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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  
Bulgaria**

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This document reproduces a written contribution from Bulgaria 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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## Bulgaria

1. In Bulgaria the issues concerning access to the case file and the protection of confidential information are regulated in the Law on Protection of Competition (LPC), mainly in Art. 55, while the detailed procedure is described in *Rules on the access, use and storage of documents constituting production, trade or other secret, protected by law*. The Rules are adopted by the Commission on Protection of Competition (CPC) in February 2009 in fulfilment of its obligation under Art. 55 (4) of the LPC to adopt such rules.

### 1. Access to the file

2. In accordance with Art. 55 (1) of the Law on Protection of Competition 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.

3. The LPC defines “production or trade secret” in paragraph 1, point 9 of its Supplementary provisions as facts, information, decisions and data related to the economic activities, the preservation of confidentiality of which is in the interest of the rightful holders thereof, and for which the latter have undertaken appropriate measures. The Rules give examples of information that may qualify as production or trade secret: technical and/or financial information relating to an undertaking’s know-how, methods of assessing costs, production processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure, sales strategies, etc. (point 8.2).

4. As regards the other secret protected by law the Rules in point 8.3 clarify that the materials containing other secret protected by law shall include information that is not subject to disclosure or its disclosure is subject to special rules envisaged by legislation. Thus, the classified information is governed by the provisions of the Law on Classified Information, and information containing personal data is governed by the provisions of the Law on Personal Data Protection.

5. In accordance with paragraph 1, point 1 of the Supplementary provisions of the LPC and point 8.1 of the Rules the term “internal documents” used in Art. 55 of the LPC includes:

- any preparatory documents (drafts, opinion papers, working groups reports, other reports, etc.), which were produced by the Commission’s board or its administration;
- the correspondence of the CPC with the European Commission and other National Competition Authorities;
- the correspondence of the CPC with other state or public authorities, excluding materials (statements, information, etc.) obtained by the Commission in relation to the specific proceedings;

- documents related to the operational activity of the CPC and its administration.
6. The restriction on access to internal documents does not prejudice the proper exercise of the right of defence of the parties and the constituted interested third parties to the proceedings, given their lack of evidential value for the establishment of infringements of the LPC, and their non-binding nature for the parties.
7. In accordance with point 8.1.3 of the Rules the Commission may grant the parties and the constituted interested third parties to the proceedings access to information and materials obtained from the competition authorities of other EU Member States or from the European Commission, in so far as these are likely to be essential for exercising their right of defence. In these cases, prior to granting the access the CPC shall consult the respective authority or the European Commission to identify any information that might constitute production, trade or other secret protected by law.
8. The LPC envisages that when there are sufficient grounds to assume that disclosure of the identity of any person, who has given statements or has provided data for an infringement may lead to significant adverse effects on his/her activity or on him/her as a person, the Commission shall take measures not to disclose his/her identity (Art.49 (3)). So the identity of these persons is also considered to be confidential information and access is granted only to a non-confidential version of the evidence or a summary of the submitted information.

## 2. Procedure for access to the file

9. Access to the case file is granted:
- after issuing and notifying the statement of objections in an antitrust case or the preliminary findings of the CPC on the effects of a merger;
  - after the CPC adopts and notifies a decision, in which it states that there is no infringement or there are no grounds for action under Art. 101 and 102 of the Treaty on the Functioning of the European Union (TFEU);
  - after the CPC adopts and notifies a decision by which:
    - it rules that the transaction is not a merger or does not fall within the scope of the law;
    - a merger is approved.
10. 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. Access to the non-confidential version of the replies to the statement of objections and enclosed data and evidence is granted after the adoption of the final decision of the CPC in the case or after the adoption of a new statement of objections.
11. Upon request by the parties and the constituted interested third parties to the proceedings the CPC shall grant them access to the file by inviting them to examine the file at the Commission's premises. In order to facilitate access to the file, the Commission shall provide to the parties and constituted interested third parties to the proceedings enumerative

lists of the non-confidential documents constituting the Commission's file as well as lists of the confidential materials in the file.

12. The Commission shall ensure access to the materials obtained during the investigation in their original form. If the CPC has commissioned a translator to verify a translation of documents, access shall be granted to the translation as well. The Commission is not obliged to translate documents submitted in a foreign language.

### 3. Protection of confidential information

13. 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.

14. The information provider has to substantiate his/her confidentiality claims with regard to each item of information, by explaining in what way the disclosure of that information would seriously harm him/her personally, the undertaking or an employee, working for that undertaking.

15. 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 above mentioned *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.

16. The information provider has to submit a list of documents, claimed to contain confidential information and is required to provide a non-confidential version of each document that he/she claims to contain confidential information by deleting the parts and items, which he/she considers confidential. The deleted parts should be replaced by (...). The content of the deleted parts should be summarized. In case the information provider considers that the whole document is confidential, he/she has to provide a short summary. The non-confidential version of the documents and the summaries should be provided in such form so as to allow other parties to assess whether the deleted parts of information are of significance for their right of defence and eventually request the competition authority to grant them access to the confidential (full) version of the document.

17. Normally, confidentiality claims have to be made in written form and submitted along with the documents and evidence for which such claims are made. The deadline for confidentiality claims is the same as the deadline to reply to the request for information.

18. 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. The time limit for launching the appeal is 7 days starting to run as of the notification of the ruling. Access to the information is not granted until the ruling enters into force either

by the expiration of the time limits for launching an appeal or by the fact that the Court has upheld the ruling. Once the ruling for disclosure of the information has entered into force, all parties to the proceedings, including interested third parties, obtain the right of access to that information.

19. According to point 7 of the Rules, the following types of information are not confidential:

- information related to an undertaking or an association of undertakings, which has become available to third parties;
- information, which is publicly available or is expected to become publicly available;
- information, which has lost its commercial significance, for example due to expiration of certain time.

20. Before rejecting the confidentiality claims, the CPC gives the party an additional deadline to fulfil its obligation to provide a non-confidential version of the documents.

21. 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.

22. In the process of assessing whether to adopt a ruling for disclosure, the CPC takes into consideration:

- whether the information can be used to prove the infringement and what is its probative force;
- to what extent the disclosure of the information would harm the interests of the information provider or the undertaking.

23. 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>1</sup> was that this ruling cannot be appealed. According to the Court the statements of the authority with regard to proving and the related requests concerning the proofs are not subject to separate judicial control as far as they are directly and inextricably related to the legality of the final act. Inherent part of the check of the legality is also the check of the compliance with the law of the legal relations with regard to access to the file. Respect of parties' right of defence, including the right to certain access to confidential information, is relevant to the final act to the extent that it affects its lawfulness.

24. Subsequently the *Rules on the access, use and storage of documents constituting production, trade or other secret, protected by law* 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.

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<sup>1</sup> Until 2019 all decisions and rulings of the CPC were reviewed by the Supreme Administrative Court.

#### 4. Access to the file during court review

25. When a decision of the CPC is appealed the complete case file is sent to the review Court with the exception of the folder containing internal documents (e.g. reports, preparatory documents, correspondence with other competition authorities or other public authorities etc.). The review Court has its own rules for protection the confidential information. In practice, all confidential materials are collected in a separate folder, which is also sent to the Court. The Court however does not grant the parties access to this folder. Solely the judges might read the folder containing the confidential information. Parties and the constituted interested third parties to the proceedings shall be granted access to the non-confidential version of the file, whereby all confidential information has been deleted.

#### 5. Example from the practice

26. 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. The CPC decided that the information contained in these documents constitutes evidence essential to prove an alleged infringement. The proceedings in the case were initiated in March 2013 against undertakings of the three economic groups operating on the Bulgarian electricity market – CEZ, EVN and Energo-Pro for an alleged prohibited agreement and/or abuse of dominant position in the process of change of electricity supplier for end customers in violation of national as well as EU antitrust law.

27. The disclosed documents are classified into three groups. The first group contains materials related to the business of the undertakings – minutes of meetings held between officials of the Group, reports, presentations, etc. The second group consists of correspondence between the Group and end customers or other free market participants (files of specific end customers). These materials show how the process of change of supplier for customers who wish to be registered in the liberalized electricity market has been conducted and what specific actions have been taken by the Group in the administration of this procedure. The third group of evidence contains data on the exchange of information within the Group (on client records, their intention to change the end supplier, their consumption, prices, offers, etc.).

28. For most of the documents the CPC disclosed only the information that would be essential to prove the infringement. At the same time, it took into consideration the confidentiality claims of the parties and kept secret the names of the employees of the companies concerned, except for the publicly known ones from the trade register; companies' names of clients, except those which are known to the CPC from the clients themselves and/or third parties; specific data on consumption and prices of specific clients; the contents of certain load profiles.

29. The ruling of the CPC to disclose the information indicated by the parties as confidential was appealed before the Supreme Administrative Court. In April 2014 the Court upheld the ruling of the CPC by stating that the LPC envisages that information indicated by the parties as confidential can be disclosed in two alternative prerequisites: to be of substantive importance for proving the infringement or to ensure the effectiveness of the right of defence and in the present case both conditions are present.