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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
Austria**

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This document reproduces a written contribution from Austria 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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Austria

1. General introduction

1. In Austria, the enforcement of competition law is structured as a purely judicial model in all areas of competition law enforcement (mergers, cartels, antitrust). The Federal Competition Authority (BWB) is an independent, monocratically organized investigation authority. The BWB is not authorized to make binding decisions, its position is in that way somewhat comparable to that of a public prosecutor. Binding decisions are made by the Cartel Court (CC). The BWB applies to the Cartel Court and acts, as well as the Federal Cartel Prosecutor, as an official party to the proceedings.

2. Competition agency's file: preliminary investigation stage

2. At the stage of preliminary investigations before the start of the judicial procedure, the access to the investigation files of the BWB for third parties is very limited. In cases where the BWB issues binding RFIs the addressee has the right to access the file. Also, where the Cartel Court issues an inspection order, the addressee of the inspection decision has access to the entire file before the Cartel Court. Otherwise, the right to be heard before the BWB as an investigative authority is safeguarded by a provision obliging the BWB to give the parties the opportunity to be informed of the results of the investigations and to take a position on them within a reasonable period of time.

3. Competition agency's file: Disclosure of evidence by BWB in proceedings for damages

3. Only upon order by the national courts and only after terminating proceedings on infringements of competition law either by decision or in another way, may the BWB disclose the following categories of evidence: First, information compiled by a natural or legal person specifically for proceedings before the competition authority, second, information it has compiled and transmitted to the parties in the course of its investigations, and third, settlement submissions that have been withdrawn. With the first official investigative measures taken by the Federal Competition Authority to proceed against an undertaking or association of undertakings, the proceedings shall be deemed as initiated. Furthermore BWB shall disclose evidence contained in its files only upon order of a national court if such evidence cannot be obtained by another party or a third party with reasonable effort. Internal documents of the Federal Competition Authority and the correspondence between competition authorities as well as between competition authorities and law enforcement authorities shall not be disclosed at any time. BWB shall not disclose any leniency submissions or settlement submissions at any time.

4. Hence the court may also request the disclosure of evidence included in the file of courts or the BWB by way of legal and administrative assistance if such evidence cannot be reasonably obtained by the parties concerned or by a third party concerned. Where the application requesting disclosure concerns information included in the files of a competition authority, the court, when assessing proportionality of a request of disclosure, shall also consider the degree of details to which individual documents have been described

regarding their nature, subject matter or content and whether there is any necessity to restrict disclosure in order to safeguard the effectiveness of public enforcement of competition law. Before deciding on the application, the court shall grant the competition authority the opportunity to give an opinion on the circumstances; the competition authority may, also on its own initiative, submit its opinion on the proportionality of requests for disclosure to the court. A competition authority may only be ordered to disclose the following categories of evidence included in its files when the competition authority has closed the proceedings: First, information that was prepared specifically for the proceedings before the competition authority, second, information that the competition authority has drawn up and sent to the parties in the course of its proceedings, and third, settlement submissions associated with such proceedings that have been withdrawn.

5. The disclosure of leniency submissions or settlement submissions must not be ordered at any time. This prohibition does not comprise information that is available irrespective of proceedings before a competition authority even though such information is included in the files of a competition authority. Restrictions on the disclosure of evidence included in the files of a competition authority shall also apply to orders to the parties concerned to submit such evidence. The use of evidence included in the files of a competition authority shall not be permissible where its submission cannot be ordered. Evidence that a person has obtained solely by inspecting the files of a competition authority may be used by this person only in actions for damages for an infringement of competition law or by a person who has succeeded to the rights of such person. If it is stated that the request for disclosure concerns a leniency submission or settlement submissions, the court may order submission of such evidence in order to assess whether and to what extent its contents are subject to a prohibition. In that assessment, the court may request assistance solely from the competent competition authority, and the author of the evidence may also have the possibility of being heard. The court shall give a decision whether and, where applicable, which parts of the evidence are subject to a prohibition and shall therefore not be included in the files. Such a decision may only be challenged by the party obliged to disclose evidence or the author of the evidence. Other parties or third parties may be granted access to such evidence by the court solely and exclusively and to the extent to which according to the court's final decision such evidence is not subject to a prohibition. If only parts of evidence are subject to differing restrictions under this provision, the disclosure of the parts concerned shall be decided taking into account the respective provisions.

4. Cartel Court's file

6. Parties of the proceedings before the Cartel Court have the full right to access to file. Hence, all evidence used by the BWB in its application to the Court is subject to access to file.

7. However, persons not being a party to the proceedings may inspect the files of the Cartel Court only upon agreement of the parties concerned.

8. In proceedings relating to an action for damages for harm caused by an infringement of competition law, upon justified application by a party, the court may order the defendant or a third party after hearing them to disclose evidence under their control, including such evidence that contains confidential information, if disclosure of such evidence is deemed to be reasonable taking into account the legitimate interests of all parties and any third parties concerned.

9. The claimant or the defendant shall circumscribe any evidence or relevant categories of evidence whose disclosure is requested as precisely and narrowly as possible on the basis of reasonably available facts. When assessing whether any disclosure requested by a party is proportionate, the legitimate interests of all parties and third parties concerned shall be considered. In particular, the following is considered: First, the extent to which the claim or defense of the parties is supported by available facts and evidence justifying the request to disclose evidence; second, the scope and costs associated with disclosure, especially for any third parties concerned, including preventing non-targeted searches for information which is unlikely to be of relevance for the parties in the proceedings, and third, whether the evidence the disclosure of which is requested contains any confidential information – especially concerning any third parties – and what arrangements exist for protecting such confidential information.

10. The court can order effective measures to protect confidential data; in particular it may request the submission of a specifically redacted extract from a document that does not include any confidential data, conduct hearings in camera, restrict the number of persons allowed to see the evidence to the parties and their legal representatives to the extent that the rights of the parties concerned are not unreasonably restricted, or instruct an expert to produce a summary of the information that does not include any confidential information.

11. The party obliged to disclose evidence may request that certain individually specified items of evidence shall solely be disclosed to the court, due to its legally recognized obligation of secrecy or its right to refuse to make a statement. In such case, the court, after having inspected the evidence in the absence of the parties, shall give a decision whether such evidence is also to be disclosed to the party requesting such disclosure of evidence.