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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Working Party No. 3 on Co-operation and Enforcement

Executive Summary of the roundtable on access to the case file and protection of confidential information

Annex to the Summary Record of the 130th meeting of Working Party No 3. on Co-operation and Enforcement

3 December 2019

The Executive Summary by the OECD Secretariat contains the key findings from the roundtable on access to the case file and protection of confidential information held during the 130th Meeting of the OECD Working Party No. 3 on Co-operation and Enforcement of 3 December 2019.

More documentation related to this discussion is at
<https://www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm>

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Executive Summary of the roundtable on Access to the Case File and Protection of Confidential Information

By the Secretariat*

Working Party No. 3 of the OECD Competition Committee held a roundtable on access to the case file and protection of confidential information on 3 December 2019.

Based on the background paper prepared by the OECD Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged:

1. As a rule, investigated parties are granted access to the relevant documents in possession of the agency. However, the extent and the timing of access differ. The terms of access vary for complainants as well.

As a rule, investigated parties are granted access to the relevant documents in possession of the agency before an adverse decision is adopted. This is essential to protect the parties' rights of defence. However, the discussion showed that there are some differences on how this is done.

First, the extent of access varies. Some jurisdictions grant investigated parties access to virtually the whole case file, excluding confidential information and other specific categories of information (e.g. agency's internal documents). Other jurisdictions only share the specific documents that are relevant to establishing the infringement. The latter may grant access to further documents upon request from the parties.

Access to leniency materials is subject to specific limits. In some jurisdictions, investigated parties have access to all materials, but subject to certain conditions (e.g. they cannot obtain copies by mechanical or electronic means). In others, investigated parties may only have access to the leniency materials that the agency considers appropriate. To decide whether to disclose the information or not, agencies may weigh the competing public interest of keeping the leniency information secret and the interest of fairness to the defendant. Similar limitations may apply to settlement materials.

Secondly, the timing of the access differs, and can range from access as of the formal initiation of the proceedings to only after the issuance of the statement of objections, in administrative systems, or at the litigation stage, in judicial systems.

The discussion also showed that there are significant differences as regards the extent of access granted to complainants. It can be similar to the one provided to investigated parties or much more limited. Access can, for example, be limited to a non-confidential version of the statement of objections or, where the agency intends to reject the complaint, to the documents on which it bases its preliminary decision, so that complainants can present their views.

* This executive summary does not necessarily represent the consensus view of the Working Party No. 3. It identifies key points from the discussion at the roundtable, including the views of a panel of experts, the delegates' oral and written contributions, and the background note prepared by the OECD Secretariat.

2. Some jurisdictions grant access to the file also to the public, but impose limits.

Many jurisdictions have general transparency rules in place, which allow that the public accesses the documents held by public bodies. This is, among others, to promote the transparency of the system.

However, there are exceptions that protect information in possession of competition agencies. Some jurisdictions, as a rule, do not have to grant access to the case file at all. Other jurisdictions grant access to the case file, but do not allow access to confidential information and the agency's internal information.

Access may also be restricted for certain purposes, e.g. for litigation, and may differ depending on the type of proceedings, e.g. it may be possible at the outset in merger cases, but only when the proceedings are closed in antitrust cases.

3. All jurisdictions protect confidential information, including business secrets.

The need to protect confidential information is a principle accepted by all jurisdictions, but the definition of confidential information varies. Business secrets are universally recognised as confidential, if the information is recent enough. Other types of confidential information include national security information and personal data, among others. Some jurisdictions allow confidential information to be categorised, restricting access to particularly sensitive information to some actors only (e.g. external counsel).

Parties that request confidential treatment typically need to identify the relevant information and substantiate their request. They are often required to provide non-confidential versions of the documents as well.

The fact that information is confidential means that, in principle, it will not be disclosed. Still, disclosure might be possible in some situations, including in the ones addressed in points 4 to 6 below.

4. Jurisdictions typically allow for disclosure of confidential information to the investigated parties, if this is necessary to protect their rights of defence. Mechanisms to limit the disclosure may be used.

Several delegations pointed out that confidential information may be disclosed to investigated parties where this is necessary to guarantee their rights of defence. There are a number of mechanisms allowing agencies and courts to disclose documents containing confidential information while limiting their distribution, for instance, through protective orders, confidentiality rings, data rooms, summaries of information or redaction of documents.

The factors that agencies and courts consider when deciding whether confidential information should be disclosed include: the degree of harm that could be caused to the submitting party and the person to which the information relates; the value of this information as inculpatory or exculpatory evidence; the availability of alternative non-confidential documents that can be used to prove or disprove the alleged infringement; and the availability of methods to desensitise information without undermining its value (e.g. non-confidential summaries).

Some delegates addressed the issue of how to proceed where there are large volumes of information. In some jurisdictions, agencies and courts can issue general guidelines on confidential treatment for different categories of information without the need to rule on each individual document. However, other jurisdictions need to justify confidential treatment on a document-by-document basis.

5. Waivers are a common instrument for the disclosure of confidential information to foreign competition agencies.

Disclosure of confidential information to foreign competition agencies is possible in many jurisdictions, and facilitates international co-operation.

Information is usually shared pursuant to a waiver, and several agencies have adopted template waivers. This is particularly common in merger control proceedings, but increasingly in the context of leniency applications as well. Far less frequently, agencies share information through information gateways, i.e. legal provisions allowing for the exchange of confidential information between competition agencies without the need to obtain prior consent from the source of the information.

6. Disclosure of leniency materials for the purposes of damages claims is rare and often requires a court order.

Allowing a claimant access to information in the case file can facilitate private antitrust litigation, especially in follow-on damage actions, as the file can include useful information for the applicants.

The disclosure of leniency materials raises specific challenges, as it may endanger the efficacy of leniency programmes. Some legislators have adopted a nuanced approach, for instance, excluding access to leniency statements, but granting it to other documents (in some cases, only after the agency has adopted a decision or closes the proceedings). In several jurisdictions, a court order is necessary for disclosure.