

Unclassified**English - Or. English****30 October 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
Switzerland**

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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. In Switzerland, investigated parties of an administrative competition proceeding as well as interested third parties, which are not part of the proceeding, can access documents of the case file. However, the regulation and extent of said access differs for these two types of parties: the investigated parties have the right to access the file. This right is well established and its precise content has been specified in case law. By contrast, provisions from different codes could form the legal basis for the disclosure of documents of a file to interested third parties not being part of the proceedings. The prerequisites as well as the scope of the disclosure differs among these provisions and case law is scarce.

2. Investigated parties, regardless of whether they are natural or legal persons, are entitled to the right to be heard throughout the proceedings. An essential part thereof is the right to access the case file. During the investigations and prior to the administrative ruling, the competition authorities, the Swiss Competition Commission (COMCO) and its Secretariat, ensure a due process by – among other things – granting access to the file. However, access may be temporarily suspended and access to confidential information may be restricted or excluded.

3. Disclosure of documents to interested third parties, e.g. to public procurement agencies, is more complex. As typical victims of bid rigging agreements, they have an interest to evaluate the potential damages they suffered. For that purpose, they may require access to COMCO's case file. In contrast to the parties of the investigation, disclosure to public procurement agencies is limited in scope and delayed in time.

1. The right of the investigated parties to access the case file

1.1. Documents covered by the right to access the file

4. The parties have the right to access all documents of the file in a proceeding. These include, among others, documents of the other investigated parties, e.g., those seized during dawn raids, minutes of interrogations carried out by the Secretariat, leniency applications and documents submitted by leniency applicants, letters and documents received from third parties as well as information and documents obtained by the Secretariat from other offices, e.g., cantonal procurement agencies. The competition authorities cannot reject access on the grounds that they consider a document irrelevant.

5. The competition authorities grant access by electronically sending the documents cleared of confidential information to the investigated parties. Of course, documents such as leniency applications, which may only be accessed at the agencies premises without the possibility of copying, are not sent, but can be accessed in situ after an appointment has been arranged with the Secretariat.

6. Internal documents of the competition authorities are not part of the case file though. Therefore, investigated parties do not have access to these documents. Internal documents are documents, which, cumulatively, do not have any evidence character and serve the sole purpose of forming internal administrative opinions. Typical examples are drafts, notes or minutes of meetings of the case team. Whether a document is internal or part of the file is determined exclusively by the objective meaning of the document, not its

formal classification as internal by the competition authorities. For this reason, e.g., expert reports prepared internally by the competition authorities are not internal documents and are therefore subject of the right of access.

1.2. Confidential information

7. Access to confidential information may be restricted or denied. Information is defined as confidential if either essential public interests of the Confederation or the cantons or essential private interests require secrecy. Essential private interests exist in particular in the case of business secrets. According to established legal practice, a business secret is information that cumulatively satisfies the following three conditions: First, the information is not publicly known. Second, the owner of the secret wishes to keep the information secret. Third, there is a legitimate objective interest in secrecy. The third condition can be specified further: the information must have an economic value and relate to a specific company. Information that pertains to an anticompetitive behavior is not deemed to be worthy of protection.

8. Other essential private interests that may require secrecy include personal rights, the protection of the identity of an informant who would otherwise have to fear retaliatory measures, and the interest of a leniency applicant that the information disclosed by him will not be used against him elsewhere, e.g., in civil proceedings. Mitigating legitimate concerns of informants and leniency applicants is also an essential public interest, because the competition authorities – and therewith the public enforcement of competition law – depend on information from such sources for their investigative activities. If essential interests are opposed to granting access, these must be weighed against the interest in granting access. When weighing these interests, all essential interests relevant to a specific case have to be considered.

9. If a document includes confidential information, only those parts of the document that include confidential information are redacted. Access is then granted to a non-confidential version of the document. As access to these documents is limited, the ability of the parties to effectively defend themselves might be limited. To mitigate this disadvantage, the law requires the competition authorities, if they want to rely on redacted parts of documents to the detriment of investigated parties, to inform them of the essential content of the redacted sections and give them the opportunity to express their views. In practice, for example, the competition authorities replace exact values (e.g., 44 %) by intervals (e.g., [40-50 %]), in order to inform about the essential content without disclosing business secrets.

10. Sometimes, however, it is not possible or practicable to redact documents, to paraphrase their content or to cover all the confidential information, e.g., for large amounts of data. In these cases, specific procedures that safeguard the interests of the owners of the confidential information are used. These include protective orders restricting the use of the knowledge gained, data rooms or access to the documents at the agencies premises without the possibility of copying the relevant documents. Such procedures are often used to protect leniency applications without unduly impairing investigated parties access.

1.3. Time of access

11. An investigation is often preceded by a preliminary investigation that establishes whether a case is worth pursuing. The law explicitly stipulates that the investigated parties have no right to access the file in a preliminary investigation (Art. 26 para. 3 Cartel Act).

However, if an investigation is subsequently opened, the right to access the file also applies to the documents taken over from the preliminary investigation.

12. Investigated parties have the right to access the file during the whole investigation and they can request access at any given time. However, for as long as it is necessary in the interest of the ongoing investigation, the competition authorities may deny access. Reasons for such a temporary suspension of the right of access include the danger that representatives or employees of the investigated parties, witnesses, or third parties could be influenced or that imminent coercive measures such as dawn raids could be thwarted. Furthermore, access to a document can only be granted once the non-confidential version has been established.

13. When the Secretariat sends its statement of objections to the COMCO, the investigated parties are at the same time given the opportunity to submit a written response to the statement of objections to the COMCO. At this time at the latest, they must be granted access to the file. This occurs *ex officio*, no request by the investigated parties is necessary.

14. In principle, investigated parties are also given access to the written responses to the statement of objection other investigated parties filed. But for certain reasons, an exception may be made in a specific case (e.g. if amicable settlements have been reached).

1.4. Remedies

15. If, on one hand, the owner of confidential information does not agree with the extent of protection that the competition authorities are willing to provide, the competition authorities issue an order to this effect. The owner of the confidential information is entitled to appeal that order with the court of the first instance, the Federal Administrative Court (FAC), as he is threatened with an irreparable disadvantage resulting from an order that would, if becoming final, disclose too much information. *Obiter dictum*, the Federal Supreme Court (FSC) stated that a subsequent appeal to the FSC is in principle possible.

16. If, on the other hand, an investigated party opines that its right to access the file has been improperly denied or restricted, its right to appeal depends on the stage of the proceeding. During the ongoing investigation proceeding, the investigated party cannot appeal a restriction of its right to access the file, as such a restriction regularly does not threaten the investigated party with any irreparable disadvantage. Once the investigation proceeding has ended and if COMCO has ruled to the disadvantage of the investigated party, it can lodge an appeal with the FAC against this ruling and complain therein that its right to access the file has been infringed. Against a decision of the FAC, an appeal to the FSC is possible.

17. The right of the investigated parties to be heard, and thus also the right to access the file, is of formal nature. If the FAC finds that the competition authorities have improperly denied access, it, in principle, has to approve the appeal without examination of the substantive merits of the appeal. However, the FAC can exceptionally remedy minor infringements of the right to be heard, as it has the same cognition as the COMCO, by making up for the omitted, i.e., by granting access.

2. Access of procurement agencies to documents of the file in bid rigging cases

2.1. Introduction

18. In the last years, the competition authorities discovered and prosecuted several bid rigging cartels. After becoming aware of the rulings, public procurement agencies evaluated whether potential action for private damages and measures under procurement law should be taken. For that purpose, public procurement agencies depend on access to documents of the relevant investigation's file. Several public procurement agencies, in particular cantons and municipalities, eventually requested access to such files.

2.2. Legal basis

19. The public procurement agencies were not parties to the proceedings. There are several legal provisions, which could constitute a basis for a – limited – access to the file for interested third parties after a ruling was taken. However, these provisions are general in nature and do not specifically regulate administrative competition proceedings. Therefore, their applicability in such proceedings and the scope they have therein is uncertain.

20. The Federal Act on Data Protection (FADP) aims to protect the privacy and the fundamental rights of persons when their data is processed. Surprisingly, a provision in this act serves as the legal basis for administrative assistance. Information relating to a (natural or legal) person may be disclosed, if this information is indispensable to the recipient in the individual case for the fulfilment of his statutory tasks (Art. 19 para. 1 let. a FADP). However, if such disclosure of data is opposed by essential public interests or clearly legitimate private interests of those whose data is requested, it must nevertheless be refused (Art. 19 para. 4 let. a FADP).

21. In a landmark ruling, the FAC confirmed the view of the COMCO that the examination of claims for damages and possible measures under procurement law by public procurement agencies are statutory tasks, which may entitle them to request the disclosure of information based on this provision.

2.3. Scope of the disclosure

22. An important question regarding disclosure of documents to interested third parties is the scope of disclosure. As stated above, the right of access of the investigated parties relates to the entire file of the case and it is irrelevant whether a document is of any importance. The same is not true when public procurement agencies seek access: Documents must only be disclosed to the extent that this is indispensable for the requesting procurement agency to fulfil its statutory tasks. A procurement agency can only suffer damages in tenders that were affected by bid rigging agreements and that it carried out itself; measures based on procurement law can also only be considered if these conditions are met.

23. A first restriction is therefore that the tenders must have been carried out by the requesting procurement agency. Only documents or parts of documents which concern such tenders are to be disclosed; all other documents, e.g., those which concern tenders from other procurement agencies, are not.

24. A second restriction is that these tenders relate to bid rigging agreements. If bid rigging agreements with regard to these tenders have been established finally and absolutely, the required connection is without a doubt proven. Whether a weaker connection to bid rigging agreements is sufficient is currently uncertain. In a pending case, the Federal Supreme Court will have to decide whether a final and absolute ruling is always necessary or whether indications of such a connection suffice (e.g., stemming from an appealed ruling of the COMCO). This question is of great importance, because in Switzerland, pending administrative competition law proceedings do not affect the course of civil limitation periods. If disclosure is only possible after all remedies are exhausted, i.e. a final and absolute ruling has been reached, the civil limitation periods will normally already have elapsed before documents can be disclosed; an action for damages is thereafter fruitless.

25. A third restriction is the imposition of a limitation of use with regard to the disclosed documents. The requesting procurement agency may use the information gained only for the examination (and, if necessary, enforcement) of civil damage claims and measures based on procurement law, but not otherwise.

26. It is time-consuming for the competition authorities to examine whether documents of a case file, namely documents that serve as evidence, satisfy these restrictions. For example, the investigated parties sometimes kept lists of hundreds of tenders that the competition authorities would have to carefully look through. If a document contains information that meets the restrictions but also includes other information, the document has to be redacted by the competition agencies.

2.4. Confidentiality

27. In a landmark decision, the court of first instance, the FAC, confirmed the view of the COMCO that the interests of an investigated party in non-disclosure do not outweigh the interests of the requesting procurement agency. In particular, the information that an investigated party has participated in a bid rigging agreement is not a business secret.

28. Nevertheless, the competition authorities do not disclose leniency applications. In their view, the public interest in maintaining a well-functioning leniency program outweighs the interest of the procurement agencies in pursuing civil damage claims and in taking measures under procurement law. One of the procurement agency involved did not share this view, lodged an appeal with the FAC and demanded the disclosure of the leniency application. The proceedings are pending before the FAC. The court will have to address this question, which it has left open so far. It is worth mentioning, that, in the past, the FAC allowed some restrictions of the right to access the file of investigated parties concerning leniency applications on the grounds of prevailing public interests.

2.5. Procedure and remedies

29. Public procurement agencies must submit their requests to the competition authorities. These then initiate the appropriate proceedings and in particular grant the investigated parties the opportunity to be heard. The COMCO decides by means of a ruling.

30. Insofar as the ruling is to their disadvantage, both, the investigated parties and the procurement agency seeking access to the file, have the right to appeal to the court of first instance, the FAC. The losing party may then lodge an appeal against the decision of the FAC with the Supreme Court, the FSC.

31. In addition, the Federal Department of Economic Affairs (EAER) also has the option to lodge an appeal with the FSC against such a decision of the FAC. It may do so in the interest of a correct and uniform application of the law. It was in fact the EAER that appealed to the FSC in the case discussed earlier in which the FSC will have to decide on the required link between tenders and bid rigging agreements.