to class members.

(ii) *Sensitivity*

12. By way of guidance only and recognising that the circumstances may inform a different approach, the Tribunal would not normally expect documents containing information with the following characteristics to be subject to claims for confidentiality:

- (a) Data which is more than five years old.
- (b) Information that is unspecific or general in expression.
- (c) Statements which are aspirational but without particular strategic or tactical content.

The Confidentiality Protocol

13. The parties should discuss all issues related to confidentiality of documents between themselves in the first instance and should seek to reach agreement as to how confidential content can best be protected in the form of a Confidentiality Protocol.

14. Such discussions should take place in advance of the first CMC in any event and the Tribunal should be provided with a Confidentiality Protocol, or a draft of that document, at that CMC.

15. The Tribunal expects that the Confidentiality Protocol will typically deal with the following matters:

- (a) The nature and extent of the sensitive information which each party anticipates disclosing.

- (b) The process by which the disclosing party will identify and set out the grounds for the claim to confidentiality in respect of that sensitive information, either in respect of single documents or groups or classes of documents.
- (c) The process by which the party receiving the documents may challenge any claim for confidentiality in respect of any sensitive information contained in those documents.
- (d) Any confidentiality rings which the parties have put in place or propose to put in place in order to serve fully unredacted documents or for the purposes of preparing for the first CMC. Note that a confidentiality ring may be put in place at later stages of a proceeding if required.
- (e) A means or mechanism by which, at the appropriate point in the proceedings, the parties will review with the Tribunal the way in which confidential documents are to be managed at the trial or final or substantive hearing, for example, an obligation on one or more parties to prompt the inclusion of the matter in the agenda for a pre-trial review.

16. The Tribunal anticipates that, by the time of the review referred to in paragraph 15(e) above, the parties and their advisers will be in a position to reduce to a minimum the population of documents for which confidential treatment is sought, in order that the trial or final or substantive hearing can be conducted with as little disruption as possible, and in any event in open court unless exceptional circumstances apply.

17. Failure to reach a workable solution between the parties with regard to confidentiality (thereby necessitating, unnecessarily, the attention of the Tribunal) will be borne in mind by the Tribunal in its consideration of costs at an appropriate point in the proceedings.

Sir Marcus Smith
President

4 January 2024