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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by
Denmark**

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This document reproduces a written contribution from Denmark 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

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1. Introduction

1. In the following, the Danish Competition and Consumer Authority (hereafter the DCCA) will describe some of the Danish rules regarding access to files in competition proceedings and protection of confidential information in such files.
2. The contribution will focus on access to file in cases regarding article 101 and 102 and mergers – and not on the special regulations regarding inspected undertakings right of access to file in cases regarding inspections (“dawn raids”).

2. Who is entitled to access to the file?

3. The main rule in the Danish Competition Act is that only the investigated parties or merging parties are entitled to access to file. These parties are more precisely the addressees of a possible decision regarding a possible infringement or merger (called “afgørelse”).
4. Other undertakings who have complained to the DCCA do not have access to file except for information directly related to themselves and with respect of business secrets etc. The public in general does not have access to file but will have to wait for a publication of a possible decision from the DCCA.
5. The following will focus on the investigated or merging parties’ access to file only.

3. What is comprised by the right of access to file?

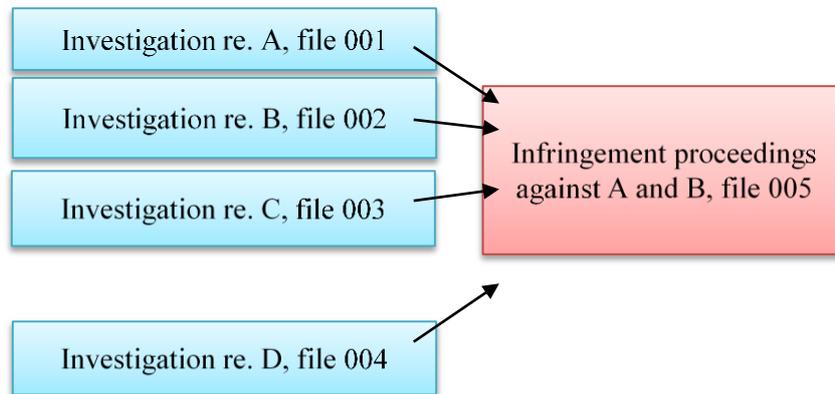
3.1. What is the content of the DCCA’ file

6. As a main rule the investigated or merging parties (the addressees of a possible infringement or merger decision) have access to all documents in the DCCA’s file regarding this possible decision.
7. The DCCA’s file regarding a specific competition case should include all relevant – internal and external – documents related to the proceeding in question. Thus, the DCCA’s file will not only contain documents, information and correspondence obtained from the parties (the addressees of a possible decision), but also documents obtained from, information about and correspondence with third parties (i.e. undertakings complaining, undertakings replying to market investigations etc.) insofar as they are relevant to the proceeding in question.
8. To give an example:
9. The DCCA carries out inspections at four separate, competing undertakings A, B, C and D to uncover if possible infringements of article 101 have taken place. During these inspections A, B, C and D are entitled to access to file to the inspections related to themselves but not those of the others.

10. After some further investigation, the DCCA decides to initiate a proceeding against the undertakings A and B regarding a possible infringement. In this case, A and B are entitled to access to file in this competition case against them.

11. This file includes relevant documents from the investigations at A and B as well as C and D. Relevant documents means all documents which contain information related to the undertakings behavior – including for example both information in favour of and against a possible infringement. However A and B are not entitled to access to the rest of the documents obtained at the investigations at C and D (and A is not entitled to the rest of the documents obtained at B and vice versa).

Figure 1.



3.2. Which documents and information are exempted from right of access

12. The main rule in the Danish Administrative Law is that the investigated or merging parties have right of access to all external documents in the file. I.e. documents exchanged with persons, undertakings and authorities outside the DCCA and the European Competition Network.

13. Furthermore, the right of access also includes internal notes of for example information received orally, which is relevant for the proceedings.

14. As an exception, the parties' access to file is restricted to protect confidential information, for example confidential information regarding competitors, trading partners and competitive conditions on the market in question. However, this is only possible 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.

4. The procedure when access to file is requested

4.1. When can the parties obtain access to file?

15. The investigated parties in a competition case or the merging parties are entitled to access to file at *any time* from the initiating of the proceedings related to a prohibition or merger decision. Such parties can also obtain access to file after the case is closed.

16. In practice this means that for example investigated parties will often request “ongoing access to file” (called “løbende aktindsigt”) from the time when they receive notice that the DCCA’ has initiated proceedings – i.e. a preliminary statement of objections called “Meddelelse om betænkeligheder” and onwards.

17. In mergers, the merging parties will often request ongoing access to file from the time of the final notification.

18. The Danish Administrative Act states that access to file should be granted upon request and as a main rule within 7 working days. However, if for example a hearing is needed in order to establish possible confidential information, access to file cannot necessarily be granted within 7 working days.

4.2. How is confidential information identified?

19. When a party request access to file the DCCA will consider whether the external documents in the file contain confidential information about other parties.

20. As a main rule confidentiality is identified through hearing of the undertakings to which the information relates.

21. To continue the example in section 3.1. above:

22. In the case against undertaking A and B mentioned above, A requests access to file, which contains a document obtained at the inspection at C.

23. In order to assess whether this document contains confidential information regarding C, the DCCA conducts a hearing of C. Based on the result of the hearing - as well as the DCCA’s knowledge of the market etc. - the DCCA assesses whether the information can be considered confidential and whether undertaking A can protect its rights of defense without the information.

5. The possibility to challenge a decision

24. The investigated or merging party requesting access to file can appeal if the DCCA decides to exempt information from access to file. Such an appeal can be made any time after receiving the decision, and as a main rule such an appeal will have suspensive effect (unless there is a statutory time limit or significant considerations for public or private interests).

25. Furthermore, the undertaking, which the information concerns, has the possibility to appeal if the DCCA decides not to exempt information.

26. To continue the example in section 4.2. above:

27. Assume the DCCA decides to exempt information from the document obtained at undertaking C. Hence, undertaking A has the option to appeal this decision to the Danish Competition Appeals Tribunal.

28. If on the other hand, the DCCA will not exempt the information even though undertaking C claims that the information is confidential, the DCCA will give undertaking C the opportunity to appeal the DCCA's decision regarding assessment of confidentiality – before giving undertaking A access to file.

29. The appeal is made to the Danish Competition Appeals Tribunal and, depending on the circumstances, such a proceeding can be finished within 2-6 months. If the Danish Competition Appeals Tribunal upheld the DCCA's decision, the complaining undertaking has the possibility to appeal to the courts.

6. How is confidential information protected?

30. According to the Danish Administrative Act the investigated or merging parties are entitled access to file in *all* external documents. If the DCCA decides that information in a document should be exempted, the information in question will be blanked out and access to file will be given in the rest of the document.

31. Thus, the investigated or merging parties can request access to all draft versions of minutes of a meeting, which have been exchanged with the third party in question in order to obtain their consent to the wording – except confidential information contained in the different versions.

32. According to the Danish Administrative Act, documents or information obtained through access to file can be used for purposes also outside the proceedings in question. Thus, as a main rule information granted through access to file is not confidential.

33. Only in rare circumstances, and provided specific conditions are met, the Danish Administrative Act allows the possibility to impose a duty of confidentiality.

34. To give an example from a merger:

35. The DCCA is handling a merger proceeding notified by A and C. In order to assess the merger the DCCA carries out a survey among the competitors B, D, E, F and G. They are requested to answer a number of questions – and at the same time – to state whether they consider their answers confidential.

36. Undertaking A requests access to file in the results of the survey. The answers includes information about B, D, E, F and G's turnover and market shares which undoubtedly are confidential. On the other hand this information is also important for the assessment of the merger and thus for the defense of A and B. The DCCA balances these considerations by giving A access to the information in ranges – which protects confidentiality and allows A (and B) to protect their rights.

37. The answers also includes information about D, E and F's clearly confidential business strategies which the DCCA exempts from access to file as the information is not important for the assessment of the merger.

7. Cases where access to file provides practical problems

38. 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.

39. 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.

40. In certain situations granting access to file provide practical problems. In particular, this may be the case in merger proceedings due to the following circumstances:

1. In a merger proceeding the DCCA has to make a decision within statutory time limits.
2. At the same time the amount of documents and information in a merger proceeding can be substantial, including a long range of sensitive information about other market participants.
3. Therefore, the handling of access to file is very time consuming as it requires:
 - a. identification of all information where a hearing of third parties is required;
 - b. hearings of these third parties;
 - c. subsequent assessment of what information the DCCA considers confidential; and
 - d. assessment of what information can be exempted taking the merging parties' rights of defense into consideration.
4. Furthermore, the handling of access to file in especially market surveys also requires that the DCCA assess whether the merging parties will obtain access to confidential information about the market structure as such – i.e. to the detriment of the competition at the market.
5. Moreover, depending on the information in question and taking the merging parties' rights of access to file into consideration, the DCCA should decide whether the confidential information should be
 - a. left out completely (for example information about business strategies),
 - b. substituted with ranges (for example market shares),
 - c. given in an anonymized form (for example answers regarding trading partners view on a dominant undertaking's merger).
6. Finally, when the DCCA has established what information should be exempted from access to file and how, the information should carefully be blanked out from all documents in which they are mentioned.

41. Thus, handling access to file in merger cases requires the same assessments and process as in other cases. However, the statutory time limits combined with a large amount of data may in some cases raise practical challenges. It is important to prioritize this work as the right assessment is crucial to both the merging parties and the competitors who are obliged to answer the DCCA's market surveys. As noted above the merging parties can use all information they obtain through access to file in their further business.

42. In practice, the DCCA receives requests of access to file in almost all infringement and merger cases. Every year a couple of these decisions are appealed to the Danish Administrative Appeal Tribunal. For example, in 2019 the Tribunal upheld a decision where the DCCA had given a merging company access to competitors' market shares in ranges and exempted information, which in practice would narrow the ranges.