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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Cancels & replaces the same document of 31 October 2019****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by
Slovenia**

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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

Please contact Ms Despina PACHNOU if you have any questions about this document
[Despina.Pachnou@oecd.org, +(33-1) 45 24 95 25]

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Slovenia

The following essay takes a closer look at the interplay between the rules governing the right to access to the file and the law on protection of confidential information in the context of public enforcement of competition law in Slovenia.

1. Legal basis for access to the case file and protection of confidential information in competition proceedings before Slovenian Competition Protection Agency

1. At the outset, it should be noted that the general legal basis for access to the case file and protection of confidential information in competition proceedings before the Slovenian Competition Protection Agency (hereinafter: Agency) is laid down in the Prevention of the restriction of competition Act (*Slo. ZPOmK-1*, hereinafter: ZPOmK-1 or Competition Act)¹, even though a variety of other legislative acts contain provisions on this matter as well. This is because ZPOmK-1 entails special provisions and is as such considered to be *lex specialis* in relation to all other acts. In this respect, the General Administrative Procedure Act (*Slo. ZUP*)² contains general provisions regarding access to file in administrative proceedings³ (e.g. Article 82), which, however do not apply to the Agency proceedings, due to the fact that ZPOmK-1 contains specific provisions tailored to the specialties of the proceedings before the Agency. By the same token, the Companies Act (*Slo. ZGD-1*) and the Trade Secrets Act (*Slo. ZPosS*), both defining the term trade secrets, are also not applicable to the proceedings before the Agency, as the special nature of the provisions entailed in ZPOmK-1 override their provisions.

¹ This Act regulates restrictive practices, concentrations of undertakings, unfair competition, regulatory restrictions of competition and measures to prevent restrictive practices and concentrations that significantly impede effective competition, where they cause or might cause effects in the territory of the Republic of Slovenia. It also determines the authority responsible for the protection of competition, the competences of this authority and the proceedings conducted by this authority.

² This Act applies to the procedures of administrative and other state authorities, self-governing local community authorities and bearers of public authority where, in administrative cases, through direct application of regulations, they decide on the rights, obligations or legal benefits of individuals, legal persons and other parties. Unless otherwise stipulated by the ZPOmK-1, the provisions of this Act apply to the decision-making of the Agency.

³ The Slovenian legal system outlines two different kinds of proceedings regarding the assessment of competition law violations: administrative proceedings, which are entirely held under the provisions of the Competition Act (administrative or supervision proceedings), and proceedings on minor offences, which are carried out almost entirely under the provisions of the Minor Offences Act. The supervision proceedings and the minor-offence proceedings before the Agency and ensuing judicial review proceedings, are regarded as two separate sets of proceedings. The Agency can impose a fine only in minor-offence proceedings, when acting as a minor-offence authority pursuant to Article 12/2 Competition Act.

2. Party to the procedure

2. Article 16 of the Competition Act differentiates between two groups of entities with a legal party status in the procedure before the Agency: on the one hand, there is the undertaking(-s) against which the procedure has been initiated ex officio by an order (the investigated party) and on the other, the person notifying a merger in a merger assessment proceeding. An interested third party or a person submitting an initiative, complaint, communication or other documents is according to ZPOmK-1 not a party to the proceedings, unless it is able to demonstrate legal interest in participating in the procedure. In this case, such a person is granted an “intervening party status” allowing it to enjoy the same rights as a party to the procedure. In this respect, legal interest must not be mistaken with plain economic interest, as the former is only established if the applicant is capable of demonstrating an interest of legal nature in the subject matter of the dispute by which it may be affected. This means that the Agency’s decision must directly affect applicant’s legal situation and not purely its economic interest. In case the applicant is indeed able to establish such legal interest, it will automatically gain the right to participate in the procedure. Importantly, although the intervening party status is typically afforded upon a request, the Agency is nevertheless required to ascertain on its own motion whether such legal interest exists throughout the whole procedure.

3. Right to access to the file

3. In Slovenia, like in most other jurisdictions, it is a firmly established standard that the parties to the procedure ought to be given access to the Agency’s case file as part of their right of defense. The right to access the file is enshrined in Article 18 ZPOmK-1 and is applicable to all procedures before the Agency as well as, in accordance with Article 60 ZPOmK-1, in judicial proceedings before the court. The Agency has adopted and published on its website⁴ a special note regarding access to the files for the parties since there are no specific provisions on this matter contained in ZPOmK-1.

4. Request for access to the file can be granted only after an order on the commencement of procedure has been issued, since it is then that the undertaking(-s) is granted the status of a party in the procedure. Access to the file is possible upon prior agreement with the official(-s) of the Agency conducting the administrative procedure or with another official designated by the head of the organizational unit to perform the access to the file. The access to the file is carried out during the Agency's office hours upon prior written or oral announcement provided by the party to the procedure. The announcement must be made at least 5 working days before the inspection of the file. The right to access to the file is exercised on the premises of the Agency (usually in a meeting room) after the Agency has received request for access to the file and is supervised by an official of the Agency conducting an administrative procedure or with another official designated by the head of the organizational unit. The request for access the file is not limited numerically, the parties to the procedure may repeatedly request to review and copy documents as long as their legal interest exists⁵. Parties can also access the file after the termination of the procedure but only to the file of a specific case in which they were parties.

⁴ <http://www.varstvo-konkurence.si/informacije/informacije-za-stranke/>.

⁵ Judgement of the Administrative Court of the Republic of Slovenia, I U 1242/2014-10 (March 10, 2015), point 12.

5. In case the Agency Director determines that access to the file would undermine the interests of the procedure after an order on the commencement of a procedure has already been issued, he may issue an order postponing the right to access to the file until the statement of objections is served to the parties. No judicial protection is allowed against such an order (Article 18/3 ZPOmK-1). This type of an order is typically issued right after the commencement of antitrust proceedings (cartels, other restrictive agreements and abuse of dominant position), when there are e.g. more parties involved (parties with different interests, i.e. competitors) the case file (typically consisting of documents with business secrets/other confidential information) still needs to be sorted, because the non-confidential versions have still not been provided and/or the Agency has not yet decided which documents are going to be used as evidence for the infringement.

6. The right to review the case file may also be granted to an expert, to the extent necessary in order to render an expert report and opinion (Article 18/4 ZPOmK-1).

7. If request for access to the file pursuant to Article 18 ZPOmK-1 is rejected by the Agency during the procedure before it⁶, the party may seek judicial protection. Such a rejection to access certain types of data cannot be done orally when the right to access to the file is actually being exercised at the premises of the Agency⁷. A written decision denying access to confidential information must be issued by the Director of the Agency later on during the procedure and a non-confidential version must be provided to the party claiming access to such information. Similarly, potential violations of the right to access to the file may also be asserted before a court after the final decision has been adopted.⁸

8. Importantly, the right to access to the file does not have the absolute character, as Article 18 ZPOmK-1 distinguishes between “accessible” and “non-accessible” documents. Accordingly, the parties to the procedure are prevented from reviewing internal Agency documents relating to the case file, including correspondence between the Agency and the European Commission or National competition authorities of other EU Member States⁹; information relating to the confidential sources pursuant to Article 17 ZPOmK-1; minutes

⁶ In practice, such a decision has never been issued by the Agency. The Agency has only refused to grant access to certain types of information, which were confidential.

⁷ Judgement of the Administrative court, RS I U 1725/2015 (February 7, 2017): During the procedure before the Agency, the party requested to access the file. While reviewing the party insisted to be given full and complete insight into all documents without concealment, including confidential documents and documents where confidential source was granted. The officials handling the proceedings denied this request orally and the Agency was latter on planning to issue a written document. The party of the procedure initiated a judicial protection against this oral order. The Court dismissed the party's action and emphasized that nor the Competition Act nor the General Administrative Procedure Act stipulate that the refusal to access to the file may be decided orally. Furthermore, the Competition Act does not provide judicial protection over the oral orders. The Court highlighted that the party should first put an effort to obtain a written order. The Court also stated that the decision regarding request to access data meaning business secrets, should not be accepted while reviewing files.

⁸ See decision of the Administrative Court of the Republic of Slovenia, I U 1027/2003 (March 17, 2004), and Decision of the Supreme Court of the Republic of Slovenia, I Up 556/2004 (August, 25, 2004) and others.

⁹ This was already confirmed by the Supreme Court of the Republic of Slovenia, G 9/2012-28 (November 26, 2013), point 12.

of consultations and voting; draft decisions; as well as confidential information which includes but it is not limited to business secrets.

4. Confidential information

9. The terms confidential information and business secrets are explicitly defined in the Competition Act¹⁰. While confidential information¹¹ is a broader term defined as information which is not publicly accessible and therefore subject to special arrangements for its protection under the Competition Act or other regulations (e.g. business secrets, business correspondence concerning the economic activity of an undertaking, personal data etc.), business secrets¹², on the other hand, form a part of the term confidential information and thereby constitute a narrower term comprised of information about an undertaking's business activity known to a limited number of people and disclosure of which could cause considerable damage to the undertaking. Besides typical commercially sensitive information (e.g. information about undertakings, their business relations, their cost components etc.), the term business secrets also notably encompasses leniency statements¹³.

10. Special treatment in competition proceedings is also given to the information related to the protection of confidential sources. At the request of a person who is the source of a report or the source of other information used by the Agency in implementing its competences, the Agency must protect the identity of such person if it is likely that the disclosure thereof may cause significant harm. A person requesting the protection of his or her identity must, upon producing documents, also produce a version of the documents that omits any information that could result in the disclosure of the source. Confidentiality of the sources is absolutely protected at the proceedings before the Agency¹⁴.

11. In addition, personal data is also considered to be confidential information in competition proceedings and as such subject to special treatment - the protection of personal data of natural persons normally prevails over the right of defense¹⁵.

12. The Agency protects confidential information only upon party's request¹⁶. The burden of proving the existence of a business secret(-s) lies on the party claiming so. The

¹⁰ In the previous ZPOmK-1, there was also a reference to Companies Act.

¹¹ Article 3/16 ZPOmK-1: "confidential information" shall mean business secrets, business correspondence concerning the economic activity of an undertaking, personal data and any other information that, under this Act or other regulations, is subject to special arrangements for its protection and to special conditions for accessing it. Information that is publicly accessible shall not be deemed confidential information.

¹² Article 3/17 ZPOmK-1: "business secret" shall mean data disclosure of which would cause considerable damage and which are known to a restricted circle of persons.

¹³ See Article 6/1 Decree on the procedure for granting immunity from, and reduction of, fines for offenders who are parties to cartels.

¹⁴ Judgement of the Administrative Court of the Republic of Slovenia, I U 1725/2015 (February 7, 2017), point 12.

¹⁵ Judgement of the Administrative Court of the Republic of Slovenia, I U 1242/2014-10 (March 10, 2015), point 9.

¹⁶ See for example Article 17 ZPOmK-1 on protection of confidential sources.

law puts the onus on the undertakings to identify confidential material, which they do not want disclosed and provide a non-confidential version. In this regard, parties are encouraged to follow Commission's guidance on confidentiality claims, as neither the Competition Act contains such provisions nor does the Agency possess similar guidelines of its own.¹⁷

13. It is clear that the non-disclosure obligation must not only be guaranteed during the procedure before the Agency, but also in the final decision itself. In this respect, Article 22 ZPOmK-1 stipulates that if a decision, by which the procedure is concluded, contains confidential information on a party, other parties must be served with a version of the final decision with all such information deleted from the statement of grounds. The Agency also has the obligation to ensure that confidential information is not disclosed¹⁸ when final decisions adopted in administrative and minor offence proceedings are published on its website.

14. In case party's request for confidentiality is rejected by the Agency, the party may seek judicial protection against such decision before the Administrative court, which however does not have suspending effect.

15. Notably, the exemptions from the right to access to the file provided in Article 18/5 ZPOmK-1 do not possess the absolute character in the sense of protection either¹⁹. Due to the fundamental tension between the parties' right of defense and Agency's obligation to preserve confidentiality, Article 18/7 ZPOmK-1 provides that the Agency may disclose information that constitute a business secret to the undertaking against which the procedure has been initiated (in the merger notifying cases: to the notifying party), if it deems that its disclosure, due to the right of defense, might objectively prevail over the interests of protecting such information as a business secret. When determining whether disclosure of confidential information in order to safeguard defense rights prevails over the right to confidentiality, the Agency must particularly take into account the importance of the information for the assessment of the infringement, its evidential value and indispensability, seriousness of the infringement and the potential scope of the damages, which may be caused by disclosing the information. Non-confidential versions of the documents in the Agency's file cannot *a priori* constitute a violation of the principle of contradiction²⁰.

16. When sensitive data is used as incriminating evidence in the procedure, such data must be revealed to the party – not disclosing such information would represent an infringement of an essential procedural requirement pursuant to Article 19 ZPOmK-1 in conjunction with Article 237/p.3 General Administrative Procedure Act rendering the final decision void.²¹ As regards undisclosed exculpatory evidence, it is for the party claiming

¹⁷ DG Competition informal guidance paper on confidentiality claims (2012), https://ec.europa.eu/competition/antitrust/guidance_en.pdf (retrieved on 20.10.2019) and Guidance on confidentiality claims during Commission antitrust procedures (2018), https://ec.europa.eu/competition/antitrust/business_secrets_en.pdf (retrieved on 20.10.2019).

¹⁸ Article 22 ZPOmK-1.

¹⁹ See above about the right to access to the file not having the absolute character.

²⁰ See Judgement of the Administrative Court of the Republic of Slovenia, I U 930/2017-64 (June 19, 2018), point 236.

²¹ See Judgement of the Supreme Court of the Republic of Slovenia, G 9/2012-28 (November 26, 2013), point 13, Judgement of the Administrative Court of the Republic of Slovenia, I U 1242/2014-

such nature of evidence to substantiate in a concrete and precise manner the way in which that certain (undisclosed) evidence could be of relevance for its defense²². When granting access to such evidence it is sufficient to reveal only the type and certain parts of the content of the document²³. In case the Agency rejects party's request, it must reject it by a decision in a concrete and substantiated manner, which, in turn, may be challenged before a competent court. The Agency is under no obligation to disclose evidence irrelevant to prove the infringement (legally irrelevant evidence)²⁴.

5. Leniency statements

17. Leniency statements, as already mentioned above, fall under the term "business secrets"²⁵ and are as such subject to Article 18 ZPOmK-1 and its exemptions in the administrative proceedings. As regards private litigation, in 2017 Slovenian Competition Act was amended as a consequence of the adopted EU Damages Directive (2014/104/EU). In order not to compromise the functioning of the leniency program and thereby the effectiveness of public cartel enforcement, Article 62.a/9/b ZPOmK-1 now explicitly stipulates that leniency statements and evidence provided by leniency applicants cannot be disclosed. Apart from such "blacklisted" information, the plaintiff may nevertheless gather information including such containing confidential material from the defendant or third party provided that the confidentiality of the documents remains under the Court's scrutiny (e.g. redaction of confidential parts).

6. Disclosure of information in Agency's possession to administrative bodies, other state authorities and holders of public authorizations

18. The Public Information Access Act (*Slo. ZDIJZ*) also applies to the Agency due to its public role.²⁶ The aim of this Act is to ensure that the work of public authorities is public and open, as well as to enable natural persons and legal entities to exercise their rights to

10 (March 10, 2015), point 6, Judgment of the Supreme Court of the Republic of Slovenia, I U 70/2016 (August 3, 2016), point 7, and Judgment of the Administrative Court of the Republic of Slovenia, I U 930/2017-64 (June 19, 2018), point 233.

²² See Judgment of the Administrative Court of the Republic of Slovenia, I U 930/2017-64 (June 19, 2018), point 231.

²³ See Judgment of the Administrative Court of the Republic of Slovenia, I U 1800/2013-29 (April 10, 2014), point 34.

²⁴ Judgment of the Supreme Court of the Republic of Slovenia, G 9/2012-28 (November 26, 2013), point 17.

²⁵ See also Judgment of the Administrative Court of the Republic of Slovenia, I U 930/2017-64 (June 19, 2018), point 234.

²⁶ This Act governs the procedure, which ensures free access to everyone, and re-use of public information held by state bodies, local government bodies, public agencies, public funds and other entities of public law, public powers holders and public service contractors (hereinafter referred to as bodies). Public information shall be deemed to be information originating from the field of work of the certain body and occurring in the form of a document, a case, a dossier, a register, a record or other documentary material (hereinafter referred to as the document) drawn up by the body, by the body in cooperation with other body, or acquired from other persons.

acquire information held by public authorities. The Agency must therefore endeavor to inform the public on its work to the greatest extent possible. In addition to the latter, pursuant to Article 13.b ZPOmK-1 the Agency may also disclose information in its possession to administrative bodies, other state authorities and holders of public authorizations on the basis of a substantiated written request by the principal or his authorized person, clearly indicating the purpose of the request to carry out their statutory responsibilities. Moreover, the Agency may also disclose information to the EU Commission and NCAs of other EU Member States in accordance with the procedure in Regulation 1/2003/EC or other authorized authorities of foreign countries when so determined by international treaties binding on the Republic of Slovenia.

19. Notwithstanding the above, the Agency may nevertheless refuse a request to access public information on the basis of ZDIJZ when it comes to information relating to protection of confidential source and information constituting a business secret of undertakings.