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COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by
Norway**

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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

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1. Introduction

1. The Norwegian Competition Authority (hereinafter the NCA) is an administrative agency with powers to enforce the merger control rules and the prohibitions against anticompetitive practices of the Norwegian Competition Act.
2. In the present contribution, the NCA will briefly explain to what extent parties and third parties are granted access to the NCA's files and the procedures that are applied in that regard.
3. The substantive merger control rules of the Norwegian Competition Act are equivalent to the rules of the EU Merger Regulation. Antitrust investigations concern suspected infringements of the prohibitions against restrictive agreements and abuses of a dominant position. These prohibitions are laid down in Sections 10 and 11 of the Norwegian Competition Act. In substance these provisions are equivalent to Articles 101 and 102 of the TFEU¹ and Articles 53 and 54 of the EEA Agreement.
4. The NCA's decisions are administrative in nature. In infringement proceedings, the NCA is empowered to impose administrative fines on undertakings.²
5. In Norwegian law, "*the Public Administration Act*"³ and "*the Freedom of Information Act*"⁴ contain general rules on access to file and the treatment of confidential information.
6. The parties' right to access 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. Rules determining the scope of the parties' access to the file are found in the Public Administration Act.
7. The Freedom of Information Act gives members of the general public a right to access documents in the possession of public authorities. The purpose of the Act is to facilitate an open and transparent public administration with a view to strengthen the freedom of information and expression, democratic participation, legal safeguards for the individual, confidence in the public authorities and control by the public. Exceptions from the right to access must have a statutory legal basis.
8. In addition to these general rules, which apply to all branches of the public administration, there are some specific provisions in the Norwegian Competition Act which

¹ Treaty on the Functioning of the European Union.

² Criminal sanctions, such as fines or imprisonment, for infringements of the Competition Act can be imposed on natural persons, but not on undertakings. Cases involving criminal sanctions must be brought by prosecuting authorities and follow the procedures for criminal cases. Such cases fall outside the scope of this contribution.

³ An unofficial translation of the Public Administration Act can be found at: <https://lovdata.no/dokument/NLE/lov/1967-02-10>

⁴ An unofficial translation of the Freedom of Information Act can be found at: <https://lovdata.no/dokument/NLE/lov/2006-05-19-16>

concern transparency and the protection of confidential information in competition cases in particular.

9. Below a distinction will be made, first, between merger cases, on the one hand, and antitrust investigations, on the other. A further distinction will be made between the parties' rights to access documents in the file and the rights of third parties to access documents in the NCA's possession.

2. Access to the file

2.1. The parties' access to the file in merger cases

10. Pursuant to Section 18 of the Public Administration Act, parties in merger cases have the right to acquaint themselves with the documents in the Authority's file. The notifying parties will therefore be given access to the NCA's file upon request at every stage of the procedure following the notification of a merger. Access to the file is granted by electronic means.

11. The parties are entitled to access all documents in the NCA's file subject to certain exceptions. The most important exceptions are: 1) the NCA's internal documents, 2) confidential information concerning third party undertakings, and 3) the NCA's correspondence with international institutions and foreign competition agencies.

12. If there is a legal basis for exempting information from access but not a duty to do so, Section 18 (2) of the Public Administration Act provides that the NCA shall consider granting full or partial access. In such cases, access should be granted if the interests of the parties outweigh the need for exemption.

13. The NCA's internal documents drawn up for its own internal preparation of the case are exempted from access in order to foster free and open internal deliberations within the NCA. Parties should nevertheless be granted access to factual information in internal documents, with the exception of facts that are immaterial to the case or available in other documents to which the parties have access.

14. The NCA's correspondence with international institutions and foreign competition agencies is normally also exempted from access. This exemption applies, in particular, to information which is received from international organisation on the condition that the information shall not be made public or which in accordance with established practice shall not be disclosed.

15. Parties are generally granted partial access to information provided by or obtained from third parties in which confidential information has been removed.

16. While parties and their representatives do not have a right to access confidential information, Section 13 b of the Public Administration Act provides that the duty of secrecy pursuant to Section 13 of the Act (see below) does not prevent information in the case file from being disclosed to the parties or their representatives. Such access could therefore be granted if the need for transparency and procedural fairness were to outweigh the need for protection.

17. In merger cases, however, redacted versions of confidential documents are normally sufficient to ensure procedural fairness and the effective exercise of the rights of

defence. Access to confidential information in third party documents is therefore generally not granted.

18. Access to confidential information would in any case not be granted without consulting the provider of the information.

19. The Public Administration Act also provides a legal basis for the establishment of confidentiality rings in merger proceedings. The NCA may thus, for instance, grant access to market data used in quantitative analyses in merger proceedings to the parties' legal counsel and economic experts when necessary to ensure a due process. The strict conditions described above will apply. The employees of the parties will as a rule not be included in confidentiality rings. The same provisions of the Public Administration Act would also allow for the organisation of data rooms.

20. If granting access to confidential information is considered necessary, strict conditions will apply. First, according to Section 13 b of the Public Administration Act, the information to which access is granted may only be used to the extent this is necessary to protect the parties' interests in the case in question. The NCA is required to inform the parties that other use is prohibited. Secondly, in accordance with the same provision, the NCA will impose a duty of secrecy on the individuals to whom confidential information is disclosed by way of confidentiality undertakings. The NCA also reminds the individuals in question that breaches of the duty of secrecy is a criminal offense. Thirdly, the number of persons who will receive the information in question will be kept as limited as possible.

2.2. The parties' access to the file in antitrust investigations

21. The parties' access to the file in antitrust investigations is at the outset subject to the same rules as in merger cases. Pursuant to Section 26 of the Norwegian Competition Act, however, undertakings subject to antitrust investigations only have the right to access documents in the NCA's file to the extent such access can be given without causing harm or risks to the investigation or any third party. Consequently, the parties will not necessarily be given access to the documents in the NCAs file at every stage of the procedure, as is the case in merger proceedings.

22. In case of suspected cartel behaviour or other serious infringements of the Competition Act, access to the file at an initial stage of the investigation will often have to be denied in order to safeguard the effectiveness of the investigation. In particular, it may be necessary to reject access in order to prevent potential evidence from being removed or destroyed, prevent coordination of witness statements or that witnesses are pressured or induced to give false or incomplete testimony. Some restrictions of the rights to access the file may also be required in order to protect the interest of third parties, in particular witnesses, against the risk of retaliatory measures. Rejections of access to the file during an investigation must be reasonable necessary and proportionate.

23. Furthermore, as will be explained in section 4 below, a duty of secrecy applies with regard to the identity of whistle-blowers and corporate statements submitted in leniency or settlement proceedings.

24. If the NCA has carried out inspections at the premises of the involved undertakings, each undertaking will receive a copy of the electronic data seized by the NCA at their premises. Original paper documents or other items of evidence gathered during inspections will be returned when they no longer need to be retained.

25. If the NCA proceeds to issue a statement of objections (SO), the undertakings involved are granted access to file upon request. Depending on the circumstances, partial access may have been granted at an earlier stage.

26. In cases involving several undertakings, each undertaking will normally receive a non-confidential version of the SO in which confidential information about other undertakings has been removed. Access to documents on the file that solely concern other undertakings will not be granted.

27. The scope and modalities of access to file in antitrust investigations are otherwise in essence the same as in merger cases. Parties will normally be given access to redacted versions of documents containing confidential information.

28. If it were to appear in individual cases that access to redacted documents might not allow the parties to exercise the rights of defence effectively, access to confidential information in third party documents could be considered. If such access were to be granted, the same strict conditions would apply as explained above.

2.3. Third parties' access to documents in the NCA's possession

2.3.1. Merger cases

29. Pursuant to Section 3 of the Freedom of Information Act, documents in the NCA's case files and document registers are at the outset accessible to the members of the general public upon request. Any person may thus request access to such documents or registers, including interested third parties.

30. The use of information obtained pursuant to the Freedom of Information Act are not subject to any restrictions. In some cases, however, other legislation or the rights of third parties may entail some restrictions on the freedom to use of the information obtained.

31. The right to access information in the possession of the NCA under the Freedom of Information Act is subject to a number of statutory exceptions.

32. The most important exceptions are the same as those mentioned above regarding the parties' access to file: 1) the NCA's internal documents, 2) confidential information concerning third party undertakings, and 3) the NCA's correspondence with international institutions and foreign competition agencies.

33. However, if there is a legal basis for exempting information from access, but not a duty to do so, the NCA shall, according to the Freedom of Information Act, consider granting full or partial access.

34. Information that is subject to a statutory duty of confidentiality, such as business secrets or other confidential information, is exempted from access without any exception. Confidential information is thus duly protected.

35. Where possible, the NCA will, upon request, grant partial access to non-confidential version of documents on its files. If the most essential parts of a document must be regarded as confidential, the whole document may, however, be exempted from access.

2.3.2. Antitrust investigations

36. Pursuant to Section 26 of the Norwegian Competition Act, as long as an antitrust investigation has not been concluded, the Freedom of Information Act does not apply to

documents in the NCA's case file. Consequently, third parties will not be granted access to documents in ongoing antitrust investigations.

37. When antitrust cases have been closed, any person may request access to documents in the NCA's files pursuant to the Freedom of Information Act. Documents that are part of leniency applications and settlement submissions, however, remain exempted from access also after the closure of investigations (see below).

38. As in merger cases, information that is subject to a statutory duty of confidentiality as well as the NCA's internal documents, are exempted from access.

2.4. Appeals

39. 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. Rejections of requests for access to documents under the Freedom of Information Act in on-going antitrust investigations cannot be appealed, however.

40. Appeals must to be addressed to the Tribunal but should be sent to the NCA. The NCA must reassess the request and decide whether or not to reverse its position. If the rejection is maintained, the appeal is submitted to the Tribunal.

41. The Tribunal has the power to overturn the NCA's decision fully or partially, but can also send the case back to the NCA for renewed assessment.

3. Protection of confidential information

3.1. Substantive rules

42. Section 13 of the Public Administration Act contains rules on the duty of secrecy applicable to any person rendering services to, or working for, an administrative agency such as the NCA. The duty of secrecy continues to apply after the person concerned has rendered its services or the employment relationship has been terminated.

43. According to Section 13, the duty of secrecy covers both information about an individual's personal affairs (sensitive personal information) as well as business secrets.

44. To constitute a business secret, the information at issue must, first, pertain to a business or commercial activity. Information that will be regarded as being of a business nature includes, amongst others, information about technical and financial matters, the undertaking's know-how, costs, production methods or processes, sources of supply, output, sales, prices, margins, market shares, customers and distributors, marketing information, business strategies or rights and obligations in business contracts.

45. The information must, secondly, be business sensitive in the sense that disclosure could be harmful to the undertaking that the information concerns. Such harm would have to be of an economic nature in the form of losses or reduced profits. Harm could arise directly as a result of disclosure or be caused by the fact that competitors could take advantage of the information at issue.

46. In the assessment of whether a piece of information constitutes a business secret it may be taken into account that disclosure could weaken the trust in the administrative agency and thereby make information gathering in future cases more difficult. This is of

particular relevance to the NCA as it gathers significant amounts of business sensitive information from market players in merger and antitrust investigations.

47. Section 13 of the Public Administration Act is a general provision applicable to both merger and antitrust cases. It applies to information submitted by parties as well as third parties.

48. Section 13 of the Freedom of Information Act contains a similar provision that exempts confidential information from third party access.

49. The Ministry of Justice has issued guidelines regarding the Freedom of Information Act, which also address what types of information that should be regarded as business secrets. Further guidance can be found in the decisional practice of amongst others the Competition Tribunal.

50. As explained above, the fact that information is treated as confidential does not necessarily rule out that the parties' legal counsel and economic experts are given access to such information. Access would, however, only be granted when required to ensure a due process, strict conditions would apply, and the person or undertaking which provided the information would be heard.

51. In addition to the general rules on confidentiality in the Public Administration Act, some provisions on the duty of secrecy can be found in Norwegian Competition Act

52. Pursuant to Section 27, first paragraph, of the Norwegian Competition Act anyone who carries out services or employment for the NCA have an obligation to maintain secrecy of the identity of whistle-blowers. This provision covers information that directly or indirectly may reveal the identity of natural persons or undertakings that have submitted tip-offs about possible infringements of the Competition Act to the NCA. The duty of secrecy also applies to parties and their representatives in the case at issue if they receive such information during the proceedings.

53. Pursuant to Section 27, second paragraph, a similar obligation to maintain secrecy applies to corporate statements submitted to the NCA as part of leniency applications or settlement submissions. This covers information which contains an acknowledgement on the part of the undertaking of its knowledge of an infringement of Section 10 of the Competition Act and its participation therein. The duty of secrecy only applies to information which have been prepared especially with a view to obtaining leniency from fines or as part of settlement procedures.

54. With a view to facilitate damages actions, access to confidential information may be granted pursuant to Section 27 a, second paragraph, to a legal or natural person with a legitimate interest when an investigation has been concluded. Access can only be granted to the extent this would not be unreasonable to the undertaking concerned.

55. The NCA may give other domestic authorities access to confidential information in some rather limited circumstances. The NCA may, in particular, inform prosecuting authorities or other enforcement agencies about infringements of laws and regulations when certain conditions are fulfilled.

56. According to an international agreement concluded between the Nordic countries, the NCA can exchange confidential information with competition authorities in other Nordic countries, both in antitrust and merger cases. Furthermore, the NCA can exchange confidential information with the EFTA Surveillance Authority and the European Commission with a view to facilitate the enforcement of the competition rules of the EEA

Agreement. Finally, the NCA may share confidential information with other competition authorities upon waivers from the involved undertakings.

3.2. Procedural aspects

57. Respondents who reply to requests for information issued by the NCA are asked to identify information in their replies which in their view should be given confidential treatment. They are also asked to state on what basis confidential treatment is warranted. This facilitates the assessment of to what extent parties and third parties can be granted access to the information gathered during the NCA's investigation.

58. Third party respondents – such as competitors or customers – may in some cases mark all the information they wish to exempt from disclosure without explaining why they consider that there is a sufficient legal basis for confidential treatment. Other respondents may fail to indicate at all whether their reply contains confidential information.

59. In merger proceedings, however, Section 18 b of the Competition Act requires, first, that respondents clearly identify any confidential information in their replies and that claims for confidential treatment be substantiated. Secondly, it is made clear that if those requirements are not fulfilled, the NCA is entitled to assume that the respondents do not object to the disclosure of the information they have provided. Since merger proceedings are conducted within strict deadlines, this provision is helpful in ensuring that issues relating to the parties' access to file can be resolved in an effective manner. In requests for information respondents are informed of the content of this provision.

60. In antitrust cases, no similar provision is applicable.

61. It is for the NCA to decide whether the respondents' claims for confidential treatment are justified or not based on the legal requirements set out above. If a claim for confidential treatment is disputed and the NCA intends to disclose information that the provider maintains would be harmful to it, the provider may bring an action for interim measures before a district court with a view to obtaining a court order preventing disclosure. In practice, however, disputes about confidentiality issues are settled amicably.

62. Should the NCA by mistake disclose confidential information and cause harm to the provider of the information, the latter may bring an action for damages against the NCA. However, to date no such action has been brought. Intentional or negligent disclosure of confidential information is subject to criminal sanctions.

63. The NCA's case teams are tasked with assessing whether confidentiality claims are justified and to ensure that non-confidential versions of replies to requests for information and other submissions are drawn up and put on the file. This may entail a dialogue with the provider of the information in order to clarify claims for confidential treatment or settle any disputes relating to confidentiality issues. The NCA's case handlers have gained a significant amount of experience in making these assessments. They are therefore able to carry out this task with the sufficient speed and accuracy to ensure that the case handling of the NCA is effective. In case of disputes or if legal advice is needed, the NCA's Legal Department will be consulted.