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Access to the case file and protection of confidential information – Note by the European Union

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More documents related to this discussion can be found at
www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

Please contact Ms Despina PACHNOU if you have any questions about this document
[Despina.Pachnou@oecd.org, +(33-1) 45 24 95 25]

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European Union

1. Legal basis for access to file procedures in the EU

1. The right of access to the file is an element of utmost importance in European competition law proceedings. This right is key to ensuring that parties in competition proceedings are heard, thereby underpinning the integrity of the European Commission in the conduct of its competition investigations.

2. The right to good administration is one of the fundamental rights on which the European Union ("EU") is founded. Article 41(1) of the Charter of Fundamental Rights of the European Union[1] states that, "every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union." Moreover, the Charter goes on to state that "this right includes […] the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy"[2]. Furthermore, Article 48(2) of the Charter adds that "[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed."

3. In antitrust and merger control proceedings, provisions relating to access to file have been developed in secondary legislation. While the language of the provisions applicable to both fields is not always identical – as will be explained in subsequent sections – a main tenet is common: investigated parties enjoy a right to access the full file of the case, subject to legitimate confidentiality interests.

4. The process of access to file in antitrust proceedings is anchored in Article 27 of *Regulation 1/2003 on the implementation of the rules on competition laid down in [Articles 101 and 102 of the Treaty on the Functioning of the European Union]* ("Regulation 1/2003")[3], as well as in Articles 15 and 16 of *Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to [Articles 101 and 102 of the Treaty on the Functioning of the European Union]* (the "Implementing Regulation")[4].

5. For access to file in the context of a merger notification, the main provisions are to be found in Article 18 of *Regulation 139/2004 on the control of concentrations between undertakings* (the "Merger Regulation"),[5] as well as in Article 17 of *Regulation 802/2004*

[1] Charter of Fundamental Rights of the European Union 2012/C 326/02, OJ C 326, 26.10.2012, p. 391–407 ("Charter").

[2] Ibid., Art. 41(2)(b).

[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 (Text with EEA relevance), OJ L 1, 4.1.2003, p. 1–25 (Regulation 1/2003).

[4] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Text with EEA relevance), OJ L 123, 27.4.2004, p. 18–24 (Implementing Regulation).

[5] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22 (Merger Regulation).

on the control of concentrations between undertakings (the "Merger Implementing Regulation")[6].

6. All these provisions on access to file – sometimes called "access to the Commission's file" – are also elaborated upon in detail, for both antitrust and merger proceedings, in the Commission Notice on the rules for access to the Commission file in cases pursuant to [Articles 101 and 102 of the Treaty on the Functioning of the European Union], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 ("the Access to file Notice").

7. The Directorate-General for Competition (also called "DG COMP" or "DG Competition") of the European Commission (the "Commission") has also published several other non-binding documents in order to provide further guidance and clarity. The most relevant are:

- The Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102;[7]
- The Guidance on confidentiality claims during Commission antitrust procedures;[8]
- DG Competition informal guidance paper on confidentiality claims;[9]
- the Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation;[10]
- DG Competition guidance document on the use of confidentiality rings in antitrust access to file proceedings;[11]

[6] Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p. 1–39 (Merger Implementing Regulation).

[7] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU No 2011/C 308/06 (Text with EEA relevance), OJ C 308, 20.10.2011, p. 6–32 (Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102).

[8] Commission, 'Guidance on confidentiality claims during Commission antitrust procedures' (2018) https://ec.europa.eu/competition/antitrust/business_secrets_en.pdf, accessed 8 October 2019 (Guidance on confidentiality claims during Commission antitrust procedures).

[9] Commission, 'DG Competition informal guidance paper on confidentiality claims' (March 2012) https://ec.europa.eu/competition/antitrust/guidance_en.pdf, accessed 8 October 2019 (DG Competition informal guidance paper on confidentiality claims).

[10] Commission, 'Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation' https://ec.europa.eu/competition/mergers/legislation/disclosure_information_data_rooms_en.pdf, accessed [8] October 2019 (Best practices on data rooms).

[11] Commission, 'The use of confidentiality rings in antitrust access to file proceedings' https://ec.europa.eu/competition/antitrust/conf_rings.pdf, accessed 8 October 2019 (Guidance document on the use of confidentiality rings in antitrust access to file proceeding).

- the DG Competition best practices on the conduct of EC merger control proceedings;[12] and
- The public version of the Antitrust Manual of Procedures, Module 12: Access to file and Confidentiality.[13]

2. Access to file

2.1. General framework applicable in antitrust and merger proceedings

8. Under EU law, the right of access to the file materialises from the moment when a party is notified a Statement of Objections. A Statement of Objections (commonly referred to as an "SO") is a document that is formally addressed to investigated or notifying parties and which outlines the Commission's preliminary objections against them or against the proposed concentration.

9. The fact that access to file is only granted at the stage of notification of the SO means that the parties will not usually[14] gain an insight into the Commission's case-file prior to that moment. Parties will also be granted access to documents received after notification of the SO when "such documents may constitute new evidence — whether of an incriminating or of an exculpatory nature —, pertaining to the allegations concerning that party in the Commission's statement of objections."[15]

10. Given that the addressees of an SO must request access to the file, there is always the possibility that such right is not fully exercised by the party in question. This is, for example, the situation with cartel settlement, where the parties decide to exercise their right to access the file by just obtaining a more limited access that still allows for the full exercise of their rights of defence in the context of the settlement. A similar situation occurs in mergers, where the notifying party(ies) typically waive their right of access to the Commission's file regarding their own documents.

11. As regards the practicalities, the case-team pursuing the case in DG Competition is responsible for granting access to file. While the specific way in which access is granted is usually agreed upon between those being granted access to the file, the case-team and the document providers, disputes may arise over how the information will be accessed or over which information will be accessible. For these situations, parties may request the intervention of the Hearing Officer, an independent arbiter that is separate from DG Competition, tasked with, *inter alia*, ensuring that parties' right to access to the file is

[12] Commission, 'Best practices on the conduct of EC merger control proceedings' (20/01/2004) https://ec.europa.eu/competition/mergers/legislation/proceedings.pdf, accessed October 2019.

[13] Antitrust Manual of Procedures, https://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf, accessed October 2019.

[14] Access to certain documents on the Commission's file is at times also granted in different moments, for example to allow the parties notifying a merger to respond to an Article 6(1)(c) decision (see Section b below) or during discussions exploring a party's willingness to settle an antitrust investigation (see Section c below).

[15] Access to file Notice, Point 27.

respected. More information on the Hearing Officer is found in Section 4 of this contribution.

12. Once all disputes are settled and in order to make the access to file effective, the Commission will usually provide the parties with an encrypted storage device containing the accessible information on the file as well as an index of the whole file. In some instances, however, other modalities may be used. Such modalities often seek to alleviate the burden on the providers of the documents that are the object of the access to file while satisfying the rights of defence of those parties accessing the file.[16] They include:

- **Data room**: by means of data rooms certain documents in the Commission's file are made accessible "in a restricted manner, i.e., by limiting the number and/or category of persons having access and the use of the information being accessed to the extent strictly necessary for the exercise of the rights of defence."[17] Data rooms are generally well-suited for situations where the preparation for access to file would be unnecessarily burdensome for the parties, be it because of the complexity in preparing non-confidential versions (for example, when the file is extremely large, data rooms are a good way for parties to filter out the information that they consider relevant) or because the data is useful only for certain skilled profiles (for example, as regards quantitative data sets underlying econometric analyses).
- **Negotiated disclosure (confidentiality ring)**: in cases with a very voluminous file, the Commission may sometimes agree that the parties voluntarily agree to use a negotiated disclosure procedure. Under this procedure the information provider and the party obtaining access to its documents may bilaterally agree on the accepted use of the information and/or the individuals to whom such information would be made available. Before proceeding down this route, parties must waive their right to access to the file vis-à-vis the Commission.[18]
- **Access to settlement submissions and leniency statements**: access to these two types of documents is subject to special rules and access to such submissions shall only be granted at the premises of the Commission. Moreover, the parties and their representatives are explicitly banned from (mechanically) copying the leniency corporate statements or settlement submissions by any means.[19] Further particularities of the access to file procedure in cartel settlement procedures are explained in section 2.c below.

2.2. The particularities of access to file in merger control

13. There are three peculiarities worth highlighting as regards access to file in merger proceedings.

[16] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102, paras 95 to 98.

[17] Best practices on data rooms, point 9.

[18] Guidance document on the use of confidentiality rings in antitrust access to file proceeding, p. 2-4.

[19] Regulation relating to the conduct of proceedings by the Commission, Art 15(1b).

14. First, access to file in merger proceedings may "reasonably be adapted to the need for speed, which characterises the general scheme of [the EU rules on merger control]".[20] This may have consequences in terms of deadlines, documents to be made accessible and other matters, all while preserving the parties' rights of defence.

15. Second, access to file after the moment of the notification of the SO in a merger is granted on a rolling basis. While the general rule in both antitrust and mergers is to grant access to all new evidence received after notification of the SO, the Merger Regulation explains that the Commission shall also give the parties concerned "the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them."[21] Further access to new documents on the file is therefore usually granted on a rolling basis. Moreover, before the access to file procedure, access to key documents is also granted to the notifying party(ies) in order to allow them to respond to Article 6(1)(c) decisions, by means of which the Commission opens its in-depth (Phase II) investigations.

16. Third, in addition to the addressees of the SO, in merger proceedings "access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets."[22] These other "parties directly involved" are "parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target of the concentration"[23]. Their right to access to file is also linked to the fact that they "should also be informed of the Commission's objections and should be granted the opportunity to express their views."[24] This also means that these other involved parties will only get access insofar as this is necessary to exercise their right to be heard.

2.3. The particularities of access to file in cartel settlement

17. In cartel settlement cases, access to file is different both as regards the timing and the documents that the parties get access to.[25]

18. As regards the timing, in these types of cases access to file is provided prior to the notification of the SO. This advancement of the exercise is necessary to provide the investigated parties with the information that they will need to assess whether they want to introduce a settlement submission, which will form the basis for the SO to be adopted by the Commission.

[20] See, for example, Case T-210/01 *General Electric* v *Commission*, EU: T:2005:456, para 631.

[21] Merger Regulation, Art. 18(1).

[22] Merger Regulation, Art.18(3).

[23] Merger Implementing Regulation, Art. 11(b).

[24] Merger Implementing Regulation, recital 12.

[25] A similar approach is followed by the Commission in those cases outside the cartel field where a party accepts its liability for an infringement in exchange for a reduction of the fine (commonly referred to as "non-cartel cooperation cases").The cartel settlement procedure is explained in detail in the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167, 2.7.2008, p. 1–6 (the "Settlement Notice").

19. Instead of granting access to its whole case-file, in settlement procedures the Commission only arranges access to "the evidence used to determine the envisaged objections". Parties may however also request access to additional documents "for the purpose of enabling [them] to ascertain [their] position regarding a time period or any other particular aspect of the cartel".[26] On the basis of this information, parties may then decide to introduce a settlement submission which, among others, should contain "the parties' confirmation that, they have been sufficiently informed of the objections the Commission envisages raising against them and that they have been given sufficient opportunity to make their views known to the Commission".[27] The pre-SO access to file also translates in the fact that "should the statement of objections reflect the parties' settlement submissions, the parties concerned should […] reply to it by simply confirming (in unequivocal terms) that the statement of objections corresponds to the contents of their settlement submissions and that they therefore remain committed to follow the settlement procedure."[28] Moreover, no oral hearing or (additional) access to the file may be requested by those parties once their settlement submissions have been reflected by the statement of objections.[29]

3. The documents available for access to file

20. In European competition law proceedings, access to the file is done in an extremely broad manner as a way to guarantee the highest level of protection to the parties' rights of defence. As such, in antitrust and merger proceedings, the addressees of the SO "will be granted access to all documents making up the Commission file [i.e., documents obtained, produced and/or assembled by the Commission Directorate General for Competition, during the investigation] with the exception of internal documents, business secrets of other undertakings, or other confidential information".[30]

21. In order to take into account the document providers' views on confidentiality matters, when submitting information to the Commission in antitrust or merger proceedings, the parties providing the documents will usually be asked to identify any materials or parts thereof that they consider to be confidential. Document providers may also bring up such confidentiality claims themselves. Failure to identify those claims within a reasonable time period may result in the Commission assuming that the documents or statements concerned do not contain confidential information.[31]

22. When submitting their confidentiality claims, document providers will be asked to justify their confidentiality claims according to one of two categories: "business secrets" or "other confidential information". If accepted by the Commission, the relevant excerpts

[26] Regulation relating to the conduct of proceedings by the Commission, Art. 10a(2).

[27] Settlement Notice, point 20..

[28] Ibid, point 26,

[29] Ibid, point 28.

[30] Access to file Notice, point 10 read in conjunction with point 8.

[31] Merger Implementing Regulation, Art. 18; Implementing Regulation, Art. 16. This provision needs to also be balanced against Article 339 of the Treaty on the Functioning of the European Union, according to which officials of the European Union are subject to an obligation "not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components."

subject to confidentiality will not be accessible during the access to file exercise. Nevertheless, those being granted access to file will be aware of their existence by means of the index of documents provided to them during the access to file exercise. Non-accessible information will normally be included in the file by means of either a non-confidential summary or by including in the file a non-confidential version of the entire document (i.e., a version identical to the non-accessible document but where the confidential information has been redacted or replaced by non-confidential excerpts, such as for example ranges of values).

23. Finally, it also needs to be noted that the documents made available to the parties through the access to file exercise shall only be used "for the purposes of the relevant [merger] proceeding"[32] or "for the purposes of judicial or administrative proceedings of the application of Articles 101 and 102 of the Treaty".[33]

3.1. Excluded from access to file: Internal documents

24. Documents that are purely internal to the Commission are in principle not made accessible during the access to file exercise (although their existence may appear from the case file index). These documents are of a wide variety and are generally those needed for the Commission's internal decision-making process. Among these documents, one can thus find documents purely internal to the Directorate General for Competition but also documents that are part of the Commission's decision-making process, such as opinions from other departments of the Commission, including the Commission's Legal Service. Internal documents "can be neither incriminating nor exculpatory [and they] do not constitute part of the evidence on which the Commission can rely in its assessment of a case."[34]

25. The following will also be categorised as internal documents:

- Correspondence between the Commission and the Member States of the EU and their national competition authorities;
- Correspondence between the competition authorities of the Member States, and
- Communications involving third-party authorities like those of the EFTA countries, Japan[35] or the United States. [36]

[32] Merger Implementing Regulation, Art. 17(4).

[33] Implementing Regulation, Art. 16a(1).

[34] Access to file Notice, point 12. See also Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* EU:C:2004:6, paragraph 68 and the case-law cited.

[35] Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities, OJ L 183, 22.07.2003, p.12 (EU Japan Agreement), Art. 9.

[36] Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, OJ L 95, 27.4.1995, p. 47.

3.2. Excluded from access to file: Business secrets

26. Certain information about an undertaking's business activity may be classified as "business secrets" and thus benefit from restricted access. The Notice on Access to file contains a list of the types of information that could benefit from such treatment: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.

27. The mere fact that certain information may fall under one of these categories does however not automatically mean that it would constitute a genuine "business secret" that merits exclusion from the access to file. For example, confidentiality claims can normally only pertain to information obtained by the Commission from the same person or undertaking and not to information from any other source. Moreover, the information needs to be genuinely secret and not be already known outside the undertaking.[37] Furthermore, the information needs to still have a commercial importance that has not been diluted for instance due to the passage of time.[38] It also needs to be highlighted that "the qualification of a piece of information as confidential is not a bar to its disclosure if such information is necessary to prove an alleged infringement ('inculpatory document') or could be necessary to exonerate a party ('exculpatory document'). In this case, the need to safeguard the rights of the defence of the parties through the provision of the widest possible access to the Commission file may outweigh the concern to protect confidential information of other parties." [39]

3.3. Excluded from access to file: Other confidential information

28. The Commission also accepts that there may exist information different from business secrets but whose disclosure could significantly harm a person or undertaking. This broad category – labelled as "other confidential information" – includes information whose disclosure could result in retaliation, personal data about individuals mentioned in

[37] In the context of the publication of competition law decisions, for information to be regarded as confidential all the following conditions must be met: i) such information must be known only to a limited number of persons; ii) its disclosure must be liable to cause serious harm to the person who has provided it or to third parties; and iii) the interests liable to be harmed by the disclosure must be objectively worthy of protection. See, point 11 of the Guidance on confidentiality claims during Commission antitrust procedures, quoting Case T-198/03 *Bank Austria Creditanstalt AG v Commission of the European Communities*, EU:T:2006:136, para 71.

[38] While the definition of an item as a "business secret" is assessed on a case-by-case basis, as a rule of thumb the Commission presumes that information pertaining to the parties' turnover, sales, market-share data and similar information which is more than 5 years old is no longer confidential. In this respect, the Court of Justice of the European Union has pointed out that "information which was secret or confidential, but which is at least five years old, must as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes essential elements of its commercial position or that of interested third parties. Case C-162/15 P *Evonik Degussa GmbH v European Commission*, EU:C:2017:205, para 64."

[39] Access to file Notice, point 24.

the SO or the decision or information that could allow the identification of certain parties including complainants or other third parties.

29. As with "business secrets", only genuine concerns about the disclosure of "other confidential information" will be accepted by the Commission.

4. The Hearing Officer

30. The Hearing Officer has an important role to play in the Commission's defence of procedural rights.

31. The function of the Hearing Officer was first created in 1982 for safeguarding in an independent manner the effective exercise of procedural rights throughout antitrust and merger proceedings. Ever since the creation of the Hearing Officer function, the competences of the Hearing Officer have been expanded, with the last Decision governing its powers having been adopted in 2011.[40] This Decision is still in force today.

32. The Hearing Officer operates as "an independent arbiter who seeks to resolve issues affecting the effective exercise of the procedural rights of the parties concerned, other involved parties, complainants or interested third persons where such issues could not be resolved through prior contacts with the Commission services responsible for the conduct of competition proceedings, which must respect these procedural rights."[41] Thus any discrepancies shall be, as a first step, raised with the Commission's Directorate-General for Competition and then, if the issue remains unresolved, they may be referred to the Hearing Officer for independent review.[42]

33. In this respect, the importance of the Hearing Officer for access to file cannot be overestimated as it is the Hearing Officer's task to ensure "that disputes about access to the file or about the protection of business secrets and other confidential information between those parties and the Commission's Directorate-General for Competition are resolved."[43] More specifically, Chapter 4 of the Decision 2001/695 governing the competences of the Hearing Officer flags two main tasks as regards access to file.

34. First, Article 7 establishes the competence of the Hearing Officer for hearing and resolving requests for access to documents, i.e., complaints from parties that consider that certain documents would need to be disclosed by the Commission in order for them to properly exercise their right to be heard. Second, Article 8 tasks the Hearing Officer with deciding how a party's rights of defence should be balanced against the other parties' legitimate interest of confidentiality. In this respect, Article 8 entitles the Hearing Officer to adjudicate on whether a party's confidentiality claims are justified. Requests under Articles 7 and 8 of Decision 2011/695 may result in a reasoned Commission decision signed by the Hearing Officer.

[40] Decision of the President of the European Commission No 2011/695/EU of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29–37 (Decision 2011/695).

[41] Ibid., recital 8.

[42] Decision 2011/695, Art. 3(7).

[43] Decision 2011/695, recital 15.

35. Finally, it is also worth noting that parties can always resort to judicial review of decisions adopted under Articles 7 and 8 of Decision 2011/695. There exists, however, an important difference concerning the different procedural stages at which the parties may appeal such decisions. Because of the definitive nature of Article 8 decisions, parties may appeal decisions adopted under Article 8 (decisions to disclose information subject to confidentiality claims) before the Court of Justice of the European Union immediately after adoption.[44] The same is, however, not true for the appeal of Article 7 decisions (decisions resolving requests for access to documents). Such decisions can not be appealed separately but only subsumed into the appeal of the final decision on the case – if any.

[44]Case 53/85 *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission of the European Communities*, EU:C:1986:256.