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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
Singapore**

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This document reproduces a written contribution from Singapore 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. Established in 2005, the Competition and Consumer Commission of Singapore (“CCCS”) administers and enforces the Competition Act (Cap. 50B) (“the Act”) and the Consumer Protection (Fair Trading) Act (Cap. 52A) in Singapore. Under the Act, CCCS is empowered to investigate and adjudicate if anti-competitive conduct has occurred, issue directions to stop and/or prevent anti-competitive activities and impose financial penalties where appropriate.
2. This paper describes the law in Singapore and CCCS’s procedures in relation to access to file and the protection of confidential information. This paper also discusses recent developments on these issues.

2. Access to File

3. Access to CCCS’s files in competition proceedings is provided for under Regulation 8 of the Competition Regulations 2007. Section 68 of the Act provides that upon completion of an investigation, and the CCCS proposes to issue a decision, i.e. the Proposed Infringement Decision (“PID”), that the Act has been infringed, the CCCS must give written notice to persons¹ likely to be affected by the decision.² The Parties must also be given the opportunity to make representations to the CCCS. Where a Supplementary PID (“SPID”) is issued, the Parties will be given an opportunity to inspect the any additional documents referred to in the SPID and make representations in relation to the new information.
4. What amounts to “reasonable opportunity” for inspection is assessed on a case-by-case basis, as it is dependent on various factors, including the number of documents on file for inspection.
5. Regulation 8 of the Competition Regulations 2007 sets out what documents CCCS must allow the Parties to inspect and what can be withheld:

Regulation 8(2) – The Commission shall give a relevant person a reasonable opportunity to inspect the documents in the Commission’s file that relate to the matters referred to in the notice given to that relevant person, except that the Commission may withhold any document –

to the extent that it contains confidential information; or

which is an internal document.

¹ For avoidance of doubt, an addressee of the PID and its representatives are referred to as “Party” (collectively, “Parties”) and other persons who provide information to CCCS in the course of the investigation but are not addressees of the PID are referred to as “Third Parties” in this paper.

² The PID is equivalent to a statement of objections

6. When determining what information to include for file inspections, CCCS officers must bear in mind the agency's duty to preserve secrecy under section 89(1) of the Act. What constitutes "confidential information" is examined in detail later in this.

7. Regulation 2 of the Competition Regulations 2007 also sets out the definition of "internal document". An "internal document" is a document:

1. Produced by CCCS or any other public authority³; or
2. Exchanged between CCCS and any other public authority, or between such other public authorities; or
3. Produced by any person retained under a contract for services by CCCS or any other public authority in connection with such a contract.

8. The purpose of granting access to file is to allow the Parties to prepare representations in response to the PID. CCCS considers access to file as critical for the Parties' rights of defence, and the failure to provide proper access may result in CCCS's findings being overturned or remitted back to CCCS on appeal, in part or in whole, or the ID being set aside on judicial review before the High Court, on the basis that due process was not adhered to.

2.1. Persons given access to file

9. As only persons affected by CCCS's decisions are given access to file, only Parties who are found to be liable for infringements of the Act will be given the opportunity to examine the documents on CCCS's files.

10. It should be noted that under the Act, persons who have suffered loss or damage directly as a result of an infringement of the Act have a right of action for relief in civil proceedings in a court under section 86 of the Act. For the purpose of such private actions, the decisions to be relied upon are CCCS's decision under section 68 of the Act, and the decision of the CAB or any subsequent appeal court that presides over any appeal from CCCS's decision. There is no provision under the Act facilitating the access to file for persons bringing private actions as a follow up from CCCS's findings of infringement.

2.2. Types of information included on file

11. CCCS provides access to all information in the documents in CCCS's file that contain information relating to the case in question, regardless of whether the information is incriminatory or exculpatory. Information included on file for inspection by Parties includes, but is not limited to:

1. Notes of Information ("NOIs") recorded during interviews with representatives of the Parties;
2. Any documents submitted by the Parties;

³ Under the Competition Regulation 2007, "public authority" includes –

A court of tribunal and any person or body exercising functions of a public nature; and

In any country or territory outside Singapore, a court or tribunal and any person which appears to the Commission to be exercising functions of a public nature.

3. NOIs recorded during interviews with Third Parties; and
 4. Documentary submissions by leniency applicants.
12. As stated above, confidential information and internal documents need not be included in the inspection files.
13. While external expert reports are generally considered internal documents, they have to be disclosed if CCCS considers the contents of the report an important factor in its decision. In such cases, in addition to disclosing the external expert report, Parties would also be given access to specific documents referred to in the external report if the said documents have an impact on their rights of defence.
14. Confidential information in the files would be redacted in a manner appropriate for the inspecting Party before the Party is given access to the files.
15. The Act does not provide for Parties to challenge CCCS's decision to exclude and/or redact certain information, although they can raise the issue while making representations to the PID. However, on appeal to the CAB, High Court or Court of Appeal, (each an "appellate body" and collectively, the "appellate bodies") Parties can apply for the appellate body to make a direction that CCCS disclose certain information. This was addressed recently in an ongoing appeal, which is examined in detail below.

2.3. Methods through which access to file is provided

16. Access to file is provided through physical inspection and via electronic means.
17. Physical inspections take place in CCCS's premises. CCCS officers, having completed assessment of confidentiality claims, produce copies of the physical documents for the Parties to inspect. The files contain the confidential and non-confidential information as appropriate for the inspecting party. Where the information is confidential to the inspecting party or considered not confidential, it will be visible for inspection. Where the information is confidential to another party, it will be redacted. A photocopier is provided to allow the Parties and their counsel to make copies of the documents.
18. Where access to file is facilitated via electronic means, a non-writeable DVD-R containing the confidential and non-confidential files (as appropriate for the inspecting Party) will be provided to the Parties. Parties receiving the files in electronic format are required to acknowledge, *inter alia*, that they have been given reasonable opportunity to inspect and make copies of the documents in CCCS's files, and that they are aware that CCCS has redacted and/or excluded confidential information and internal documents.
19. For certain documents, such as corporate statements provided by leniency applicants, Parties can only access these documents in hardcopy and can only make notes or copy the information by hand.

3. Protection of Confidential Information

20. Regulation 2 of the Competition Regulations 2007 defines "confidential information" to include:
1. Commercial information the disclosure of which would, or might, in the opinion of CCCS, significantly harm the legitimate business interests of the undertaking to which it relates;

2. Information relating to the private affairs of an individual the disclosure of which would, or might, in the opinion of the CCCS, significantly harm the individual's interest; or
 3. Information the disclosure of which would, in the opinion of CCCS, be contrary to public interest.
21. "Confidential information" which falls within (i) above includes, but is not limited to, financial statements, production capacity, customer information and strategic plans for the party's business. Information that would be considered confidential under (ii) above would include the identification number of interviewees as well as their home addresses. As for the last category, CCCS considers a myriad of factors, including whether the disclosure of information would have implications related to national security, national economic interests or any other public interests.

3.1. Determining if information is confidential

22. In the course of investigations, it is CCCS's practice to ask that all Parties and Third Parties who have provided information to make confidentiality claims over the information provided. The purpose of these claims is for Parties and Third Parties to indicate the information that they consider confidential. For example, after a set of NOIs is recorded, the information provider is given a photocopy of the NOIs and given a chance to mark out the information which he or she considers to be confidential. Confidentiality claims can also be made over any information submitted by Parties.⁴ When making confidentiality claims, Parties must justify the basis of their claims and can do so by explaining how it falls within the statutory definition of "confidential information".⁵

23. The CCCS officers, which are in charge of preparing the inspection files, evaluate the confidentiality claims to determine what information should be redacted. When evaluating the confidentiality claims, they first consider if the claim was made properly. This involves first considering if the information is indeed confidential as per the statutory definition, and secondly, whether the information should nevertheless be disclosed, for example, where the information is necessary for other Parties to exercise their rights of defence.

24. If the information is found to be confidential and does not have an impact on the rights of defence of other Parties, CCCS officers will redact the information from the files prepared for inspection by the other Parties.

3.2. Disclosure of confidential information

25. To ensure that the rights of defence of the Parties are met, disclosure can be facilitated by providing a numerical range (where the confidential information is in numerical form, e.g. market shares, financial information etc.), and anonymising the source of information where the information is provided by the Third Parties but including what they said.

⁴ Parties often choose to submit two versions of each set of submissions sent to CCCS, one with the confidential information marked out, and the other with the confidential information redacted.

⁵ Section 89(4) of the Act.

26. If it is necessary for Parties to have access to the redacted information to properly exercise their rights of defence, CCCS may consider the use of confidentiality rings, which only allow specific persons to have access to the confidential information. For example, confidentiality rings can be used to provide experts (engaged by a certain Party) access to confidential information.

27. In addition to consideration of the Parties' rights of defence, CCCS may disclose any information under the following circumstances⁶:

1. where the consent of the person to whom the information relates has been obtained; or
2. for the purposes of —
 - a prosecution under the Act;
 - enabling CCCS to give effect to any provision of the Act;
 - enabling CCCS, an investigating officer or an inspector to investigate a suspected offence under the Act or to enforce a provision thereof; or
 - complying with such provision of an agreement between Singapore and a foreign country if the documents are available to CCCS, the foreign country undertakes to keep the information confidential (unless allowed otherwise by the Singapore Government) and the disclosure of information is not likely to be contrary to public interest.

28. Where CCCS proposes to disclose information, which had been identified by Parties as confidential, CCCS may inform Parties who submitted the information or from whom the information originated of CCCS's intent to disclose the information. CCCS may also give the person a reasonable opportunity to make representations regarding CCCS's intent to disclose the information. CCCS will then consider the representations and determine if the information should be disclosed.

29. The Act does not provide for Parties or Third Parties to appeal against CCCS's decision to disclose confidential information or prevent the aforementioned disclosure. While it is an offence for individual CCCS officers to fail to comply with preserving the secrecy of confidential information⁷, there is no penalty that can be imposed on CCCS as a whole for improper disclosure of information. Any challenge against CCCS's decisions to release confidential information may be made by way of judicial review.

3.3. Treatment of confidential information on appeal

30. Where a matter proceeds to the appellate stages, CCCS and the appealing Parties ("Appellants") can request confidential treatment of documents or part of a document filed in connection with any appeal proceedings before the CAB. The request must be made in writing within 14 days of filing the document, and indicate the information for which confidentiality is claimed. The applicant making the request must also set out the reasons

⁶ Section 89(5) of the Act.

⁷ Section 89(2) of the Act.

for the claim. It is then up to the CAB to determine if confidential treatment should be granted.⁸

31. Procedurally, CCCS will facilitate the appeal bodies' assessment of the appeal by providing them with any relevant documents in their full, unredacted form. The Appellants, on the other hand, will continue to receive the redacted versions of the documents, with confidential information redacted as appropriate for the specific Appellants.

32. To ensure that the appeal bodies are aware of the redactions, they would be given a copy of the redacted versions given to the Appellants. CCCS will indicate if the confidential information is to be shown only to a specific Party (but redacted from all other Parties and the public), or made available to all Parties but kept from the public.

33. CCCS has had its decisions regarding confidentiality and redactions challenged on appeal before the CAB. The Appellant sought the disclosure of a list of documents (setting out the dates and descriptions of each of the documents by CCCS) and details of communication between CCCS and Third Parties in relation to the matter. The basis of the Appellant's application was that access to the information was essential to their rights of defence and pursuant to the rules of natural justice. The CAB allowed the application, subject to the conditions that: (1) CCCS's internal documents be excluded from disclosure; and (2) discovery documents be limited to those relied upon by CCCS in the investigation and in the said appeal and/or documents referred to in CCCS's ID. CAB also directed that the unredacted versions of the documents be produced to specified persons, but gave CCCS permission to apply to CAB in the event that any redacted information in the documents comprised confidential information or information detrimental to any individual.⁹

3.4. Confidentiality of leniency applicant and leniency information

34. The identity of leniency applicants is kept confidential throughout the course of the investigations, up to the point when a PID is issued. Thereafter, CCCS may disclose the identity of the leniency applicant to allow parties to exercise their rights of defence properly.

35. It should be noted that CCCS' records of the leniency applicants' oral proffers are considered internal documents, and will not be disclosed for inspection. However, corporate statements that are submitted in documentary form will be placed on file for physical inspection, though as mentioned above, they cannot be mechanically copied. After the case is closed, the information is filed away and not accessible to the public.

36. During an investigation which is triggered by a leniency application, CCCS will endeavour to obtain evidence that corroborates the contents of the leniency application from other parties. Such evidence and the leniency applicant's corporate statements that are submitted in documentary form are made available in the course of file inspection, which allows parties to respond to the information provided by the leniency applicants. This approach ensures that the rights of defence of the parties are adequately protected, while at the same time protecting the integrity of the leniency programme.

⁸ Regulation 28 of the Competition (Appeals) Regulations.

⁹ As this disclosure order is part of an on-going appeal, CCCS is not at liberty to disclose further details of the appeal.

3.5. Sharing of information with foreign agencies or courts

37. Where there is a cooperation arrangement with foreign competition bodies, CCCS may furnish information to a foreign competition body pursuant to such cooperation arrangements. Requests for information from foreign competition bodies may be for different reasons, such as enforcement against cross-border anti-competitive conduct, or pursuant to a court order in the foreign jurisdiction. The foreign competition body must provide a written undertaking relating to the requested information that will comply with the terms of disclosure as specified by CCCS.¹⁰

38. As regards information provided by leniency applicants, CCCS only discloses such information to foreign competition bodies where the leniency applicant provides a waiver. The rationale behind this is that such disclosure may expose the leniency applicant to civil or criminal proceedings overseas.

¹⁰ Section 88 of the Act.