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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Cancels & replaces the same document of 25 November 2019****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Summaries of contributions**

3 December 2019

This document reproduces summaries of contributions submitted for Item 4 of the 130th OECD Working Party 3 meeting on 2-3 December 2019.  
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](http://www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm)

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## *Summaries of contributions*

This document contains summaries of the various written contributions received for the discussion on access to the case file and protection of confidential information (130th Meeting of the Working Party No 3 on Co-operation and Enforcement on 2-3 December 2019). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an \*.

## *Austria*

In Austria, the enforcement of competition law is a purely judicial model with the Federal Competition Authority (BWB) as an independent investigation authority. It applies to the Cartel Court (CC) which makes binding decisions.

### ***Competition agency's file: preliminary investigation stage***

At the stage of preliminary investigations before the start of the judicial procedure, the access to the investigation files of the BWB for third parties is very limited. It only exists for addressees of binding RFIs and of inspection decisions. Otherwise, the right to be heard is safeguarded by a provision obliging the BWB to give the parties the opportunity to be informed of the results of the investigations and to take a position on them within a reasonable period of time.

### ***Competition agency's file: Disclosure of evidence by BWB in proceedings for damages***

Only upon order by the national courts, only after terminating proceedings on infringements of competition law and only if such evidence cannot be obtained by another party or a third party with reasonable effort, may the BWB disclose the following categories of evidence included in its files: First, information compiled by a natural or legal person specifically for proceedings before the competition authority, second, information it has compiled and transmitted to the parties in the course of its investigations, and third, settlement submissions that have been withdrawn. Internal documents of the BWB and the correspondence between competition authorities as well as with law enforcement authorities shall not be disclosed at any time. BWB shall not disclose any leniency submissions or settlement submissions at any time. Detailed provisions exist with regard to the decision of the court whether the request for disclosure is proportionate and whether parts of the evidence are subject to a prohibition. They are detailed in the submission.

### ***Cartel Court's file***

Parties of the proceedings before the CC have the full right to access to file. Hence all evidence used by the BWB in its application to the Court is subject to access to file. However, persons not being a party to the proceedings may inspect the files of the CC only upon agreement of the parties concerned.

In proceedings on damage action, upon justified application by a party, the court may order the defendant/a third party after hearing them to disclose evidence under their control. This might include evidence that contains confidential information, if disclosure is deemed to be reasonable taking into account the legitimate interests of all parties and any third parties concerned. Factors considered when assessing the legitimacy of interests are detailed in the submission.

The court can order effective measures to protect confidential data detailed in the submission. The party obliged to disclose evidence may request that certain individually specified items of evidence shall solely be disclosed to the court for specified reasons.

## *Belgium\**

Belgium's submission first provides a succinct explanation of the key procedural steps in infringement proceedings. Then, it outlines Belgium's rules and practices in the context of access to the case file and protection of confidential information. Finally, the submission provides an excerpt of the Code of economic law, in French and in English. Belgium's submission exclusively refers to infringement proceedings. It does not deal with merger control.

## BIAC

*Business at OECD* welcomes the OECD’s examination of procedural fairness – and in doing so, the acknowledgement of its importance – of which access to file forms a crucial part. It is vital that agencies adopt robust procedures on access to file and ensure that such access is complete, timely, and meaningful. Parties under investigation must be given the opportunity to understand and respond to the allegations being made and have recourse to an independent review of an agency’s decision on access to file.

*Business at OECD* has previously commented on the broader subject of procedural fairness, noting that “[p]rocedural fairness is critical to protect the interests of firms subject to competition law enforcement proceedings who face the risk of substantial sanctions, not least being increasingly onerous financial penalties, but which may also include the prohibition of or mandated changes to business practices and transactions. Importantly, such fairness also strengthens and streamlines agency decision-making, reducing the number of appeals, and increases public confidence in agency decisions and so is of general public benefit.”<sup>1</sup>

In these comments, *Business at OECD* focuses on:

1. the importance of access to file in the context of a broader examination of procedural safeguards, and to the efficiency and legitimacy of the investigatory process;
2. the crucial need for access to file to be meaningful;
3. the importance of agencies implementing adequate protections for confidential information;
4. the need to balance the right to access a case file with the protection of confidential information within it; and
5. considerations of inter-agency sharing of confidential information.

We have in these comments focused on access to file being granted to parties under investigation (rather than access by third parties or potential claimants in follow-on damages actions, including in the context of access to leniency applications).

Please click [here](#) to download the full paper.

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<sup>1</sup> Business at OECD, Submission Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Working Party No. 3 “Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings” ¶ 1.2 (Feb. 16, 2010), available at [http://biac.org/wp-content/uploads/2014/05/BIAC\\_2010\\_Oct\\_WP3\\_Procedural\\_Fairness\\_2010-02-05\\_FINAL.pdf](http://biac.org/wp-content/uploads/2014/05/BIAC_2010_Oct_WP3_Procedural_Fairness_2010-02-05_FINAL.pdf).

## *Bulgaria*

In accordance with Art. 55 (1) of the Law on Protection of Competition (LPC) the parties and constituted interested third parties in the proceedings shall have the right to access any evidence, collected in the course of investigation with the exception of those containing production, trade or other secret, protected by law. No access shall be granted to internal documents of the Commission, including correspondence with the European Commission or with a national competition authority of a Member State of the European Union.

In antitrust and merger cases when statement of objections is issued access to the case file should take place within a deadline set by the CPC in the ruling for adoption of statement of objections. In practice, the access to file should take place in the period between the notification of the statement of objections and the oral hearing.

Pursuant to Article 55 (2) of the LPC any person, submitting information to the CPC in the course of proceedings shall identify the materials that are claimed to contain production, trade or other secret, protected by law and which should, therefore, be treated by the Commission as confidential. In such cases the person shall substantiate its claim and shall submit the same materials in a version in which all data considered to be confidential have been erased.

The balance between a party's right to review and respond to evidence that will be used against it and the need to protect confidential information is ensured with the detailed procedure envisaged in the *Rules on the access, use and storage of documents constituting production, trade or other secret, protected by law* which ensure transparency aimed at protecting the rights of the persons providing information during the Commission's proceedings and the proper exercise of the parties' right of defence. The Supreme Administrative Court, in its practice, has recognized that the Rules are well-known and generally applicable and thus guarantee compliance with the principles of predictability, good administration and equality of legal entities.

In accordance with Art. 55 (2) of the LPC whenever the Commission considers that certain information is not confidential, it shall issue a ruling in this regard and inform the person of it. The ruling shall be subject to appeal before the Administrative Court – Sofia district. Pursuant to Article 55 (3) of the LPC, confidential information may be disclosed if it is of substantive importance for proving the infringement or to ensure the effectiveness of the right of defence. The CPC is empowered to disclose confidential information either on its own initiative or upon request of a party to the proceedings. Unlike Art. 55 (2), Art. 55 (3) does not mention that the CPC discloses the confidential information with a ruling which is subject to appeal. With regard to this the practice of the Supreme Administrative Court<sup>2</sup> was that this ruling cannot be appealed. Subsequently the Rules were amended in March 2013 and now point 20 clarifies that the rulings with which the CPC discloses confidential information are subject to appeal by the person that has provided the disclosed confidential information.

On 18 December 2013 for the first time in its practice the CPC issued a ruling disclosing information in more than 250 documents for which confidentiality was claimed by the parties in the proceedings. Later the ruling of the CPC was upheld by the Supreme Administrative Court.

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<sup>2</sup> Until 2019 all decisions and rulings of the CPC were reviewed by the Supreme Administrative Court.

## Canada

In the course of performing its duties under Canada's *Competition Act* ("Act"), the Canadian Competition Bureau ("Bureau") often comes into possession or control of confidential information through the use of formal powers or the provision of information on a voluntary basis. The Bureau's *Information Bulletin on the Communication of Confidential Information Under the Competition Act* sets out the Bureau's policy on the communication of confidential information, which serves to assure parties providing confidential information to the Bureau, whether voluntarily or pursuant to a specific provision of the Act, that the Bureau takes seriously its duty to protect this information.

In civil enforcement matters, the Bureau has a duty to search for and disclose all documents in its possession or under its control that are relevant to proceedings. In criminal enforcement matters, jurisprudence has affirmed that "... there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it."

If it is necessary to use confidential information in formal proceedings before Canada's Competition Tribunal or the courts, the Bureau makes efforts to protect the information from disclosure. Available measures include sealing orders, confidentiality orders, confidential schedules to public documents, and in camera proceedings.

The Act allows for communication to international partners. In all cases where confidential information is communicated to a foreign authority, the Bureau seeks to maintain the confidentiality of the information through either formal international instruments or assurances from the foreign authority.

The Bureau has a statutory duty to conduct its inquiries in private and to maintain the confidentiality of information it receives pursuant to the Act. The Bureau is committed to treating confidential information responsibly and in accordance with the law because maintaining confidentiality is fundamental to the Bureau's ability to pursue its responsibilities under the Act and to maintain its integrity as a law enforcement agency.

## *Chile*

In Chile, access to the FNE's investigation file is granted as a matter of law. According to the Chilean Constitution and the Chilean Law on Transparency and Access to Public Information (Law No. 20.285), all citizens have the right to request and receive information in possession of administrative bodies. Hence, all citizens –irrespective of whether they have a lawfully recognized interest in the case or not- have the right to request access to the FNE's file during an investigation, notwithstanding the FNE's power to determine that certain investigations as a whole and/or aspects of a file are restricted or confidential.

Investigations involving cartels, due to their extremely sensitive nature, are declared restricted. In these cases third parties may not have access to the FNE's file. Furthermore, the FNE, ex officio or at the request of the interested party, may order that certain aspects of the file be maintained restricted or confidential, in order to: protect the identity of those that have made declarations or provided information under a leniency programme; protect formulas, strategies or trade secrets or any other element whose disclosure could significantly affect the competitive performance of parties providing the information; or to safeguard the effectiveness of the investigations of the FNE. This information is redacted from the copy of the file that is given to an individual or enterprise that has requested access. Also, FNE employees have the legal duty not to disclose information and affected parties may challenge the FNE's decision to deny access to some information.

Additionally, Law No. 20.285 lists specific grounds on which information can be declared secret or restricted by an administrative body (such as the FNE) and, hence, a request to access information can be totally or partially denied.

During a trial before the TDLC, any party is allowed to request access to the FNE's investigation file, provided that it is related to the trial. In this case, the FNE must present all the documents and files related to said investigation. However, the TDLC is obligated not to disclose the information that has been declared confidential during the investigation. Furthermore, the FNE or any party that is the owner of the documents submitted by the FNE, is entitled to request that additional information contained in the agency's file be declared confidential. If confidentiality is granted, the FNE shall present a "public version" of the classified document, in which the information declared confidential is redacted. The same rule applies to any party requesting that certain information presented in a case trial is declared confidential.

## *Colombia*

The Superintendence of Industry and Commerce rigorously applies to its enforcement proceedings principles and rules that materialize fundamental rights such as the right to a Due Process, to Privacy and to Access Public information. In that context, the competition law enforcement procedures conducted by the SIC include clearly stated rules as to the rights to access the information in possession of the agency depending on the stage of the administrative procedure, the access to information other than the one classified as evidence in the context of the investigation, and the protection and use of classified information by the SIC for enforcement purposes.

Colombian provisions and case law show the treatment given to confidential information when advancing enforcement procedures and guaranteeing the rights of the parties. For starters, the Competition Authority establishes whether the information in question is confidential according to the Constitution and the Law. The information classified as confidential cannot be disclosed by the authority, in principle. Still, disclosure may occur to prove and infringement and further in the proceedings the parties may be allowed to request confidential treatment. Also, in order to guarantee the parties rights of defense.

The way in which the Colombian Competition authority guarantees the right to access the file and provides the protection of confidential information is analyzed through relevant case examples. The cases display situations that are at the heart of the discussion because they provide insights on the way in which the competition authority balances fundamental objectives within antitrust enforcement. This contribution discusses issues regarding the rights to access the information in possession of the agency depending on the stage of the administrative procedure, the access to information other than the one classified as evidence in the context of the investigation, and the protection and use of classified information by the SIC for enforcement purposes.

## *Croatia*

In its contribution, the Croatian Competition Agency (CCA) wishes to present the legislative framework regarding the access to the case file and protection of confidential information, in particular during various stages of the competition proceedings.

## *Czech Republic*

The paper summarises options and assumptions given by law according to which the file of the Office for Protection of Competition (hereinafter referred to as “the Office”) can be accessed by parties to the proceedings as well as the third parties. Furthermore it gives explanations of specific protection of different types of documents that are regularly contained in such files.

The introduction of the paper explains that there are several types of access to administrative file regarding competition proceedings. These are governed pursuant to four different legal Acts. The Act No. 500/2004 Coll., the Code of Administrative procedure, the Act No. 143/2001 Coll., on the Protection of Competition and Amending Certain Acts, the Act No. 262/2017 Coll., on Damages in the Field of Competition, and the Act No. 106/1999 Coll., on Free Access to information.

The first chapter describes the general regulation of access to the file in any administrative proceedings in the Czech Republic that is governed mainly by the principle of privacy. Nevertheless, there are exemptions from this principle if the party requesting the access to the administrative file shows lawful legal interest. Any refusal of the access to the file in administrative proceedings must be reviewable by courts that have ultimate access to any document in the file.

The second part follows with some specifics of the access to the file in competition proceedings conducted by the Office. Scope of the right to access to the file within the proceedings before the Office differs depending on the stage of the proceedings, status of the party requesting the access or type and origin of documents in the file. The most important protection in competition file is granted to leniency and settlement applications. Besides this, parts of the file containing business or bank secret or similar confidential information are also generally excluded from the access. Nevertheless, after the statement of objections is issued, parties to the proceedings or their representatives may access any document in the file disregard its protection if it has been or will be used as evidence.

The third part summarises possibility of access to documents for the purpose to ease eventual claims for damages caused by an infringement of competition law in the special civil law procedure. The Czech civil courts may impose an obligation to disclose all required documents to the claimant subject to condition that it is necessary and proportionate for possibility to successfully claim damages. Nevertheless such access is still limited. Some documents are not accessible at all and others may be accessed only after the investigation is closed. When assessing disclosure of documents, the court has to take into account the requirement for effective public enforcement of competition law. Therefore the duty to disclose requested documents shall be preferably imposed on the sued parties, though under specific conditions it may be imposed even on the Office.

The fourth part explains rules for providing information based on the general right to free access to information. Based on that, the Office as a public authority has the duty to provide some information even from its files. When providing such information all the restrictions of the right to free access to information must be considered. Only the information requested that are not excluded from free access to information by the legislation shall be provided.

The paper's conclusion is the opinion that the system of access to the file of the Office according to the Czech legislation is relatively balanced. At the same time the paper also considers possible changes and eventual drawbacks of several aspects that might be changed in the future if the Competition Act is amended.

## *Denmark*

According to the Danish Competition Act the investigated parties or merging parties are entitled to access to file. Other undertakings are not entitled to access to file except for information directly related to themselves (and with respect of business secrets regarding others). The public in general does not have access to file.

The main rule in the Danish Administrative Act is that investigated or merging parties have right of access to all external documents in the file. However, this right is restricted to protect confidential information if the following criteria are fulfilled:

1. The information has to constitute a confidential business secret or confidential information about the market in question (i.e. confidentiality due to competitors or to the competition).
2. The investigated or merging parties should be able to protect their interests without the confidential information.
3. The need to protect confidential information must be balanced against and outweigh the parties' right of access to file.

The DCCA will usually identify confidential information regarding competitors by hearing the undertakings to which the information relates. On the basis hereof the DCCA will decide what information should be exempted and how (for example blanked out in the documents or given in ranges etc.).

The investigated or merging parties can request access to file at any time from the initiating of the proceedings related to a prohibition or merger decision. If information are exempted from access to file, the investigated or merging parties can appeal to the Danish Administrative Appeal Tribunal – and such an appeal will have suspensive effect (unless there is a statutory time limit or significant considerations for public or private interests).

Access to file provides the investigated parties or merging parties the right to see the factual basis of such proceedings involving them. This secures their right of defense and eventually that the DCCA makes the right decision. Therefore, access to file is fundamental to ensure correct decisions. At the same time, protection of confidentiality is also crucial in order to protect competition and the competitors. Consequently, in every case the right balance between these two considerations has to be achieved. In certain situations granting access to file provide practical problems. In particular, this may be the case in merger proceedings - due to the amount of information and the time limits.

## *EU*

Access to the case file and the protection of confidential information are two evident expressions of the rights of defence and to good administration that are enshrined in the European Charter of Fundamental Rights. These principles find their translation into antitrust and merger proceedings before the European Commission in Regulations 1/2003 and 139/2004 respectively as well as in their corresponding Implementing Regulations.

Under EU law, the right of access to the file emerges from the moment when a party is notified a Statement of Objections, the chargesheet outlining the Commission's preliminary objections against the party or the proposed concentration in question. It is at this moment when parties will be given access to all documents making up the Commission file with the exception of internal documents, business secrets of other undertakings, or other confidential information. In other words, access to file will be conducted in a way to strike a balance between the information providers' legitimate interest in confidentiality and the parties' rights of access to the file.

Exceptionally, parties will also be granted access to file at other moments of the proceedings such as when new evidence is incorporated into the file after notification of the Statement of Objections. The access to file procedures also provide for special rules in order to address case-specific circumstances like the strict deadlines in merger procedures, the protection of leniency and settlement submissions in cartels or the existence of bulky numerical data understandable only by individuals with certain technical profiles.

Another important element in the European rules for access to file and the protection of confidential information is the Hearing Officer, an independent arbiter who seeks to resolve issues affecting the effective exercise of the procedural rights of the parties in situations where the parties cannot solve such disputes directly with the case-team pursuing the investigation. In addition to the Hearing Officer, parties may also resort to the European Courts in due course in case they consider that their rights of defence or their legitimate interest in confidentiality are not being respected during the course of the investigation.

## *Germany*

Access to the case file is an important step in all contentious antitrust and merger cases. There are hardly any administrative offence proceedings of the Bundeskartellamt without requests for access to the case file. The inspection of files complements the fundamental procedural rights such as the right to due legal process, the right to be heard and the right of defence. However, the right to access the file cannot be unlimited and must be balanced against the legitimate interest of the protection of confidential information including business and trade secrets.

## *Greece*

The right of access to the file is highly significant in competition law proceedings and crucial in ensuring that parties in competition proceedings are heard, as well as supporting the integrity of the Hellenic Competition Commission (the “HCC”) in the conduct of its investigations. In antitrust and merger control proceedings before the HCC, provisions relating to access to file are set out primarily in the Rules of Internal Procedure and Management of the Hellenic Competition Commission (the “Rules on Internal Procedure”) and a separate Notice on the treatment of confidential information deals with the notion and treatment of confidential information in the framework of the right of access to the HCC’s case file.

Investigated parties or parties notifying a concentration enjoy a right to access the file, which materializes from the moment when a party is notified a Statement of Objections, subject to legitimate confidentiality interests. Complainants also have the right to access any non-confidential information following notification of the Statement of Objections, however they may not claim right of access to the case file to the extent recognized for the parties against which the complaint is filed. Third parties have no access to the files of cases pending before the HCC.

The confidential nature of information requires balancing the requirements for due exercise of the right of defense against the need to safeguard the confidentiality of certain information, as well as any legal interests prohibiting their disclosure. As a general rule preparatory documents and internal documents of the HCC, the European Commission, other EU national competition authorities, documents and information exchanged for the application of Articles 11 and 14 of Regulation (EC) 1/2003, correspondence between the HCC and other authorities, professional and business secrets and information the disclosure of which would significantly harm a person or undertaking are confidential. In terms of procedure, in all cases of submission or collection of information for proceedings before the HCC, the persons who submit or by whom the information is collected, specify in a reasoned confidentiality claim the information, documents and parts of documents containing confidential information and provide a separate non-confidential version. In case there is a disagreement regarding the confidentiality claim, the Directorate-General for Competition or the case Rapporteur, as the case may be, reasonably inform the claimant in writing of the Authority’s intention to disclose information, and if a disagreement on the confidentiality claim persists, the President of the HCC decides on the classification.

The HCC may accept commitments to address competition concerns and it also applies a settlement procedure. In these procedures access to file is generally limited. In leniency procedures access to file is consistent with the need to avoid any disclosure of information which could undermine the leniency program. There are also rules for disclosing evidence during trials for actions for damages deriving from violations of competition law, in line with the EU Damages Directive, whereby national courts may limit the disclosure of evidence to that which is proportionate, based on the legitimate interests of all parties and third parties concerned.

## *Hungary*

This contribution aims to present the provisions of the Hungarian Competition Act on access to the case file and the processing of confidential data. It is important to highlight that the Hungarian Competition Authority is committed to facilitating the effective exercise of the right of access to the case file of entitled parties'. The contribution begins by providing a general overview of the different stages and aspects of a competition supervision proceeding, with the aim of placing the detailed and thorough rules relating to access to the case file in the correct context. It then details the natural or legal persons (parties to the proceeding, witnesses, third parties) who are entitled to gain access to the case file in accordance with the Hungarian Competition Act.

The contribution then explains to whom and how access to the case file can be granted during the different stages of a competition supervision proceeding. As a general rule, the parties to a proceeding are able to access the non-confidential case file in the second, decision making phase of the proceeding after the Statement of Objections or the investigation report has been delivered to them. Prior to this date, access to the case file is provided if the circumstances set out in the Competition Act are met. Furthermore, third parties (for example complainant, claimants of damage actions) are allowed to gain access to the non-confidential documents contained in the case file after the proceeding has been terminated.

This is followed by the presentation of the most important types of confidential data and the treatment of such data, including its disclosure. In this respect the contribution focuses on the confidential treatment of documents containing business or private secrets, documents of settlement and leniency procedures and documents containing the identification data of protected witnesses and legal persons, as these documents are dealt with the most frequently in the GVH's practice.

Last but not least, the contribution provides a summary of the online system, the so-called Virtual Data Room (VDR), through which the parties to proceedings can exercise their right to access the case file. The VDR enables electronic access to case files not containing any business secrets or restricted data (non-confidential documents).

*Ireland\**

Ireland's submission first provides a succinct explanation of the competition law framework in its jurisdiction. Then, it outlines Ireland's rules and practices in the context of access to the case file and protection of confidential information. The submission outlines the practices in the jurisdiction relating to competition proceedings and provides a more detailed explanation as regards merger control procedures.

## *Israel*

The Israel Competition Authority (hereafter – the "ICA") believes that access to case file and protecting confidential information is a central and significant issue that is associated with almost every implementation of power by the Director General – both criminal and administrative, since it is essential to enable judicial review of the Director General's decisions. Over the years, and currently, great efforts are being made to ensure the existence of a balanced and due discovery process. In this task, the participants are the information providers, the appellants, the ICA and Israel Competition Tribunal.

The scope of access to case file ranges from broad discovery, which typically applies with reference to defendants in criminal cases; a narrower discovery in administrative procedures; and a more limited discovery granted to petitioners under the Freedom of Information Law.<sup>3</sup>

The ICA believes it is essential to find the proper way in which to protect the confidential information of the various parties involved in a particular proceeding. Notably, solutions for the protection of confidential information bring about challenges to the legal procedure. Certain solutions, for instance, harm the principle of "open court" and the public nature of the justice procedure. Nevertheless, all disclosure proceedings are essential for conducting due process in order to review the ICA's administrative decisions.

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<sup>3</sup> The Freedom of Information Law-1998 (hereafter - the "Freedom of Information Law").

## *Latvia*

### Access to file

Rights to access to the case file are defined in Latvian Competition Law (CL) Article 26 and are based on the constitutional right of person to a fair trial secured in the Constitution of the Republic of Latvia.<sup>4</sup> In a wider sense, right to access to file or to get acquainted with case file is closely connected with the right to be heard which includes right to express opinion in written form and submit evidences, also present opinion orally during oral hearing.

The right to access the case file is defined in the Article 26 (7) of CL. According to this norm the parties of case proceedings have a rights to access to the case, express their opinion and submit additional information and evidences within 20 days from the moment of receipt of the Statement of objection<sup>5</sup> (SO). Competition Council (CC) has the obligation to give access to the file after SO is sent. But restrictions to access to the file may be applied before that. Balancing the interests of investigation and rights of the parties to access the file according to the Article 26 (6) of CL CC may restrict access to case file if the interest of investigation may be undermined. Data subject rights to access are clearly limited to their personal data. Access to the file is decided at the level of the Executive directorate of CC and the presentation of case file also is made by the Executive directorate. If access is denied, the party may challenge refusal to access the file to the court.

According to the Article 26 of the CL rights to access to file applies to the parties which have certain procedural status in the case – parties against whom proceedings have been initiated, third parties or merging parties in merger case. Any other person who's rights or legal interests may be affected by the envisaged decision initially are obliged to request to get a third-party status in the case according to Article 28 Administrative Procedural Law. According to Article 26 (6<sup>1</sup>) of CL also natural person as data subject may request to access to his or her personal data.

### Protection of confidential information

To what information and documents access need to be restricted or limited is generally regulated by Freedom of Information Law what defines all kind of restricted information (personal data, commercial secrets, internal information of the authority and etc.) except state (or official) secrets. In order to ensure a balance between person right of access to the file and the protection of confidential information Authority must assess very carefully which of the information has status of restricted access information. Criteria how to define commercial secrets, personal data or other confidential information are specified in the special laws (like Commercial law, Personal data processing law) or regulations. It should also be noted that direct evidences (emails, etc.) in the case will not be recognized as confidential information, since the parties have a right to access to the evidence on which the infringement is based. Investigation and decision regarding confidential information are handled by Executive directorate of CC. Procedure for determining the status of

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<sup>4</sup> Article 92 of the Constitution of Republic of Latvia - <https://likumi.lv/ta/en/en/id/57980>.

<sup>5</sup> With this letter CC inform the participants in the process in writing that information necessary for the taking of a decision has been acquired.

restricted access information in competition law proceedings is given in the Article 26<sup>1</sup> of CL.

## *Lithuania\**

The parties to the proceedings of the Competition Council (CC) have the right to access the investigation case file. Access to the file is granted following the issuance of the statement of objections, using electronic storage devices or, where this is not possible, at the premises of the CC. Interested third parties cannot access the file until the final decision has been adopted.

The CC has a statutory obligation to protect commercial secrets collected in the course of antitrust investigations or merger proceedings. There is no definition of the notion ‘commercial secret’ in the Law on Competition, but there is one in the Civil Code. Courts have provided further guidance.

In order to ensure the protection of the commercial secrets in possession of the CC, undertakings must submit a request for confidential treatment. The CC may require that undertakings provide non-confidential versions of the documents and a description of the information they want to protect. The body handling the relevant proceedings decides on confidentiality requests. The undertaking may challenge the decision of this body before the CC and, subsequently, before the Vilnius Regional Administrative Court.

As to the disclosure of confidential information, the Supreme Administrative Court of Lithuania has stated that if the CC does not grant the parties access to confidential information and the parties believe their rights of defence have been infringed, they must identify what specific confidential information is held by the CC and why the exclusion of that particular confidential information breaches their rights.

As to international co-operation, the CC cannot share confidential information with domestic or foreign agencies if it does not obtain a waiver. As an exception, the Council may share confidential information with other competition authorities of the European Union for the purpose of applying Articles 101 and 102 of the Treaty on the Functioning of the European Union.

## *Mexico*

This contribution presents the approaches on case file access and confidential information of the Mexican Competition Authorities.

For the case of the Federal Economic Competition Commission (COFECE or Commission) its contribution describes when and how access to a case file may be granted by the Commission, as well as the instances at which a decision for not granting access may be challenged. It also describes the criteria used by the Commission to ensure the protection of reserved and confidential information. Moreover, it explains the new Regulatory Provisions for the qualification of information derived from legal counsel provided by economic agents, which establish measures for how information resulting from legal counsel between a lawyer and a client is handled.

The contribution from the Federal Telecommunications Institute (IFT), points out that constitutional provisions establish both data protection and due defence as human rights. The ultimate duty to legally protect those rights rests upon the authorities responsible for the file, both in administrative and judiciary levels. Secondary laws, including the Federal Economic Competition Law (LFCE), and other guidelines, provide criteria to classify information and procedures, and to grant them confidential or reserved treatment in a competition procedure, on a case-by-case basis. IFT protects confidential information under its custody and takes any necessary measures to avoid undue disclosure of information and to grant due access when processing competition cases, observing competition law and transparency regulations in a harmonised and consistent way. Finally, it argues why further criteria from the Supreme Court is needed in order to provide certainty.

## *New Zealand*

New Zealand has what is essentially a prosecutorial regime for anti-competitive business acquisitions and conduct. However, the Commerce Act 1986 provides for clearance and authorisation by the Commission or the courts on appeal, of mergers and certain other types of practices and agreements.

In respect of access to the file, there is no specific regime to provide access or to deal with access to confidential information. However, the Commerce Commission (Commission) is subject to a broader information disclosure regime set out in the Official Information Act 1982 (OIA). This legislation has a principle of availability, meaning that unless there are (statutorily mandated) reasons to withhold the information, it should be released when requested. The Commission adheres to this principle in all of its functions, however the principle is tempered where the release of information would prejudice those functions, or the party supplying the information.

The Commission undertakes to be an objective, fair and impartial organisation. As such, the Commission seeks to provide access to as much information as possible as a matter of course. Public versions of documents are routinely published on the Commission's website, such as investigation reports, public submissions on merger investigations, and clearance and authorisation documents. Where requests are made for confidential information, the Commission makes an assessment under the OIA, as set out above, and will release the information where the public interest in the information outweighs potential reasons for withholding the information.

Information will however be withheld (at least initially) where disclosure would prejudice the Commission's continuing investigation – for example, where publishing information about an ongoing cartel investigation or the identity of a leniency applicant would hinder the Commission's ability to investigate the conduct.

The Commission's Investigation Guidelines set out the Commission's approach to sharing confidential information with other domestic and overseas agencies. New Zealand has a mutual assistance in criminal matters regime, and the Commission has second generation co-operation agreements with the Canadian and Australian competition authorities which provide for the sharing of confidential information for example.

## Norway

Access to the file is an important principle in Norwegian administrative law with the aim of ensuring procedural fairness and the effective exercise of the rights of defence. In addition, members of the general public have a right to access documents in the possession of public authorities in order to facilitate openness and transparency.

Parties in competition law proceedings are generally granted access to non-confidential versions of documents on the NCA's file in accordance with the Public Administration Act. In merger cases, access will be given upon request at every stage of the procedure following the notification of a merger. Undertakings subject to antitrust investigations, only have the right to access documents in the NCA's file to the extent such access can be granted without causing harm or risks to the investigation or any third party. Consequently, the parties in antitrust investigations will not necessarily be given access to documents on the file at every stage of the procedure, as is the case in merger proceedings.

Parties can under certain circumstances be granted access to confidential information about other undertakings. A precondition is that such access is necessary to ensure a due process. Strict conditions will in any event apply. The information remains classified as confidential and cannot be used for other purposes. The number of persons who will be authorised to access the information will be limited. Unauthorised use of the information is subject to criminal sanctions.

Parties are not granted access to the internal documents of the NCA.

Interested third parties may request access to documents in the NCA's possession pursuant to the Freedom of Information Act. Access to confidential information and the internal documents of the NCA is not granted. In antitrust cases, the Freedom of Information act is only applicable when an investigation is closed.

If a request for access to documents in the NCA's file is rejected fully or partially, an appeal may be brought before the Norwegian Competition Tribunal.

Section 13 of the Public Administration Act contains rules on the duty of secrecy and covers both sensitive personal information and business secrets. To constitute a business secret, the information at issue must pertain to a commercial activity and be of business sensitive nature in the sense that disclosure could cause harm to the undertaking that the information concerns.

## *Romania*

In Romania, the parties subject to investigation have the right of access to the competition authority's file, one of the procedural guarantees offered in order to apply the principle of equality of arms and to protect the rights of defence.

In order for the parties which are investigated to effectively express their views on the conclusions reached by the RCC in its report, they will be granted access to all documents making up the investigation file, with the exception provided by the law, namely internal documents, business secrets of other undertakings or other confidential information.

The access to file is granted to investigated undertakings, following the notification of the RCC's investigation report.

The written observations made by the parties under investigation are included in the file. As a rule, according to the RCC Guidelines regarding access to file, the parties do not have a right to access observations formulated by other parties under investigation. If RCC intends to use in the decision finding an infringement a document provided by an undertaking subject to investigation with its written observation to the investigation report, then the authority will grant access to that document to the parties under investigation.

Before granting access to confidential information, the authority must assess whether the need to safeguard the right of defence by granting access to the file may outweigh the concern to protect confidential information, on the basis of the reasoned request by the party claiming access and of the point of view of the person to whom the confidential information belongs, and taking into consideration the relevance of the information and its indispensability in establishing whether an infringement took place and the degree of sensitivity of information.

Even if the exceptions from access to file, provided by the competition law and by the Guidelines on access to file do not expressly refer to the judicial phase, the courts constantly held that the scope underlying the protection of confidential information by the RCC could not be realized without granting such protection also during the judicial phase, insofar still exists the grounds on which the competition authority based its refusal to grant access to confidential information.

## *Russian Federation*

The Federal Antimonopoly Service of the Russian Federation, in carrying out its functions, as part of conducting inspections, handling cases of violation of antimonopoly legislation, monitoring economic concentration, its own requests, receives and uses information, including information that is classified as commercial secret.

According to the Russian legislation, a commercial secret is a mode of confidentiality of information, allowing its owner to increase incomes under existing or possible circumstances, avoid unnecessary costs, maintain a position in the market of goods, works, services or obtain other commercial benefits to which third parties do not have free access on a legal basis and in respect of which commercial secret has been introduced.

The mode of commercial secret is implemented only after the owner of the information constituting a commercial secret takes measures to protect it. At the same time, information containing data that cannot be a commercial secret in accordance with the legislation (for example, information contained in applications, objections, explanations and other materials submitted at the initiative of a person participating in a case of violation of the antimonopoly legislation, written or oral form on issues arising during the consideration of the case of violation of the antimonopoly legislation).

Thus, during consideration of a case, a balance must be ensured between the interests of the persons who provided information constituting a commercial secret to the case materials and those involved in the case of violation of the antimonopoly legislations whose rights and legal interests are affected by the relevant case.

The presence in the case file of information constituting a commercial secret cannot itself constitute a basis for an unreasonable restriction of the rights of persons involved in a case of violation of the antimonopoly legislation in properly preparing and stating their own position.

The rights of persons involved in a case of violation of the antimonopoly legislation are ensured, among other things, by providing persons who have established a commercial secret mode in relation to the information they have submitted, to agree to familiarize themselves with information containing commercial secret to other persons involved in the case.

In the absence of such consent, the announcement in this meeting of information containing a commercial secret, submitted at the request of the antimonopoly body, is carried out in the absence of persons who do not have the right to familiarize themselves with materials containing a commercial secret.

## *Singapore*

The Competition and Consumer Commission of Singapore (“CCCS”) recognises that access to file is an important factor in ensuring the rights of defence for any party against whom a proposed infringement decision (“PID”) is issued. However, the parties’ rights of defence must be balanced against CCCS’s duty to safeguard any confidential information that comes into CCCS’s possession in the course of investigations.

Access to file for competition cases that have reached the PID stage is a statutory right provided for in Competition Regulations 2007, a piece of subsidiary legislation under the Competition Act. All information in CCCS’s files relating to matters referred to in the notice to parties informing them of CCCS’s decision to issue a PID at hand is included in the inspection files for Parties to peruse, whether the information is incriminating or exculpatory. However, confidential information in the documents will be redacted, and CCCS’s internal documents are not included in the inspection files. Access to file can be facilitated by physical inspection or by electronic means.

In the course of investigations, Parties are given opportunities to claim confidentiality over the information they provide. These claims are assessed by CCCS and if the claims are found to be proper and the non-disclosure of the relevant information does not have an impact on the other Parties’ rights of defence, CCCS will redact the information from the inspection files as appropriate for the inspecting Party.

When a matter proceeds to appeal, the appeal body hearing the matter will be given unredacted copies of the relevant documents, while the appellants would be given the documents with confidential information redacted. Parties can apply to have access to the redacted information, and the Competition Appeal Board<sup>6</sup> (“CAB”) has granted such applications, but subject to the conditions that CCCS’s internal documents be excluded from disclosure and that the documents to be disclosed must be limited to those relied upon by CCCS in the investigations, or referred to in the appeal and/or Infringement Decision.

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<sup>6</sup> The CAB is an independent body comprising members appointed by the Minister for Trade and Industry. Under the Act, the CAB hears appeals against decisions of the CCCS. The CAB may confirm or set aside the CCCS decision which is the subject of the appeal, or any part of it, and may remit the matter to CCCS, impose or revoke or vary the financial penalty, give any directions and make any decisions that the CCCS could have made.

## *Slovenia*

The present contribution delves into the interplay between the rules governing the right to access to the file and the law on protection of confidential information in the context of public enforcement of competition law in Slovenia in light of recent case-law developments.

More specifically, the first and second sections provide an overview of the legislative acts entailing provisions on these two fundamental procedural rights and their relationship with one another in attempt to give answers to questions such as who is entitled to request access to the file or to keep certain information in the case file confidential in the first place and when, if such decision is adopted, can the decision not to grant/to grant access to evidence be challenged and by whom.

The third part seeks to illuminate the differences between various categories of confidential information and takes a closer look at their characters in the sense of protection in relation to the right of defense.

The final part touches upon the relationship between leniency statements, right of confidentiality and right to access to the file and concludes with a short section on Agency's obligation to disclose information in its possession to other public bodies.

## *South Africa*

Rule 15 was interpreted by the South African Supreme Court of Appeal (SCA) in *ArcelorMittal*.<sup>7</sup> The SCA found that it would be absurd to allow a member of the public to have access to the Commission's record, whilst refusing a litigant access to the same record.<sup>8</sup> As a result, the SCA found that ArcelorMittal (AMSA), being one of the litigants, was entitled to the Commission record subject to any claims of privilege or any restriction under Commission rule 14.<sup>9</sup>

The SCA found that the Commission could not prevent access to the record generally, but that it had to identify specific documents or categories of documents to which it may wish to restrict access.<sup>10</sup> The SCA, however, recognised that the Commission may be obliged to restrict information relating to the investigation if it is in the public interest and if the Commission reasonably believes that disclosure would prejudice the future supply of such information.<sup>11</sup>

However, the SCA did not clarify the stage at which a respondent could get access to the Commission's record, namely whether a respondent is entitled to have access to the Commission's record before or after close of pleadings.<sup>12</sup>

### **Legal developments following *ArcelorMittal* interpretation of Rule 15**

Following the SCA's judgment in *ArcelorMittal*, the Commission received an avalanche of requests for access to the Commission's record in various cases during the pleading stage, but before the filing of the respondents' answering affidavits. The respondents in complaint proceedings used the SCA's judgment in *ArcelorMittal* to circumvent the normal discovery process, which ordinarily happens after the close of pleadings. In some cases, the respondents refused to file their answering affidavits before receiving the Commission's record. This resulted in protracted interlocutory applications for access to the Commission's record resulting in a negative impact on the length of the litigation process.

Prominent examples of the impact of the old Rule 15 in delaying cases being heard on the merits are *Group Five Ltd v The Competition Commission*<sup>13</sup> (Group 5); *The Standard Bank of South Africa Ltd v the Competition Commission* (Standard Bank);<sup>14</sup> *Waco Africa (Pty)*

<sup>7</sup> *Competition Commission v ArcelorMittal South Africa Ltd and Others* – 2013(5) SA 538 (SCA).

<sup>8</sup> *ArcelorMittal* para 46.

<sup>9</sup> *Ibid.*

<sup>10</sup> *ArcelorMittal* para 50.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Group 5 (Tribunal)* para 18.

<sup>13</sup> *Group Five Ltd v The Competition Commission* (CR229Mar15/DSC124Sep15) – Tribunal decision of 18 January 2016; *Group Five Ltd v The Competition Commission* (139/CAC/Feb16) – CAC decision of 23 June 2016.

<sup>14</sup> *The Standard Bank of South Africa Ltd vs the Competition Commission* (160/CAC/Nov17).

*Ltd and others v Competition Commission;*<sup>15</sup> and *Continental Tyres South Africa (Pty) Ltd and Goodyear South Africa (Pty) Ltd v the Competition Commission and others.*<sup>16</sup>

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<sup>15</sup> Waco Africa (Pty) Ltd and others v Competition Commission (CR27Feb18/STR301-EXC300-DSC078/Mar-May18.

<sup>16</sup> Continental Tyres South Africa (Pty) Ltd and Goodyear South Africa (Pty) Ltd v the Competition Commission and others (case no. 157/CAC/Nov2017.

## *Spain\**

Spain's submission first addresses the rules on access to the case file during the proceedings by parties with a legal interest. It also discusses access once the proceedings have been closed, under transparency rules. Then, the submission explains how confidential information is protected by the Spanish Competition Authority. In particular, the submission outlines the three-step analysis used to determine whether confidential treatment should be granted and how are leniency materials protected. Finally, the submission outlines the main procedural rules concerning confidentiality requests.

## *Switzerland*

In Switzerland, investigated parties as well as interested third parties can access the case file. The right of the investigated parties to access the case file is well established and its precise content has been specified in case law. In contrast, disclosure of documents to interested third parties is more complex because it takes place based on provisions from different codes and the prerequisites as well as the scope of the disclosure differs among these provisions. Third parties that request access to the case file are in particular the victims of an anticompetitive behavior, e.g., public procurement agencies affected by bid rigging. They have an interest to access documents of the case file in order to evaluate civil claims for compensation. Compared to the access of investigated parties, disclosure to victims of bid rigging is limited in scope and delayed in time.

## *Chinese Taipei*

The Administrative Procedure Act is the fundamental statute governing all activities of administrative agencies in Chinese Taipei. It is designed to ensure rights of defense for parties during administrative procedures, and to enable them to acquire sufficient information relevant to investigations, in which they are involved, in order to properly defend themselves. The materials and files that parties or interested third parties are granted by administrative authorities to access are limited to the extent necessary to claim or protect their legal interests. On the other hand, administrative authorities cannot deny any application for access to files without justification. To make an appropriate decision, taking into account all circumstances favoring or hindering the parties, the Fair Trade Commission of Chinese Taipei (hereinafter referred to as “CTFTC”) conforms with the applicable provisions of the Administrative Procedure Act to provide access to case files.

Although the right of access to files is crucial to parties under investigation, the scope of disclosure is subject to applicable laws. Information obtained from the CTFTC’s investigations, including sensitive information submitted by complainants and leniency applicants and trade secrets may be classified as confidential. Therefore, the CTFTC intends to strike a balance among protection of access, collaboration with other government agencies and ensuring confidentiality by following some practical principles such as seeking approval from the providers of the information, removing, redacting or sealing the confidential information prior to disclosure of the file, etc. In addition, subject to domestic legal restrictions, only non-confidential information, including empirical enforcement experience and observations, can be shared with foreign competition authorities.

## Turkey

The right of access to file has been ensured in Article 44 (2) of the Act on the Protection of Competition No. 4054 (Competition Act). The procedure and principles of the exercise and arrangement of the right has been regulated in Communiqué Related to the Arrangement of Access to File and Protection of Confidential Information No. 2010/3 (Communiqué).<sup>17</sup>

Article 44 (2) of the Competition Act states that, parties may ask for a copy of any documents drawn up within the agency concerning them, and if possible, a copy of evidence obtained. Article 6 of the Communiqué elaborates and ensures that, parties may access all the documents produced and evidence assembled relating to them within the body of competition authority. However, in accordance with the Communiqué, internal correspondences and the business secrets and other confidential information related to other undertakings, associations of undertakings and persons are not accessible. The regulations under Communiqué are arranged regarding the investigations, however they are also applied comparatively to mergers and acquisitions under final examination and to the process of revocation of the exemption.<sup>18</sup>

The right to access to file has been balanced with the protection of confidential information and business secrets. In accordance with the Article 6 of the Communiqué, parties may access to file except the business secrets and other confidential information related to undertakings, associations of undertakings and other persons. The request of access to file may be fully or partially denied if the documents include any business secrets and other confidential information. However, access will be granted, where possible, by deleting the business secrets and confidential information.

It should also be noted that, in Turkey, issues not covered within the scope of Communiqué are covered under the Act on Right to Information No. 4982 (Information Act) since Communiqué covers only issues related to competition law. In that regard, the right of complainants and the third parties access to the file is not legislated in the Competition Act or the Communiqué. Therefore, request of those should be examined within the scope of the general rules.<sup>19</sup> In that manner, general rules refer to the Information Act which is the fundamental regulation of right to access the information under Turkish Law. According to the Article 4 of the Information Act, everybody<sup>20</sup> (real or legal person) has the right to acquisition of information. However, there are some limitations set regarding the requested information in the Information Act.

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<sup>17</sup> [https://www.rekabet.gov.tr/Dosya/communiqu%C3%A9s/dosyaya\\_-giris\\_hakk-\(2016-2-ile-degisik-2010-3\)-20191022160924378-pdf](https://www.rekabet.gov.tr/Dosya/communiqu%C3%A9s/dosyaya_-giris_hakk-(2016-2-ile-degisik-2010-3)-20191022160924378-pdf)

<sup>18</sup> Article 16 of the Communiqué.

<sup>19</sup> Article 5(3) of the Communiqué.

<sup>20</sup> The foreigner residents in Turkey or foreign legal entities operating in Turkey can benefit from the Information Act according to the principle of reciprocity and with the condition of the requested information must be relevant to them.

## *Ukraine*

According to the Law on Protection of Economic Competition (“LPEC”), parties to a case have a right to access to the case files and materials (except for information with restricted access, as well as for information, disclosure of which is capable of affecting interests of other case participants, or affecting further investigation of the case). Under the Rules Applicable to Proceedings on Applications and Cases on violations of Legislation on Protection of Economic Competition (Rules of Proceedings), access to the case files is granted only after the parties received a copy of a statement of objections in the case.

The parties to the AMCU case access the file (its non-confidential part) in the AMCU’s premises and may photocopy such documents. Under the Law “On Access to Public Information” (“APIL”) requested information can be sent via e-mail. Under the APIL, a decision of a public authority to deny full access to information or a failure to provide such access is appealable to the head of the authority in question, or a higher authority, if applicable, or to the Human Rights Commissioner (Ombudsman), or to a court.

At the same time, the AMCU Law provides safeguards for non-disclosure of information with restricted access and bank secrets received by the AMCU. In particular, under Article 22<sup>1</sup> (3-4) of the AMCU Law, restricted information received by the AMCU in the course of exercising its powers shall be used solely for the purpose of ensuring the fulfillment of the AMCU tasks specified by the economic competition protection laws and is not subject to disclosure. Such information may be provided to the investigating authorities and the court in accordance with the law. As a matter of law, the AMCU officers bear legal liability (administrative and criminal) for unauthorized disclosure of commercial secrets.

In accordance with Article 31 (6) of the LPEC, the AMCU decisions in antitrust cases are published on the official AMCU website within 10 working days as of the day of their adoption, except for the information with restricted access which shall be excluded or otherwise altered to ensure its sufficient protection and, on the other hand, sufficient transparency regarding the reasoning of the decision.

Upon receiving a request for disclosure of internal official use information AMCU denies access to such information as a matter of law, as otherwise it will not be able to ensure objective and comprehensive investigation of cases and adequate protection of competition. Government agencies and other possessors of confidential information may handle this information strongly within the scope of their authority, under strict procedures specified by law and upon consent of persons who provided it, unless otherwise provided by law.

When a person provides the AMCU with information which he/she defines as confidential, the AMCU is guided by a specific procedure. Information is treated (and protected) as confidential if such information was clearly marked as confidential before its submission to the AMCU. Beyond that, there should be a clear justification for classifying such information.

Under Article 22<sup>2</sup> of the AMCU Law, the AMCU, on the basis of international treaties ratified by the Ukrainian Parliament cooperates with the competent authorities of other states, in particular through the exchange of information with restricted access. There is only one such international treaty in force – Agreement for the implementation of a coordinated antimonopoly policy dated January 25, 2000. However, the provisions of the Treaty regarding the exchange of confidential information are not practically operative, as

there are no appropriate systems for the protection of such information. At present, the possibility of concluding bilateral treaties with the respective states is being considered.

## *United Kingdom*

This submission considers the basis on which the CMA provides access to documents on its case file during the course of competition investigations.<sup>21</sup> It sets out, in particular, the relevant legal framework for the provision of access to file in competition investigations and the way in which the CMA handles confidential information.

Under the Competition Act 1998 ('CA98'), the CMA has powers to apply, investigate and enforce the prohibitions under Chapter I and Chapter II of the CA98 and Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU'). Both the CA98 and the TFEU prohibit, in certain circumstances, agreements and conduct which prevent, restrict or distort competition, and conduct which constitutes an abuse of a dominant position.

When the CMA applies national competition law either to agreements which may affect trade between Member States or to abuse prohibited by Article 102, the CMA is also required to apply Articles 101 and 102 of the TFEU.<sup>22</sup>

When carrying out competition investigations, the CMA will have regard to its published guidance on procedures in competition investigations, 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases'; CMA8.<sup>23</sup> The CMA has also published guidance on the CMA's policy and approach to matters such as information requests, handling information and disclosing information to parties when involved in case and projects across the CMA, in 'Transparency and disclosure: Statement of the CMA's policy and approach'; CMA6.<sup>24</sup> The CMA applies its guidance flexibly. While the CMA will have regard to the guidance when dealing with suspected competition law infringements, it may adopt a different approach when the facts of an individual case reasonably justify it.<sup>25</sup>

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<sup>21</sup> This submission does not further consider disclosure of documents in respect of the CMA's merger control functions or as a prosecutor of the criminal cartel offence in the UK. The CMA notes that there is no explicit statutory obligation for the CMA to give access to its case file in merger cases. However, the CMA will disclose some of the documents on its case file where this is considered necessary for the merging parties to understand the CMA's key reasoning. The scope of this disclosure is far narrower than under access to the file in a Competition Act 1998 case. Disclosure in relation to criminal cartel prosecutions under the Enterprise Act 2002 is governed by provisions in the Criminal Procedure and Investigations Act 1996 and related Code of Practice, regulations, guidance and the Criminal Procedure Rules.

<sup>22</sup> Article 3 of Council Regulation on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU (Regulation 1/2003). In the event of a 'no deal' Brexit, Articles 101 and 102 TFEU will no longer be applied in the UK, and the CMA and concurrent regulators will no longer be subject to Regulation 1/2003. Please see the CMA's Guidance on the functions of the CMA after a 'no deal' exit from the EU, 18 March 2019 (CMA106) for further details.

<sup>23</sup> Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8, January 2019).

<sup>24</sup> Transparency and disclosure: Statement of the CMA's policy and approach (CMA6, January 2014).

<sup>25</sup> CMA8, paragraph 1.5.

The CMA's power to enforce competition law under the CA98 and the TFEU is a concurrent power and certain UK sectoral regulators also carry out investigations under these provisions in their particular sectors.<sup>26</sup> Sectoral regulators have similar procedures for investigating potential breaches of competition law, including in relation to access to file, and are bound by the same statutory provisions as the CMA in relation to the enforcement of competition law under the CA98.

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<sup>26</sup> For example, the Financial Conduct Authority (FCA) in relation to financial services; the Office of Communications (Ofcom) in relation to activities connected to electronic communications, broadcasting and postal services matters; and the Gas and Electricity Markets Authority (Ofgem) in relation to gas and electricity. See Regulated Industries: Guidance on concurrent application of competition law to regulated industries (CMA10, March 2014) for more detail.

## *United States\**

The United States (“U.S.”) submission is provided on behalf of the Federal Trade Commission and the U.S. Department of Justice Antitrust Division. The submission first discusses what the case file is and how it is created. Then, it addresses the means and circumstances under which parties or the public may access the case file, such as disclosures required in federal court or administrative litigation or requests pursuant to the Freedom of Information Act. Finally, the submission addresses the limits on access to the case file, including but not limited to, protections for confidential information.