

Unclassified**English - Or. English****13 November 2019****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
Latvia**

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This document reproduces a written contribution from Latvia 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. Access to file

1. 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.¹ In wider sense right to access to file or to get acquainted with case file 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.

2. 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 objection² (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. Although person may request access authority may not reveal any information it has about the data subject before investigation phase is finished. 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 before the court.

3. 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 (6¹) of CL also natural person as data subject may request to access to his or her personal data.

4. According to the Article 26 (7) of CL information in the case shall be regarded as internal use information until the decision is taken, and it may be examined only by the persons to whom the officials of the CC present the relevant materials. If the party of the proceedings request information before investigation is finished and access may not be granted due to the interests of investigation the decision to refuse access is taken by the CC.

5. Although after the SO is sent there is a 20 days statutory time limit defined in CL for the parties to have access to the case what may be also extended, in our practice there are cases where a party request access to the file even after replies (opinions) of the parties to the SO are submitted. CC does not have obligation to grant access to the replies (opinions) on the SO received from the parties and additional materials submitted by the other parties. But there could cases when such access may be granted, e.g. in the case one

¹ Article 92 of the Constitution of Republic of Latvia - <https://likumi.lv/ta/en/en/id/57980>

² With this letter CC inform the participants in the process in writing that information necessary for the taking of a decision has been acquired

of the parties submits new incriminating evidences against others. If additional evidences are gathered by the CC on its initiative after the SO is sent CC is obliged to provide access to new case materials. Taking into account procedural economy access to the file may not be granted if the party request to access the same documents previously viewed by the party. In any cases, CC asses the request to access the case file submitted by the party case by case basis. The parties can get the access to the file after the case is closed, e.g., to prepare claim for damages.

6. Parties of the case are granted access to the all information and evidences relating to the case. Access is not granted to the other persons commercial secrets or other confidential information (leniency application, internal documents, etc.). Party who is accused according to CL (addressee of the SO) have the right to request to get access also to confidential information. Decision to grant or to deny access is take by Executive directorate. The presentation of the case file shall take place in the following manner – representatives comes to CC premises and in the presence of expert of CC get acquainted with case file. Parts of the materials of the case file what contain other persons commercial secret or other confidential information are hidden during the disclosure.

7. The case materials which are showed by officials of CC to each party of the case may be distinguished in two parts - general information and information which proves infringement.

8. General information may include different kind of information (documents) – application (from which the case started), addition information which CC gathered from other institutions and information from data bases e.g. Public procurement data base. Also that includes information requests and non-confidential information received, e.g. bidding documentation of the tenderers or information request to the Enterprise Register from which CC can see undertaking shareholders and members of the board, factual and official address, annual turnover of the company, etc.) Also in the file there are information regarding Court warrant (application from CC to get permission to make inspection at the premises of the parties and Court warrant), letter to the police for support during inspection (because in our CL it is stated that our inspection can be hold only in the presence of the police), etc.

9. Case material which contain direct or indirect proofs of the infringement – documents and files obtained during inspection at the premises of involved parties of alleged infringement or from other sources (also, third parties). That applies also to minutes of questions and answers of the representatives of the parties and their employees who possibly were involved or knew of the infringement, electronical evidences (e-mail correspondence between parties involved, files of the documents which are applicable to the case), etc. Also, it could be some financing/accounting documents which proves *de facto* implementation of the infringement.

10. Information which is not disclosed to the parties of the case – leniency application or information received from leniency applicant, documents prepared by the authority internally – reports of experts or documents prepared before inspection (inspection groups, key words, strategy of inspection, questions for the officials, etc.). Concerning such confidential documents as commercial secrets CC only is entitled to show non-confidential version of documents in the file. Information from other agencies if agency applied restricted access status in their proceedings to document submitted to CC will be in the same way protected by the competition authority.

11. Liability for disclosure to CC officials of restricted access information is provided in the Article 10 of the CL, which provides that in case of disclosure of restricted access information injured party may ask for claim of damages in Court.

2. Protection of confidential information

2.1. Scope of the protection

12. 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 the evidence on which the infringement is based. For example, if it is a case of bid rigging and during investigation CC found email correspondence between tenderers where they exchange with information about particular tender it will never be declared confidential information to the parties of the case although that contain commercial or other sensitive data. But such information anyway partly will be protected (personal data etc.) and will not be disclosed not in the public version of decision.

13. According to Article 5 Freedom of Information Law **restricted access information**³ is such information as intended for a restricted group of persons in relation to the performance of their work or official duties and the disclosure or loss of which, due to the nature and contents of such information, hinders or may hinder the activities of the institution, or causes or may cause harm to the legal interests of persons. As restricted access information shall be regarded information:

- which has been granted such status by law;
- which is intended and specified for internal use by an institution;
- which is a commercial secret, except in the case where a purchase contract has been entered into in accordance with the Public Procurement Law or other type of contract regarding actions with State or local government financial resources and property;
- which concerns the private life of natural persons;
- which is related to certifications, examinations, submitted projects (except projects the financing of which is expected to be a guarantee provided by the State), invitations to tender (except invitations to tender, which are associated with procurement for State or local government needs or other type of contract regarding actions with State or local government funds and property) and other assessment processes of a similar nature;

³ Article 5 of Freedom of Information Law - <https://likumi.lv/ta/en/en/id/50601>

- which is for official use only;
- which is the information of the North Atlantic Treaty Organisation or of the European Union, that is designated as "NATO UNCLASSIFIED" or "LIMITE" respectively.

14. Article 5 Freedom of Information Law defines that the author of the information or the head of an institution shall determine restricted access status for information by indicating the grounds laid down in this Law or other laws. The author of information or the head of an institution shall determine restricted access status for information for a time period, which is not longer than one year. The author of information or the head of an institution may decide on setting a new time period, also on cancelling the status prior to the termination of the laid down time period. If the time period for which restricted access status has been determined to information has expired, or if the restricted access status has been cancelled prior to the time period laid down in law, such information shall become generally accessible information. Information, which is accessible to the public without restrictions provided for in law or has already been published, shall not be regarded to be restricted access information.

15. In the competition law proceeding both term “confidential information” and “restricted access information” are used with similar notion. Most of the confidential information are commercial secrets what includes business secrets, strategic plans, or other commercially sensitive information; personally, identifiable or sensitive personal information; information that implicates certain public interests such as national security; information provided by other agencies.

16. According to Article 19 of Commercial law **commercial secrets**⁴ status may be assigned by a merchant for such matters of economic, technical or scientific nature and information, which is entered in writing or by other means or is not entered and complies with the following features:

- it is contained in the undertaking of the merchant or is directly related thereto;
- it is not generally accessible to third parties;
- it is of an actual or potential financial or non-financial value;
- its coming at the disposal of another person may cause losses to the merchant;
- in relation to which the merchant has taken reasonable measures corresponding to a specific situation to preserve secrecy

17. An undertaking has exclusive rights to commercial secrets. An undertaking has the right to request the protection of commercial secrets, as well as compensation for losses, which have been caused by the illegal disclosure, or use of the commercial secrets.

2.2. Procedure for determining confidential information

18. Investigation and decision regarding confidential information are handle by Executive directorate of CC. Procedure for determining the status of restricted access information in competition law proceedings is given in the Article 26¹ of CL. First of all, the submitter of information shall clearly indicate the relevant documents and a justification for the assignment of status of restricted access information. For example, in the case of

⁴ Article 19 of Commercial Law - <https://likumi.lv/ta/en/en/id/5490>

commercial secrets submitter must prove that it fulfills criteria defined in the Article 19 of the Commercial law. If the submitter of information has not fulfilled the requirements to assign the special status, the CC is entitled to refuse to grant confidentiality status notifying the submitter of information and giving seven day time to correct the initial request for confidentiality or submit additional arguments.

19. If the deficiencies are not corrected within the period of seven days, access of the other parties of the case may be restricted based only based on the status of internal use what means till all relevant facts and evidences are gathered (usually when the SO is sent). The CC shall notify the submitter of information refusal to grant access. According to Article 26¹ (4) of CL the CC may require that the person, who requests restricted access status for particular information in the document also submits a non-confidential copy of document.

2.3. Leniency applications

20. The information in the Leniency application shall be treated as restricted access information that may be disclosed only to the parties of the case in order to protect their rights and legal interest. But it is important to highlight that during the procedure when documents of the case are presented to the party CC officials regarding leniency documents only show these documents to the parties without right to make a copy or scanning these documents. Leniency application and documents prepared for submission to the competition authority for immunity from fines or reduction of fines under the CL and protect for disclosure to other institutions. According to Article 250.67 of the Civil Procedure Law a court, when reviewing claims for damages, may require evidences (emails, etc.) but no other leniency documents, e.g., corporate statement of leniency, the testimonies provided within the scope of the leniency program which include information provided voluntarily by a person in oral or written form to the competition authority, or any entries of the relevant information. However, it should be noted that this restriction does not apply to evidence existing independently from the investigation conducted by the competition authority, regardless of whether such information is in the case materials of the competition authority or not. In any case, the CC carefully evaluates and differentiates the information provided to it, preserving both the leniency applicant's interests and ensuring the rights of defense of the other parties to the case.

2.4. Sharing of confidential information

21. Upon a request of a competition authority of another Member State in a case regarding a possible infringement of European Union competition law, the CC may perform the investigation activities (inspection) in relation to existing market participants in the territory of Latvia in accordance with the procedures provided for in CL and other laws and regulations⁵. Also regulation stated in Council Regulation No 1/2003 determine cooperation between authorities. To carry out cooperation effectively authorities should also exchange with confidential information.

22. During the investigation CC is entitled to share confidential documents where are signs of other infringements with other agencies performing criminal or administrative investigation according to their competence. CC have a rights to use in administrative procedure evidences gathered gathered during the criminal investigation.

⁵ Article 32, 33., 34 of Competition Law - <https://likumi.lv/ta/en/en/id/54890>

23. During the litigation CC submits copies of the case materials (case file) to the court indicating which information in particular documents are confidential. Court is also obliged to to secure confidentiality. In practice the court taking into account our request for information protection and protect confidentiality of information to the same extent as CC. Court may revise such status during the litigation stage if the one of the parties request and court recognize that is necessary for this party defence.