Working Party No. 3 on Co-operation and Enforcement

DISCUSSION ON HOW TO DEFINE CONFIDENTIAL INFORMATION

-- European Union --

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This note is submitted by the European Union to the Working Party No.3 of the Competition Committee FOR DISCUSSION under Item IV at its forthcoming meeting to be held on 29 October 2013.

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DISCUSSION ON HOW TO DEFINE CONFIDENTIAL INFORMATION

− European Union −

1. Please describe how your jurisdiction defines information which is to be treated as confidential in the course of investigations under your competition laws. Please include definitions from constitutional and statutory provisions, as well as definitions included in regulations and government or agency practice.

1. The obligation of "professional secrecy" (i.e. the term used under EU law) applies to all officials and other servants of the institution in their work for the European Union. Professional secrecy entails the general obligation not to disclose information received in an official capacity.

2. Article 339 of the Treaty on the Functioning of the European Union (TFEU) obliges the institutions of the Union and its officials not to disclose information "of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components". Article 339 TFEU is the expression of a general principle which applies during the course of the administrative procedure before the Commission according to which undertakings have a right to protection of their business secrets.¹

3. Article 28 of Regulation 1/2003 and Article 17 of the Merger Regulation implement Article 339 TFEU in the area of competition law enforcement. All persons employed by the Commission and by the authorities of the Member States "shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy." It is important to note that these provisions extend the professional secrecy obligations also to officials from Member State authorities in so far as those obtain information through the application of the cooperation or information mechanisms of Regulation 1/2003 or of the Merger Regulation.

4. Information covered by the obligation of professional secrecy falls within two categories, business secrets and other confidential information.² Irrespective of whether business secrets or other confidential information are involved, information covered by the obligation of professional secrecy cannot be disclosed to the general public.³

1.1. Business secrets

5. Business secrets receive strong protection under EU law. The notion of "business secrets/confidential information" is frequently interpreted in the jurisprudence of the European courts and


in a Commission Notice outlining its administrative practice. Article 339 TFEU, which is of general application, makes reference to a specific type of information, i.e. "information about undertakings, their business relations or their cost components". European courts have generally defined "business secrets" as information "of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter's interest". 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. Furthermore, the ECJ has interpreted article 339 TFEU that it not only protects company related information but also the request not to disclose the identity of an informant.

1.2. Other confidential information

6. The category "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. Depending 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. The Court of First Instance and the Court of Justice have acknowledged that it is legitimate to refuse to reveal to such undertakings certain letters received from their customers, since their disclosure might easily expose the authors to the risk of retaliatory measures. Therefore the notion of "other confidential information" may include information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous. The category of other confidential information also includes military secrets.

1.3. Personal data protection and EU competition law enforcement

7. When enforcing EU competition law (whether under the anti-trust, mergers, or state aid rules) against Undertakings or Member States DG COMP processes information relating to identified or identifiable natural persons, such as names, contact details, the position of the natural person in the undertaking (e.g. CEO, marketing manager, etc.) or in the administration of the Member State concerned, etc. As a result, it is bound to comply with the provisions of Regulation 45/2001 on personal data protection.

8. Article 2 of the Regulation defines personal data as "any information relating to an identified or identifiable natural person […]; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity".

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7. Work (e-mail) address. telephone and fax number) and occasionally also private contact details
9. The fact that DG COMP in the context of its competition enforcement activities falls under the scope of the data protection Regulation triggers various obligations for DG COMP and rights of the data subjects concerned. The competition regulations provide for appropriate safeguards that the personal data are processed lawfully and in compliance with the data quality principles laid down in the data protection Regulation.

2. Does the definition of confidential information turn on the nature of the information (e.g., business secrets, personal information), the manner in which it is obtained by the agency, how the agency intends to use it, or some combination of the above?

10. It follows from the description above under 1 that the protection against disclosure of information under EU law is linked to both the way the information has been obtained and the nature of the information itself.

3. Is the definition of confidential information used in competition investigations specific to competition enforcement, or does the definition apply generally to situations where the government acquires information from undertakings or individuals?

11. The definition of "professional secrecy" is laid down in Article 339 TFEU, which falls under Part seven of the Treaty entitled "General and Final Provisions". It follows from this title that the rights and obligations following from this provision are not limited to Competition enforcement as such. It has to be noted though that the general principles of Article 339 TFEU have been further elaborated in specific competition related EU legislation, such as Regulation 1/2003, the Merger Regulation and the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty.

12. As explained under 1 above the provisions of Regulation 45/2001 on personal data protection are of general application and not limited to situations involving the application of the competition rules.

4. What role does the source of the information have in determining confidentiality? Can the agency challenge the source’s confidentiality claims or designations, and what is the process for doing so? In the event of disagreement, who is the final decision-maker, and when is this decision made?

13. Under the Treaty on the Functioning of the EU, confidential information is warranted special protection. At the same time, access to this information can be necessary for an addressee of a statement of objections to properly exercise its rights of defence. The Hearing Officers decide on requests for access to the file, balancing the interest of confidentiality against the undertaking’s right to access all information collected throughout the proceeding. By the same token, the Hearing Officers decide on the disclosure of information whose content is claimed to be confidential when a Commission’s decision is published. Where it is intended to disclose documents containing alleged business secrets, or other confidential information, the undertaking concerned must be granted the opportunity to, first, make known its view on the intended decision of the Hearing Officer, and, second, if a decision is adopted to challenge that decision before the General Court.

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9 OJ C 325/7 of 22 December 2005.

14. Information will be classified as confidential where the person or undertaking in question has made a claim to this effect and such claim has been accepted by the Commission.

15. Claims for confidentiality must relate to information which is within the scope of the above descriptions of "business secrets" or "other confidential information". The reasons for which information is claimed to be a business secret or other confidential information must be substantiated. Confidentiality claims can normally only pertain to information obtained by the Commission from the same person or undertaking and not to information from any other source. Information relating to an undertaking but which is already known outside the undertaking (in case of a group, outside the group), or outside the association to which it has been communicated by that undertaking, will not normally be considered confidential. Information that has lost its commercial importance, for instance due to the passage of time, can no longer be regarded as confidential.

16. As a general rule, the Commission presumes that information pertaining to the parties' turnover, sales, market-share data and similar information which is more than 5 years old is no longer confidential.

17. 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 rights of the defence of the parties through the provision of the widest possible access to the Commission file may outweigh the concern to protect confidential information of other parties. It is for the Commission to assess whether those circumstances apply to any specific situation. This calls for an assessment of all relevant elements, including:

• the relevance of the information in determining whether or not an infringement has been committed, and its probative value;

• whether the information is indispensable;

• the degree of sensitivity involved (to what extent would disclosure of the information harm the interests of the person or undertaking in question);

• the preliminary view of the seriousness of the alleged infringement.

18. Similar considerations apply to proceedings under the Merger Regulation when the disclosure of information is considered necessary by the Commission for the purpose of the procedure.

19. Where the Commission intends to disclose information, the person or undertaking in question 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 document.

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11 However, business secrets or other confidential information which are given to a trade or professional association by its members do not lose their confidential nature with regard to third parties and may therefore not be passed on to complainants. Cf. Joined Cases 209 to 215 and 218/78, Fedetab, [1980] ECR 3125, paragraph 46.

12 Cf. Article 27(2) of Regulation (EC) No 1/2003 and Article 15(3) of the Implementing Regulation.

13 Article 18(1) of the Merger Implementing Regulation.
20. Moreover, the Commission may require undertakings, in all cases where they produce or have produced documents, to identify the documents or parts of documents, which they consider to contain business secrets or other confidential information belonging to them, and to identify the undertakings with regard to which such documents are to be considered confidential.

21. For the purposes of quickly dealing with confidentiality claims, the Commission may set a time-limit within which the undertakings shall: (i) substantiate their claim for confidentiality with regard to each individual document or part of document; (ii) provide the Commission 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 concise description of each piece of deleted information. The non-confidential versions and the descriptions of the deleted information must be established in a manner that enables any party with access to the 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 Commission to grant access to the information claimed to be confidential.

4.2. Treatment of confidential information

22. In antitrust proceedings, if undertakings fail to comply with the provisions concerning confidentiality claims described above, the Commission may assume that the documents or statements concerned do not contain confidential information. The Commission may consequently assume that the undertaking has no objections to the disclosure of the documents or statements concerned in their entirety.

23. In both antitrust proceedings and in proceedings under the Merger Regulation, should the person or undertaking in question meet the conditions concerning confidentiality claims, to the extent they are applicable, the Commission will either:

- provisionally accept the claims which 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.

24. The Commission may reverse its provisional acceptance of the confidentiality claim in whole or in part at a later stage. Where the Directorate General for Competition 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 information, it will grant the person or undertaking in question an opportunity to express its views. In such cases, the Directorate General for Competition will inform the person or undertaking in writing of its intention to disclose information, give

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14 In merger proceedings the principles set out in the present and subsequent paragraphs also apply to the persons referred to in Article 3(1)(b) of Merger Regulation.

15 Cf. Article 16(3) of the Implementing Regulation and Article 18(3) of the Merger Implementing Regulation. This also applies to documents gathered by the Commission in an inspection pursuant to Article 13 of the Merger Regulation and Articles 20 and 21 of Regulation (EC) No 1/2003. See also, the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308/6 20.10.2011, para 149.

16 Cf. Article 16(3) of the Implementing Regulation and Article 18(3) of the Merger Implementing Regulation. See also, the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308/6 20.10.2011, para 94.

17 Cf. Article 16(3) of the Implementing Regulation.

18 Cf. Article 16 of the Implementing Regulation.
its reasons and set a time-limit within which such person or undertaking may inform it in writing of its views. If, following submission of those views, a disagreement on the confidentiality claim persists, the matter will be dealt with by the Hearing Officer according to the applicable Commission terms of reference of Hearing Officers.\textsuperscript{19}

25. The Commission may use two additional procedures for the purpose of alleviating the burden of drawing up non-confidential versions of submissions: the negotiated disclosure to a restricted circle of persons and the data room procedure.\textsuperscript{20}

26. First, the Commission may accept in certain cases, especially those with a very voluminous file that the parties agree voluntarily to use a negotiated disclosure procedure. Under this procedure, the party entitled to access to file agrees bilaterally with the information providers claiming confidentiality to receive all or some of the information which the latter have provided to the Commission, including confidential information. The party being granted access to file limits access to the information to a restricted circle of persons (to be decided by the parties on a case-by-case basis, if requested, under the supervision of the Commission).

27. Second, the Commission may organise the so-called data room procedure. This procedure is typically used for the disclosure of quantitative data relevant for econometric analysis. Under this procedure, part of the file, including confidential information, is gathered in a room, at the Commission's premises (the data room). Access to the data room is granted to a restricted group of persons, i.e. the external legal counsel and/or the economic advisers of the party (collectively known as the ‘advisers’), under the supervision of a Commission official. The advisers may make use of the information contained in the data room for the purpose of defending their client but may not disclose any confidential information to their client.

28. The Hearing Officer may decide pursuant to Article 8(4) of the terms of reference of the hearing officer that the data room procedure shall be used in those limited cases where access to certain confidential information is indispensable for a party's rights of defence and where the hearing officer considers that, on balance, the conflict between respect for confidentiality and the rights of defence is best solved in this way. The hearing officer will not take such decisions if he or she considers that the data room is not appropriate and that access to the information should be given in a different form (e.g. a non-confidential version).

4.3. Personal data protection

29. The purpose of the processing of personal data carried out by DG COMP is to determine whether the undertakings or Member States concerned act in conformity with the competition rules of the EC Treaty. There are various legal safeguards in competition regulations ensuring that data (including possible personal data) in competition proceedings are processed lawfully. Information covered by the obligation of professional secrecy may not be disclosed.

30. The Hearing Officers need to take into account the data protection Regulation when deciding on the disclosure of information on natural persons in the context of their decisional powers.\textsuperscript{21}


\textsuperscript{20} Cf. the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308/6 20.10.2011, para 95-98.

\textsuperscript{21} The ninth recital of the preamble of the HOs' Mandate says explicitly "when disclosing information on natural persons, particular attention should be paid to Regulation 45/2001."