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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
Romania**

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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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Romania

1. Access to the Romanian Competition Council's file in competition proceedings the file

1.1. Extent of the investigation file

1. In Romania, the parties subject to investigation have the right of access to the competition agency's file. According to the competition law, the President of the Competition Council will allow the parties involved into an investigation to study the case file and get copies and excerpts of the investigation papers on electronic support.

2. The case file in a competition investigation consists of all documents, which have been obtained, produced and/or assembled by the case team of the RCC, during the investigation. The term "document" is used for all forms of information support, irrespective of the storage medium and covers also any electronic data storage device as may be or become available.

3. As is provided by the competition law, the right of access to case file does not cover business secrets, other confidential information and the internal documents of the RCC, the European Commission or competition authorities in the European Union member states. The right to file case access is not extended either to cover the correspondence between the RCC and the European Commission or competition authorities in the European Union member states or between the latter, when such correspondence is included in the RCC file. Therefore, the case file includes accessible and non-accessible documents.

4. Photocopies and excerpts from confidential information such as business secrets and other confidential information are available and may be obtained solely by order of the President of the RCC.

5. So, in order for the parties which are investigated to effectively express their views on the preliminary conclusions reached by the RCC case team in its report, they will be granted access to all documents making up the investigation file, with the exception of internal documents, business secrets of other undertakings, or other confidential information.

6. As regards access to corporate statements made in the context of a leniency application, it is granted only to the addressees of a statement of objections, provided that they commit, together with their legal counsels getting access on their behalf, not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted and to ensure that the information to be obtained from access to that corporate statement will only be used for the purposes of judicial or administrative procedures that have as object the application of art. 5 of the Romanian competition law or of art. 101 of the TFEU. Other parties such as complainants will not be granted access to corporate statements.

7. The access to file is granted to investigated undertakings.

8. Like the principles stated in the European jurisprudence, national legislation does not recognize for the complainants in the administrative procedure the same procedural rights and guarantees as for the parties subject to investigation. Therefore, third persons,

including complainants, have no right of access to the file, even if according to the competition law, they may receive a non-confidential version of the report on investigation.

9. In merger proceedings, besides investigated parties, access to the file shall also be given, upon request, to other involved parties who have been informed of the objections in so far as this is necessary for the purposes of preparing their comments. Such other involved parties are parties to the proposed merger other than the notifying parties, such as the seller and the undertaking which is the target of the merger.

1.2. Timing- access to file granted only after the notification of the investigation report

10. Access to the file, according to the law provisions, will be granted upon request following the notification of the RCC's investigation report (the act equivalent to the statement of objection in Commission competition proceedings) to the parties. So, it is up to the addressee of the investigation report to exercise its right of access to the file or not.

11. According to the law, the president of the RCC is empowered to grant access to the file in competition proceedings. In practice, once the access to the file is approved, the access is provided by the rapporteur and the case team. There is no transparency obligation that would force the competition authority to provide access to the file to parties that do not demonstrate a lawfully recognized interest in the case.

12. Access to the file is granted in competition proceedings only after the investigation report is issued and sent to the investigated parties.

13. In practice, in a court proceeding having as object to force the competition authority to grant access to the investigation file before issuing the report, Bucharest Court of Appeal¹ held that, since the goal of granting access to the file is to protect the rights of the defence, access to file can only be granted after the investigation report is sent to the parties. So, the undertakings subject to investigation do not have the right to access to file prior to that moment.

14. Moreover, in *ex officio* proceedings, the right of access to the file is only granted if the report proposes sanctions for the investigated parties.

15. It is possible to add information to the file after access is granted. Generally, it is about documents without probative value, which are determined by the necessity to complete the competition proceedings (e.g. correspondence between the parties and RCC regarding the turnover achieved in the year prior to the sanctioning decision or explanations regarding the calculation of the turnover).

16. Also, the written observations made by the parties under investigation will be included in the file. But as a rule, according to the RCC Guidelines regarding access to file, the parties do not have a right to access observations formulated by other parties under investigation. By exception, if the competition authority intends to use in the decision finding an infringement a document provided by an undertaking subject to investigation with its written observation to the investigation report, then the authority will grant access to that document to all the parties under investigation.

17. As regards the time limit for accessing the file, this should be done by the party as close as possible after receiving the report of investigation, having in mind the fact that if

¹ Bucharest Court of Appeal - Court file no. 5281/2/2017

parties request access to confidential information, RCC also needs to request the opinion of the party to whom the information concerned belongs. If in fact, the parties subject to investigation have made a request for access to confidential information at a later stage, before sending their written observation to RCC and they were granted access to confidential information after that moment, due to the fact that there are some procedural stages which the authority must take, the parties concerned could still express their opinion and thus exercise their right of defence through written observations before oral hearings, during the oral hearings and after that moment.

1.3. Access to evidence in the agency's file once the case has been closed

18. Once the case is closed in front of the competition authority, investigated parties may access evidence in the file only in a judicial procedure having as object the annulment of the decision imposing a sanction, if the judge decides so. In a court case², the judge granted access to the plaintiff to some information in the investigation file which were classified as confidential information. In order to take this decision, the judge considered that the respective information did not refer to particular factual situations which could be considered business secrets or other confidential information.

19. In private damages actions, according to provisions of the Government Emergency Ordinance no.39/2017 regarding actions for damages in cases of infringement of the competition rules, the court may request the disclosure of evidence from the file of the competition authority only when the evidence cannot be obtained from another party or from a third party and observing the conditions provided by the same administrative act.

20. In cases when RCC intends to disclose confidential information, the person or undertaking to which that information belongs shall be granted the possibility to provide a non-confidential version of the documents where that information is contained, with the same evidential value as the original documents.

21. In proceedings under Articles 101 and 102 of the Treaty, the qualification of a piece of information as confidential is not a bar to its disclosure if such information is necessary to prove an alleged infringement (“inculpatory document”) or could be necessary to exonerate a party (“exculpatory document”). In this case, the need to safeguard the parties’ rights of defence by providing the widest possible access to the investigation file may outweigh the concern to protect confidential information of other parties.

1.4. Use of the information obtained through access to file

22. According to the provision of the RCC’s Guidelines on access to file, access to the file is granted on the condition that the information thereby obtained may only be used for the purposes of judicial and administrative proceedings for the application of the competition rules at issue and only for the scope for which it was requested.

1.5. Challenge of the decision not to grant access to evidence or to grant access

23. The order of the president of the RCC denying access to confidential information can be challenged by the investigated parties in an action brought against the final decision

² Bucharest Court of Appeal – Court file no. 1409/2/2011 CNPR

of the competition authority finding an infringement, in front of the Bucharest Court of Appeal, the first instance in competition matters.

24. If a third party made a request for access to file and the request was denied, then the answer of the competition authority may be challenged before judicial body through a separate action, according to the provisions of the law of administrative litigation.

25. Regarding the RCC decision to grant access to evidence to a third party, it could be challenged before court by the interested party, namely the party to whom the evidence belongs. But in practice there were no cases in which access to evidence was granted to third parties not subject to investigation.

26. If it is found that the RCC acted improperly denying access to evidence in the file, this could lead to the annulment of the decision finding an infringement of the competition rules in case the right of defence of the party subject to investigation was breached.

27. Also, if the competition authority improperly grants access to evidence in the file, this could lead to its civil liability for the damages caused and proved by the party injured.

1.6. Methods through which access to the file is provided

28. The RCC will grant access to the file to the parties subject to investigation who can examine the accessible file on the authority's premises. The parties may obtain copies of the accessible file in electronic format.

29. In order to facilitate access to file, the addressees of the investigation report will receive a list of content. The access is granted to evidence in its original form, as the RCC has no obligation to provide translations.

2. Protection of confidential information

2.1. Balance between the need to safeguard the right of defence by granting access to the file and the concern to protect confidential information

30. The president of the RCC, before approving or denying access to confidential information, must assess whether the need to safeguard the right of defence by granting access to the file may outweigh the concern to protect confidential information. The analysis considers the reasoned request by the party claiming access, which must show how that confidential information may be of use to it and also the point of view of the party or person to whom the confidential information belongs.

31. RCC must assess whether those circumstances apply to any specific situation based on all relevant elements, including:

- the relevance of the information in determining whether an infringement has been committed, and its probative value;
- whether the information is indispensable;
- the degree of sensitivity of information (to what extent the disclosure of the information would harm the interests of the person or undertaking in question).

32. All these aspects will underpin the decision of the president of the RCC to grant or deny access to confidential information.

33. Same considerations apply to merger proceedings when the RCC appreciates whether disclosure of information is considered necessary for the purpose of the procedure or not.

2.2. Non-accessible documents: confidential information

34. According to the RCC Guidelines on access to file, confidential information includes business secrets and other confidential information. Any information regarding an undertaking's business activity for which disclosure could result in a serious harm to the same undertaking is considered a business secret. Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy. So, business secrets, trade secrets, commercially sensitive information are all included in the category of confidential information.

35. The second category, namely “other confidential information” includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking. The assessment of confidentiality depends on the specific circumstances of each case. This may apply to information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers. Therefore, the notion of other confidential information may include information that would enable the parties under investigation to identify complainants, whistleblowers or other third parties where those have a justified wish to remain anonymous. Also, classified information which are defined by Law no. 182/2002, such as secret state information, disclosure of which could undermine national security are included in this category.

36. To these categories of information same principles apply as at the European Commission level.

2.3. Procedure for provide confidential treatment

37. For an information to be deemed as confidential, the person or undertaking in question must make a reasoned claim to this effect and that claim must be accepted by the competition authority. Also, the person concerned must provide a separate non-confidential version of the document or information and to identify the undertakings/persons regarding which such documents are to be considered confidential.

38. The competition authority may set a time-limit within which the undertakings concerned shall:

1. substantiate their claim for confidentiality regarding each individual document or part of document;
2. provide the authority with a non-confidential version of the documents, in which the confidential passages are deleted. In antitrust proceedings the undertakings in question shall also provide within the said time-limit a summary description of each piece of deleted information.

39. These two intermediate steps must be carried out in a manner that enables any party with access to file to determine whether the information deleted is likely to be relevant for its defence and, therefore, whether there are sufficient grounds to request the competition authority access to the information claimed to be confidential.

40. In antitrust proceedings, if undertakings fail to comply with the provisions described above, RCC may assume that the documents or statements concerned do not contain confidential information and therefore assume that the undertaking concerned has no objections to the disclosure of the documents or statements concerned in their entirety.

41. If the person or undertaking in question meets the conditions described above, to the extent they are applicable, then the RCC will either:

- provisionally accept the claims which *prima facie* seem justified; or
- inform the person or undertaking in question that it does not agree with the confidentiality claim in whole or in part, where it is apparent that the claim is unjustified.

42. At a later stage, RCC may reverse its provisional acceptance of the confidentiality claim in whole or in part. So, before sending the investigation report, the RCC will reconsider its provisional acceptance when the information concerned is considered necessary for proving an alleged infringement, being an “inculpatory document” or it is in favor of the person subject to investigation to exonerate that party as “exculpatory document”. The party to whom the information belongs shall be informed.

43. The rapporteur of the investigation analyzes the confidentiality of the information obtained during the investigation, considering the reasons put forward by the parties which claim such treatment. In case of disagreement between the party concerned and the rapporteur, the president of the RCC will decide, as described below.

2.4. Rules on disclosure of information during the administrative procedure

44. Where the RCC does not agree with the confidentiality claim from the outset or where it takes the view that the provisional acceptance of the confidentiality claim should be reversed, and thus intends to disclose that information, it will grant the person or undertaking in question the opportunity to express its views on this aspect. In such cases, the RCC will inform in writing the person or undertaking concerned of its intention to disclose information, give its reasons and set a time-limit within which that person or undertaking will inform the authority in writing of its views. If, following submission of those views, a disagreement on the confidentiality claim persists, the party concerned will address the matter to the RCC president. If after this stage the disagreement persists, then the party to whom the alleged confidential information belongs may address the court.

45. As regards the decision to provide confidential treatment to an information, this could be challenged by an addressee of the investigation report to which access to that specific confidential information was denied by the RCC. The order of the RCC president not to grant access to confidential information can be challenged by the parties to the investigation in an action brought against the final decision of the competition authority finding an infringement in front of the Bucharest Court of Appeal.

46. As we mentioned before, where the RCC takes the view that the provisional acceptance of the confidentiality claim should be reversed, and thus intends to disclose that

information, it will grant the person or undertaking in question the opportunity to express its views on this aspect.

47. If, following submission of those views, a disagreement on the confidentiality claim persists, the party concerned will address the matter to the president of the competition authority. If after this stage the disagreement still persists, then the party to whom the confidential information concerned belongs may address this matter to the competent court according to the law of administrative litigation, requesting the annulment of the RCC's act containing the decision not to grant confidential treatment. The party could also request the suspension of the enforcement of that act in order to prevent disclosure of its information.

48. Founding that confidential information were disclosed improperly, then the person in question is responsible for the damages caused to the person to whom confidential information belonged.

2.5. Rules on disclosure when the competition case is examined by a court

49. The exceptions from access to file, provided by the competition law and by the Guidelines on access to file does not expressly refer to the judicial phase, but the courts repeatedly held that the scope underlying the protection of confidential information by the RCC could not be realized without such protection during the judicial phase, insofar still exists the grounds on which the competition authority based its refusal to grant access to confidential information.

50. In practice, in some cases³, where the court considered that confidential information needs to be disclosed, based on the opinion of the complainant in the case that the respective information is relevant for its defence, the court asked for the opinion of the person or undertaking to whom belonged that confidential information. So, the court asked the persons concerned if the information still have confidential nature, and if the answer was affirmative, they had to submit a non-confidential version of the documents.

2.6. Protection of the leniency applicant and of the leniency applications

51. As respects the protection of the leniency applicant and of the leniency applications, during the administrative procedure the access to corporate statements is granted only to the addressees of a statement of objections, provided that they commit, together with their legal counsels getting access on their behalf, not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted and to ensure that the information to be obtained from access to that corporate statement will only be used for the purposes of judicial or administrative procedures that have as object the application of art. 5 of the Romanian competition law or of art. 101 of the TFEU before the administrative litigation courts. The parties have access to the documents attached to corporate statements.

52. So, as can be observed, the corporate statements have a special regime, in the sense that the companies subject to investigation have access to them, similar to the other documents in the investigation file, but without having the legal possibility to obtain copies, but only the right to consult the statements and to make notes of their content.

³ Bucharest Court of Appeal – Court file no. 1409/2/2011 CNPR v. Competition Council

53. Regarding the practice of the national courts in cases where it was requested by the parties who challenged the RCC decision finding an infringement of the competition rules, to submit the corporate statements to the case file, we must emphasize that, in compliance with the European provisions regarding the special protection of corporate statements in leniency applications in competition matters, the national courts have admitted the submission by the RCC of that corporate statements, in a sealed envelope, exclusively for the use of the court.

54. According to article 6 of the Government Emergency Ordinance no.39/2017 regarding actions for damages in cases of infringement of the competition rules, the court may not, at any time, order that a party in the damage action or a third party disclose any of the corporate statements made in the course of leniency applications.