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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
Greece**

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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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1. Relevant Legal Framework

1. The right of access to the file is highly significant in competition law proceedings and crucial in ensuring that parties in competition proceedings are heard, as well as supporting the integrity of the Hellenic Competition Commission (the “HCC”) in the conduct of its investigations. The HCC as a public authority must ensure that its administrative powers are exercised in accordance with principles of fair procedure, including giving the affected parties an opportunity to be heard¹.
2. Legal principles and fundamental rights, including a right to good administration, govern all administrative procedures under Greek jurisprudence. The Greek Code of Administrative Procedure establishes the basic principles and fundamental rights essentially applied in all procedures of administrative nature, amongst which is the right to access administrative documents. In particular, article 5 of said Code provides for the general legal framework covering access to documents by the persons entitled to this respect, leaving room for exceptions in cases where more specific provisions apply; such is the case in proceedings enforcing competition law.
3. In antitrust and merger control proceedings before the HCC, provisions relating to access to file are set out primarily in the Rules of Internal Procedure and Management of the Hellenic Competition Commission (the “Rules on Internal Procedure”)². A separate Notice on the treatment of confidential information deals with the notion and treatment of confidential information in the framework of the right of access to the HCC’s case file³.

2. Persons having a right to access the file and procedure

4. ***Investigated parties or parties notifying a concentration*** enjoy a right to access the file, subject to legitimate confidentiality interests, which materializes from the moment when a party is notified a Statement of Objections⁴. A Statement of Objections is a document formally addressed to investigated parties (and complainants) or notifying

¹According to OECD’s Report on Competition Law and Policy in Greece – A Peer Review, June 2018, stakeholders consider that the Greek Competition Act grants significant procedural safeguards to both complainants and undertakings under investigation. The Greek Supreme Administrative Court has also decided on two cases regarding a major cartel case in the Greek milk production and distribution market that the HCC has applied the access to file rules in line with the EU law and the fundamental rights, thus safeguarding due process and rights of defence.

² Rules of Internal Procedure and Management of the Hellenic Competition Commission, published in the Government Gazette Issue 54/B’/16.01.2013, available at www.epant.gr

³ Notice on the treatment of confidential information and on the submission of the non-confidential versions of documents, available at www.epant.gr

⁴ See art. 15 para 7 of the Rules of Internal Procedure “*The persons against whom the procedure of the Commission has commenced or those who have notified a concentration have a right to access to the non confidential information of the file, following the notification of a Statement of Objections*”.

parties which aims to inform them of the preliminary position of the HCC so as to enable them to exercise their rights of defense in writing and orally at a hearing. Prior to the notification of the Statement of Objections, a copy of the non-confidential version of the main text of the complaint may be granted to the persons against which the complaint is filed provided that this does not impair the investigation carried out by the Directorate-General for Competition.

5. **Complainants** have the right to access any non-confidential information following notification of the Statement of Objections, however they may not claim right of access to the case file to the extent recognized for the parties against which the complaint is filed. The complainants' access to confidential information is restricted to what is absolutely necessary in order to ensure the protection of public interest, in the sense of protecting competition.

6. **Third parties** have no access to the files of cases pending before the HCC.

7. The right to access to file is exercised following a written application of the interested party and is realized (a) by review of the documents at the offices of the Directorate General or (b) by copying in printed or electronic form at the expense of the applicants⁵.

3. Meaning of Confidential Information

8. As a matter of general principle of law, assessment of the confidential nature of information requires balancing the requirements for due exercise of the right of defense against the need to safeguard the confidentiality of certain information, as well as any legal interests prohibiting their disclosure⁶. Efficient and consistent application of national and European rules on competition requires that the disclosure of evidence does not unjustifiably restrict the efficient enforcement of competition law by the HCC. Moreover, the qualification of information as confidential does not prevent the HCC from disclosing and using information necessary to prove an infringement of Articles 1 and 2 of Law 3959/2011⁷ (the "Competition Act") or Articles 101 and 102 TFEU. Where business secrets and confidential information are necessary to prove an infringement or for the purpose of applying competition rules in general, the Commission must assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.

9. The following are considered as confidential information and access is not provided:

⁵ Article 15 para 10 of the Rules of Internal Procedure *op.cit.*

⁶ Notice on the treatment of confidential information and on the submission of the non-confidential versions of documents, *op.cit.*

⁷ Law 3959/2011 - "Protection of Free Competition", Published in the Government Gazette Issue A' 93/20.04.2011.

1. **All preparatory documents and documents for internal use** (such as notes, drafts or other working papers and communication) of the HCC, the European Commission and other EU national competition authorities⁸.
2. All documents and information exchanged for the application of **Articles 11 and 14 of Regulation (EC) 1/2003** (including any observations made by the European Commission or other competition Authorities within the European Competition Network on a particular case⁹).
10. The following are considered as confidential information and access to them is, in principle, not provided:
 3. Correspondence between the HCC and other public authorities or services or other competition authorities or the European Commission¹⁰ or between those authorities.

In certain exceptional circumstances, access is granted to such documents after deletion of any business secrets or other confidential information. Prior to granting access to the case file, the HCC shall request the Authority which has provided the document to identify business secrets or other confidential information. By way of an exception, the above documents shall be accessible, in a way similar to documents obtained from private parties, in particular if and to the extent that those documents contain allegations against the parties which the HCC must examine, or form part of the evidence of the investigation. These considerations apply, in particular: a) in the context of exchange and use, as evidence, for the purpose of applying Articles 101 and 102 TFEU, of documents and information, between the European Commission and EU Member States' competition authorities according to Article 12 of Regulation (EC) 1/2003¹¹, b) in the context of collection of information and evidence from public or other authorities for the exercise of HCC's powers under Article 38 of the Competition Act.

4. **Professional and business secrets**, i.e. the documents or parts of documents containing business secrets. Professional/business secrets deserve special protection. They are confidential information in relation to an undertaking's business activity, of which not only disclosure to the public but also mere transmission to a person other than the one who provided the information might seriously harm the latter's interests. Examples of information that may qualify as professional/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,

⁸ See Article 15 para. 11 of the Rules of Internal Procedure *op.cit.*, “*The internal documents of the Directorate General, the European Commission and other national Competition Authorities, as well as the correspondence between the Directorate General and other services or Competition Authorities, are also considered confidential information*”.

⁹ See Article 27 para 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 4.1.2003, p. 1–25, Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43–53 para. 46.

¹⁰ See Article 15 para. 11 of the Rules of Internal Procedure *op.cit.*

¹¹ Article 22 of Regulation (EC) 1/2003, *op.cit.*, See also Commission Notice on cooperation within the Network of Competition Authorities, *op.cit.*, para. 26 et seq.

customer and distributor lists, marketing plans, cost and price structure and sales strategy.

5. **Other confidential information.** This category includes information other than professional and business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking¹². Depending on the specific circumstances of each case, this may apply to information provided by third parties about undertakings which are able to place 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 to identify complainants or other third parties who reasonably wish to remain anonymous and any information which, while being, in principle, related to a business activity, are also linked to personal data or private life information of the natural person concerned. The category of other confidential information also includes military secrets, as well as any correspondence concerning classification of information as confidential, as it is generally so closely linked to confidential information itself that its disclosure would be equivalent to disclosing confidential information.

11. In relation to the cases of paragraphs 4) and 5) above, the assessment on whether a piece of information constitutes a professional/business secret or other confidential information, shall be made on case-by-case basis. For any information to qualify as confidential, it is necessary that such information be known only to a limited number of persons, while its disclosure might seriously harm the person who has provided that information or third parties. Moreover, the interests that may be harmed by disclosure must be worthy of protection.

4. Information not considered confidential

12. Information and documents submitted or collected by undertakings which are not covered by the above definitions of “business secrets” and “other confidential information”, and in particular information already publicly available, will not be considered confidential¹³. For a piece of information to lose its confidential nature, it is sufficient for it to be available to specialist circles (even small ones) or capable of being inferred from publicly available information.

13. By way of example, the following types of information shall not, unless duly justified, be considered confidential:

- Data related to the respondent undertaking/undertaking concerned or the corporate group to which it belongs (such as, foreseeable price increases, dates of implementation of such increases, customer names, credit duration), which is already known outside the undertaking (in case of a group of undertakings, outside the group) or outside the association to which it has been communicated by that

¹² Paragraph 12 of Article 15 *op.cit.*, provides that questionnaire replies and depositions in the course of case proceedings may be accessible solely as to their content, without prejudice to the relevant confidentiality rules, and may be non-accessible as to the identity of the persons who have submitted a reply or made a statement, particularly in view of the risk of adoption of retaliatory measures.

¹³ Notice on the treatment of confidential information and on the submission of the non-confidential versions of documents, *op.cit.*

undertaking. An example in this respect is an undertaking's announcement of its commercial policy, such as by sending letters and circulars to its wholesalers or distribution network.

- The names and positions of managers and employees of the companies involved in an infringement.
- General terms of transactions, as well as any similar contractual clauses included in agreements signed with a number of counterparties on the basis of standard agreements/framework or pilot contracts (such as terms applicable to a distribution/franchise network).
- Corporate acts and information subject to publication by law.
- Protocol numbers of administrative documents.
- Legal remedies, appeals and any judicial documents in general, as well as extra-judicial statements against the litigants concerned, unpublished court decisions and minutes of court hearings against the litigants concerned.
- Notices and minutes of public or private tenders and other information about the tenderers after completion of the relevant evaluation process by the competent authority, provided that the applicant for access to such information is one of the tenderers.
- Circulars issued by public organizations and bodies, periodicals and other printed material published by associations of undertakings distributed to their members, information available on the Internet.
- Information that has lost its commercial importance, for instance due to the passage of time. As a general rule, information that is more than five years old is no longer confidential. In that case, relevant information is considered confidential only if it is established, on specific grounds, that despite its historical nature, it continues to be an essential element of the commercial position of the undertaking concerned.
- Ranking of the various competitors in the relevant market, based on their respective market shares.
- Data from and about another undertaking which has been provided by or collected from the respondent/ investigated undertaking (for example, price announcements, sales data etc.). Exceptionally, however, data received pursuant to a confidentiality contract or a contract including a confidentiality clause, may be considered confidential
- Findings of a study commissioned in connection with initiated proceedings, together with the general conditions and methodology of the study, provided that the protection of any intellectual property rights is safeguarded.

5. Treatment of confidential information

14. In all cases of submission or collection of information for proceedings before the HCC, the natural or legal persons who submit or by whom the information is collected, specify in a reasoned confidentiality claim the information, documents and parts of documents containing confidential information and provide a separate non-confidential

version thereof¹⁴. In case there is a disagreement regarding the confidentiality claim, the Directorate-General for Competition or the case Rapporteur, as the case may be, shall inform the claimant in writing of the Authority's intention to disclose information, state the relevant reasons and set the time frame within which the claimant may submit his arguments in writing¹⁵. If, following submission of those arguments, a disagreement on the confidentiality claim persists, the President of the HCC shall decide on the classification of a document or a piece of information. Any information, documents or parts of documents for which a reasoned confidentiality claim has not been submitted or which have not been provided in a separate non-confidential version, shall be considered non-confidential¹⁶.

15. The Directorate-General for Competition or the case Rapporteur, may exceptionally classify information, documents and parts of documents as confidential. The Rules of Internal Procedure provide that when drafting the Statement of Objections, the number of the different versions is established, depending on the number of the parties involved in the case and the information, documents and parts of documents that are considered to be confidential and from each version of the Statement of Objections the information considered confidential vis-à-vis each addressee is omitted. Whenever the use of documents containing business secrets is deemed necessary by the Rapporteur, when drafting the Statement of Objections, in order to establish whether or not an infringement has been committed, such information is included therein without it being necessary to follow the procedure referred to in paragraph 3 of Article 15 of the Rules of Internal Procedure, and, it loses its confidential nature from that point¹⁷.

16. Furthermore, after notification of the Statement of Objections to the parties¹⁸, the persons against whom the proceeding before the HCC was initiated or those who have filed a complaint, as well as the persons who have notified a merger, have the right of access to all non confidential information contained in the case file. Where access to documents containing business secrets is absolutely necessary for the exercise of the rights of defense of one or more persons against whom the proceeding before the HCC was initiated or who have notified a merger, the President, by reasoned decision, grants access to such documents, in whole or in part, only to the persons for whom it has been deemed necessary for the exercise of their right of defense¹⁹.

17. Documents to which access is granted under Article 15 of the Rules of Internal Procedure shall only be used for the purposes of judicial or administrative proceedings for the application of the provisions of the Competition Act and Articles 101 and 102 TFEU²⁰.

¹⁴ Article 15(2) of the Rules of Internal Procedure, *op.cit.*, see also Article 41(3) of the Competition Act and HCC Notice of 11.09.2012 "On the form and manner of submission of complaints pursuant to Article 36 of L. 3959/2011", para. 17.

¹⁵ Article 15(3) of the Rules of Internal Procedure, *op.cit.*

¹⁶ Article 15(4) of the Rules of Internal Procedure, *op.cit.*

¹⁷ Article 15 para. 6 of the Rules of Internal Procedure, *op.cit.*

¹⁸ Article 15 paras. 7 and 8 of the Rules of Internal Procedure, *op.cit.*

¹⁹ Article 15 para. 7 of the Rules of Internal Procedure, *op.cit.*

²⁰ Article 15 para. 14 of the Rules of Internal Procedure, *op.cit.*, see also Article 41 para. 1 of the Competition Act, *op.cit.*

6. Particularities in relation to access to file

18. The HCC may accept commitments to address competition concerns and it also applies a leniency program and a settlements procedure. Rules regarding access to file differ in these specific procedures. The Competition Act also provides for the treatment of confidential information submitted by the HCC to the courts which are competent to review its decisions.

6.1. Commitments Procedure

19. In commitment procedures²¹ the parties are not granted access to the file as such right to access is provided in article 15 of the Rules of Internal Procedure. In practice, if they so request, they are granted access to the complaint, the results of the market test if performed, important documents of the file if deemed necessary and the memoranda submitted by other parties before the oral hearing.

6.2. Settlement Procedure

20. The Settlement Procedure²², which is essentially modeled after the EU equivalent procedure, aims at simplifying and speeding up the handling of pending cases. The HCC achieves efficiencies through a streamlined administrative process, resulting in a relatively more expedited adoption of infringement decisions regarding Article 1 of the Competition Act and/or Article 101 TFEU. According to the procedure, undertakings or associations of undertakings must acknowledge participation to an infringement and accept unequivocally their liability in relation to the infringement. In addition the parties must confirm that, in view of the above, they do not envisage requesting full access to the file or requesting to be heard in an oral hearing before the HCC's Board, in order to enjoy a reduction in the administrative fine imposed.

6.3. Leniency Program

21. The procedure in the context of the HCC's Leniency Program²³ provides for the appropriate treatment of the material collected in the context of this procedure, consistent with the need to avoid any disclosure of information which could undermine the Leniency Program.

22. While there are no specific rules to protect leniency material from disclosure to parties to the proceedings when requesting access to the case file in the context of HCC

²¹ HCC Decision No. 588/2014 which defines the terms, conditions and the procedure for the acceptance of commitments offered by undertakings to cease possible infringements of articles 1 and 2 of the Competition Act or 101 and 102 TFEU, available at www.epant.gr

²² HCC Decision No. 628/2016 established the terms and conditions of the settlement procedure in cartel cases, according to the provisions of Articles 25a and 14 par. 2 of the Greek Competition Act, available at www.epant.gr

²³ HCC Decision No. 526/VI/2011 on the terms and conditions to qualify for immunity from or reduction of fines imposed on undertakings and natural persons who contribute with their cooperation in horizontal cartel investigations of Article 1 of the same law or Article 101 TFEU, available at www.epant.gr.

proceedings with the exception of access to oral leniency corporate statements²⁴, the relevant provisions of the Competition Act, the Rules on Internal Procedure and the general guidelines on treatment of confidential information and access to file apply while the case is ongoing and until the case is closed. In particular, the leniency application is registered in a confidential registry for leniency applications. The filing of the leniency application as well as the identity of the applicant is kept confidential. The leniency application is followed by (a) a corporate statement and (b) evidence regarding the infringement. No access to the leniency application (both the corporate statement, either oral or written, and the supporting evidence) will be granted before the HCC has notified its Statement of Objections to the parties to the proceedings, according to the general rule applicable in HCC proceedings, that access to file is granted following the notification of the Statement of Objections.

23. Following the notification of the Statement of Objections, access to confidential information is granted to the undertakings involved in the infringement to the extent that and in a way that combines both the interest of protecting the efficiency of the leniency programme, and especially protecting corporate statements, and the rights of defence of undertakings involved in the infringement, e.g. by rendering corporate statements accessible only at the premises of the HCC.

6.4. Damages Procedure

24. National Law 4529/2018²⁵ (which transposed the Damages Directive²⁶ into national law) introduces rules for disclosing evidence during trials for actions for damages deriving from violations of competition law. Specifically, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of his claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control.

25. National courts may limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider the extent to which the claim or defense is supported by available facts and evidence, the scope and cost of disclosure and whether the sought evidence contains confidential information.

26. In case a litigant party fails or refuses to comply with the disclosure order of any court or destroys the relevant evidence, the allegations of his/her counterparty are deemed fully evidenced and a monetary fine amounting to € 50,000-100,000 shall be imposed against the party who did not comply.

27. In addition, the Law provides that national courts cannot at any time order a party or a third party to disclose leniency statements and settlement submissions. They may

²⁴ See paragraph 45 of the Leniency Program.

²⁵ Published in the Government Gazette, Issue A'56/23.03.2018, see art. 4-7.

²⁶ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance OJ L 349, 5.12.2014, p. 1–19

however order the disclosure of the following categories of evidence only after the HCC has closed its relevant proceedings:

- Information that was prepared by a natural or legal person specifically for the proceedings of the HCC;
- Information that the HCC has drawn up and sent to the parties in the course of its proceedings; and
- Settlement submissions that have been withdrawn.

28. To the extent that the HCC is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought.

6.5. Preparation of the file for submission to the Courts

29. Regarding the transmission of confidential information, the Competition Act expressly provides for the protection of the confidential information contained in the file submitted by the HCC to the Athens Administrative Court of Appeals and the Council of State for the purpose of the review of its decisions, whereby²⁷ *“Confidential information bearing on the application of the present law shall form part of the administrative file [...] The confidential information referred to in the present paragraph shall form part of the file submitted to the Athens Administrative Court of Appeal and the Council of State and shall remain confidential. The above information shall therefore be forwarded in a separate section of the administrative file marked ‘confidential information’. The court registrar shall ensure that the parties cannot access the parts of the file that are confidential for them, unless access is deemed necessary in order to defend their overriding interest and the adjudicating court grants them respective permission, to the necessary extent, at their request.”*

²⁷ Art. 41 par. 3 of the Competition Act.