

ANNEX XX

Guidance on confidentiality claims during Commission antitrust procedures¹

(version 2018)

- (1) If an investigation leads to adoption of a Statement of Objections, the Commission grants access to documents that DG Competition has obtained, produced and/or assembled during the course of its investigation. Access to that file is granted upon request and only to those undertakings/associations of undertakings to which a Statement of Objections is addressed². If the Commission has decided in a cartel case to pursue a settlement procedure, the Commission will disclose information in its file to the parties that are engaged with it in settlement discussions³.
- (2) The right of access to the file does not extend to the parts of the file that contain business secrets or other confidential information, or to internal documents of the Commission or of the competition authorities of the Member States (nevertheless, see also paragraph (26) below).⁴
- (3) Access to the file is granted on condition that the information thereby obtained may be used only for the purposes of judicial or administrative proceedings for the application of Article 101 or 102 TFEU⁵.
- (4) Undertakings, associations of undertakings and persons must indicate business secrets and other confidential information in submissions and/or documents in the Commission's file that originate from them⁶. This obligation extends also to observations that addressees of a Statement of Objections may submit.
- (5) In certain circumstances the Commission may decide to grant access to documents in the file also at other stages of the proceedings. In particular the Commission may decide to grant access to key submissions in antitrust proceedings other than cartel proceedings, or to written replies to the Statement of Objections. If that would be the

¹ This guidance concerns confidentiality claims vis à vis parties of the proceedings. Note that there is distinct guidance on confidentiality in view of preparation of public versions of Commission decisions and related publications. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. In regulations and notices adopted before the 1 December 2009, references to Articles 81 and 82 of the EC Treaty should be understood as references to Articles 101 and 102 of the TFEU.

² Article 15 of Commission Regulation (EC) No 773/2004, OJ L 123, 27.4.2004, p. 18.

³ Article 10(a)(2) of Regulation 773/2004; paragraphs 15 and 16 of the Commission Notice on the conduct of settlement procedures in cartel cases, OJ C 167, 2.7.2008, p. 1.

⁴ Articles 27 and 28 of Council Regulation (EC) No 1/2003, OJ L 1, 4.1.2003, p. 1; Articles 15(2) and 16 of Regulation No 773/2004; point 10 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, p. 7 ("Notice on access to file"). See also Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others/Commission*, EU:C:2004:6, [2004] ECR I-123, paragraph 68.

⁵ See Articles 16(a) of Regulation No 773/2004, as modified by Regulation 2015/1348; Point 48 of the Notice on access to file.

⁶ Article 16 of Regulation No 773/2004.

case, the Commission would take into account genuine concerns regarding confidentiality, including fears of retaliation, before granting any access⁷.

- (6) This document provides guidance for identifying business secrets and other confidential information and outlines the manner in which the non-confidential versions must be submitted. If you do not to comply with this guidance, the Commission may assume that your submissions/documents do not contain any business secrets or other confidential information⁸ and, that therefore you have no objections to the disclosure of that information.
- (7) This guidance document does not replace the respective provisions in EU law concerning professional secrecy and claims for confidentiality⁹.

I. What may constitute business secrets and other confidential information

- (8) EU legislation on proceedings pursuant to Articles 101 and 102 of the TFEU foresees that information shall not be communicated or made accessible by the Commission in so far as it contains **business secrets** or **other confidential information** of a person¹⁰.
- (9) **Business secrets** are confidential information about an undertaking's business activity 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 interests¹¹. 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 strategy¹².
- (10) **Other confidential information** is information other than business secrets, 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 Justice of the European Union has 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 measures¹³. Therefore, the notion of other confidential information may include information that would enable the parties to identify complainants or other

⁷ See in this regard paragraphs 71-74 and 103 of the Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011 ("Best Practices"), p. 6–32.

⁸ Article 16(4) of Regulation No 773/2004.

⁹ Article 339 TFEU, Regulation No 1/2003, Regulation No 773/2004 and the Notice on access to file.

¹⁰ Article 16(1) of Regulation No 773/2004.

¹¹ Case T-353/94 *Postbank NV/Commission*, EU:T:1996:119, [1996] ECR II-921, paragraph 87.

¹² Point 18 of the Notice on access to file.

¹³ The EU Courts have pronounced upon this question both in cases of alleged abuse of a dominant position (Article 102 of the TFEU) (Case T-65/89, *BPB Industries and British Gypsum/Commission*, EU:T:1993:31, [1993] ECR II-389; and Case C-310/93P, *BPB Industries and British Gypsum/Commission*, EU:C:1995:101, [1995] ECR I-865), and in merger cases (Case T-221/95 *Endemol v Commission*, EU:T:1999:85, [1999] ECR II-1299, paragraph 69, and Case T-5/02 *Laval/Commission* [2002], EU:T:2002:264, ECR II-4381, paragraph 98 et seq).

third parties where those have a justified wish to remain anonymous. The category of other confidential information also includes military secrets¹⁴.

- (11) In the context of the publication of competition law decisions, it emerges from the case law that, for **information to be regarded as confidential, all the following conditions must be met**: i) such information must be known only to a limited number of persons; ii) its disclosure must be liable to cause serious harm to the person who has provided it or to third parties; and iii) the interests liable to be harmed by the disclosure must be objectively worthy of protection¹⁵. These principles are applied also in the assessment of confidentiality claims in the context of Statements of Objections, access to the file and final decisions.
- (12) Finally, the names of people not involved in the infringement may be considered confidential information to the extent that they constitute personal data which cannot be transferred. As with all redactions, it is up to the undertaking that provided the document to make such confidentiality claims. If such a name remains in a non-confidential version of a document because there was no confidentiality claim with respect to it, the Commission is entitled to infer that 'there is no reason to assume that the data subject's legitimate interests might be prejudiced' pursuant to Article 8 of Regulation no. 45/2001¹⁶.

II. What is not considered to be a business secret or other confidential information

- (13) The assessment of whether given information contains business secrets or other confidential information has to be done on a case-by-case basis. Information in your submissions/documents that is not covered by the definitions of “business secrets and other confidential information” (see paragraphs (9)-(11)) will not be considered confidential.
- (14) In particular, information relating to an undertaking that 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 usually not be considered as confidential. For information to lose its confidential nature, it is sufficient for it to be available to specialist circles or capable of being inferred from publicly available information¹⁷.
- (15) Information that has lost its commercial importance, for instance due to the passing of time, can also no longer be regarded as confidential. The General Court has considered and ECJ confirmed a period of five years in itself to be sufficient for information to lose its qualification as business secrets or other confidential information¹⁸. Confidential treatment of information may only be granted to such data exceptionally,

¹⁴ Points 19-20 of the Notice on access to file.

¹⁵ Case T-198/03 *Bank Austria Creditanstalt AG/Commission*, EU:T:2006:136, [2006] ECR II-1429, paragraph 71.

¹⁶ OJ L 8, 12.1.2001, p. 1.

¹⁷ Order in Case T-89/96 *British Steel/Commission*, EU:T:1997:77, [1997] ECR II-835, paragraphs 26 and 27.

¹⁸ See Case T-341/12 *Evonik Degussa GmbH v Commission*, EU:T:2015:51, paragraphs 84-85 and Case C-162/15 P *Evonik Degussa GmbH v Commission*, paragraphs 64-67.

if it can be shown that, they still constitute essential elements of the commercial position of the undertaking concerned, notwithstanding their historical nature¹⁹.

- (16) By way of example, the following type of information is usually not regarded as a business secret or other confidential information, unless duly justified (showing the need for their deletion from the accessible part of the file²⁰):
- data from and about another undertaking (such as price announcements, sales data, etc). Exceptionally, however, data received pursuant to a contract with another undertaking, which envisages confidentiality, may be considered confidential. General references to a non-disclosure agreement are insufficient to justify the confidentiality of such data;
 - information made known outside your undertaking (such as price targets, price increases, dates of implementation of such increases and customer names, especially when these are undertakings);
 - facts relating to an application for immunity or a reduction of fines, where these facts aim to provide evidence of an alleged infringement, unless the disclosure of such facts could harm the Commission's leniency policy;
 - names and positions of individuals related to the subject matter of the investigation. If the individuals in question were allegedly involved in or received information about the suspected infringement, their names and positions cannot be redacted from accessible versions of the submissions/documents.
- (17) It should be noted that **oral corporate statements** that have been supplied in an application for immunity from or a reduction of fines under the Leniency Notice²¹ **cannot by definition contain any business secrets or other confidential information**, as they are a presentation of undertaking's knowledge of a cartel and its role therein²².

III. How to claim confidentiality

- (18) For reasons of administrative efficiency, the Commission may ask you to provide first a draft non-confidential version of the submissions/documents, in which the information claimed to be confidential is highlighted but remains legible. After the Commission has provisionally accepted your confidentiality claims, you will be asked to submit a final non-confidential version in which confidential information is blacked out. The Commission reserves the right to reconsider at a later stage in the proceedings its initial evaluation of your confidentiality claims.
- *Submit complete non-confidential version to each document on which you have confidentiality claims*

¹⁹ See, for example, Order in Case T-271/03 *Deutsche Telekom/Commission*, EU:T:2006:163, [2006] ECR II-1747, paragraph 45.

²⁰ See, for example, point 19 of the Notice on access to file.

²¹ Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17 ("the Leniency Notice").

²² See paragraph 31 of the Leniency Notice. The Commission requires leniency applicants to make a declaration to that effect at the time of their leniency application.

- (19) You must submit a non-confidential version for each submission/document on which you claim confidentiality²³. Standard confidentiality stamps in letterheads from law firms, or automatic disclaimers in e-mails, are not regarded as requests for confidential treatment.
- (20) The non-confidential version of your submissions/documents must **mirror the confidential version in terms of the number of pages and its format**. If you claim confidentiality for any parts of a document, you are requested **to provide a non-confidential version of the ENTIRE document**.
- *Limit redactions to specific pieces of information*
- (21) In general, you cannot claim confidentiality for an entire document or whole sections of it. It is normally possible to protect confidential information with limited redactions. Entirely blank or blacked-out pages will not be accepted. As a minimum, leave the headings of the documents and/or the headings of the columns contained in tables and pictures as well as any list of annexes intact.
- *Provide reasons for your confidentiality claims and non-confidential summaries*
- (22) You are required to provide the Commission with all relevant details in order to enable it to assess the confidentiality of a piece of information. Therefore, you are requested to
- a. **support each claim** for confidentiality in writing, explaining:
 - the reasons why the information in question constitutes a business secret or other confidential information;
 - in particular, how the disclosure of this information would cause serious harm to your undertaking or would significantly harm a person or undertaking.
 - b. **provide a concise but meaningful non-confidential summary** of each piece of information claimed to be confidential.
- Standard justifications such as 'business secret' or 'information not known to other party' without any justification will not be accepted. When redacting figures such as market shares or turnover figures you are asked to indicate ranges. Regarding sales and/or turnover data, provide ranges not wider than 20% of the respective total amounts. Relative figures such as market shares (in %) should be indicated in ranges not wider than 5%.
- (23) The justifications and the non-confidential summaries for each piece of information claimed to be confidential should be presented in the form of a list. Please see the format below:

²³ Article 16(2) of Regulation 773/2004.

Example: List of confidentiality claims²⁴ [accessible to addressees of the SO!]

ID # (if available)	Deletions on page # of original confidential version/paragraph # (please indicate annex # where relevant)	Reasons for confidentiality request	Non-confidential summary

- (24) The non-confidential versions of the submissions/documents and the summaries of the redacted information must be drafted in a way as to enable a party entitled to access the non-confidential versions to determine whether the information deleted is likely to be relevant for its defence. **It is therefore very important to provide accurate descriptions, on the basis of which other parties can assess the information and make, if they deem necessary, well-motivated request to the Commission to grant access to information you have claimed to be confidential.**
- (25) Please note that, in line with the non-confidential versions of submissions/documents, also the non-confidential summaries and the justifications of your confidentiality claims will need to be made accessible to the parties that are entitled to have access to the file. Therefore, **ensure that the table containing the summaries and the justifications of your confidentiality claims does not contain any confidential information.** Check also that the properties of your electronic documents do not contain any confidential information. The Commission will assume that the summaries and the justifications of your confidentiality claims as well as the properties of your submitted non-confidential versions are non-confidential.
- (26) Please note that a piece of information which is considered to be confidential may nevertheless be disclosed, if such disclosure **is necessary to prove an alleged infringement or could be necessary to exonerate a party**²⁵.
- *Ensure that your non-confidential versions are technically reliable*
- (27) In access to the Commission's file, the non-confidential versions of your submissions/documents will be made accessible to the parties to the proceedings in the same format in which they were submitted by you. It is your responsibility to ensure that the non-confidential versions provided by you are technically reliable and redacted information cannot be retrieved by any means, including forensic tools. The Commission does not take any responsibility for insufficiently blacked-out non-confidential versions.

²⁴ For more details see below "Examples of confidentiality claims: how to provide reasons and non-confidential summaries".

²⁵ Points 24-25 and 42 of the Notice on access to file.

- *Assessment of further access to file requests, disclosure of confidential information and comparison with your own confidentiality claims regarding your submissions/documents*

- (28) If you are granted access to the file and thereafter submit a reasoned request for further access to confidential information provided by other undertakings, the Commission will assess whether the need to safeguard the rights of the defence of the parties outweighs the concern to protect confidential information of other parties. In accordance with points 24 and 47 of the Access to File Notice, the Commission will assess whether such information is necessary to prove an alleged infringement ('inculpatory document') or could be necessary to exonerate a party ('exculpatory document').
- (29) In assessing any requests you make for further access to information claimed by other parties to be confidential, the Commission will take account of whether these requests are consistent with any claims that you make with respect to your own information.
- (30) Where the Commission intends to disclose information that you have claimed to be confidential, you will be granted the possibility to provide a non-confidential version of the document where that information is contained, with the same evidential value as the original document²⁶. You can also propose the use of a negotiated disclosure procedure or a data room procedure if you think that such a procedure would better safeguard confidentiality and facilitate the exchange of such confidential information²⁷.

²⁶ Point 25 of the Notice on access to file.

²⁷ Points 95-98 of the Best Practices.

Examples of confidentiality claims: how to provide reasons and non-confidential summaries

During antitrust proceedings companies are requested to provide reasoning for all of their confidentiality claims, along with non-confidential summaries, in a table format containing the headings set out in the table below.

This table provides examples of reasoning for confidentiality request and of non-confidential summaries. Please note that this table is provided as an example and is non-exhaustive.

ID # (if available)/	Deletions on page # of original confidential version/paragraph # (indicate annex # where relevant)	Reasons for confidentiality request	Non-confidential summary
ID 548-34 ²⁸	Pages 1-3	A has ongoing price negotiations with B. Knowledge of its pricing strategy by B would seriously undermine A negotiation positions in ongoing negotiations and for future supply contracts.	Board meeting of [DATE] regarding price strategy towards B
ID 548-39	Page 6	Potential project with competitor of B. Project is still viable. Knowledge of the details of these discussions would impair current and future business opportunities of A.	Internal e-mail correspondence of [DATE] regarding supply in [NAME OF A COUNTRY/GEOGRAPHIC AREA]
ID 549-22	Page 18	Recent information on production costs, profits or other financial information which are relevant for the current business strategy and commercial relations.	Strategic and commercial information on company A's operations, that includes information on production costs, profits and other financial information
ID 549-22	Page 54-57	Document contains details of A's business strategy and sensitive	Internal Management Summary- Chart of [DATE] on volumes, pricing,

²⁸ This is an example of reference to so called collection ID, which contains under one ID number (here 5480) all documents received in the same submission, where each document has received its own individual identification number (here 34).

		information on key commercial data which are not publicly known and whose knowledge by supplier B would seriously harm A's business interests and reveal its strategy for B, which would affect A's position in future supply discussions with B.	contract structure and business strategy in [PRODUCT AND GEOGRAPHIC AREA CONCERNED]
ID 549-25	Pages 2-6	Names and/or role/title and/or other personal information enabling the identification of an individual that is not related to the investigation. The disclosure may harm the personal interests of these persons.	"Name of an individual" or "Employee of Company A" or "personal information"
ID 550	-	No confidentiality claimed ²⁹ .	-
ID 551	Pages 2, 5 and 8	The deletions concern an internal assessment of minutes of meetings with B. A has ongoing business relations with B. If revealed, the information will give B insight into A's negotiation strategies, internal assumptions and seriously harm A's position in future supply discussions with B.	Minutes of meetings with B of [DATE]
ID 555	Page 5	Private discussions with individuals not related to the investigation.	Private discussions

²⁹ In case you do not claim confidentiality for a document, this should also be explicitly stated in the table as shown above. Alternatively, you can list separately all documents for which you do not claim confidentiality. In any event, you are requested to make an explicit confidentiality waiver for all documents in which you have no confidentiality redactions.

ID 600	Pages 2, 4, 5 and 8	Private appointments in the personal agenda of a company's employee.	Private appointments
ID 603	Page 3	Identification details of an employee of a customer who is not related to the investigation.	Identification details of customers' employees not related to the investigation
ID 650	Page 1	Names of individuals (other than CEO, brand manager and marketing officer) having participated in an internal meeting where only incidentally it was discussed about issues related to the investigation.	Identification details of employees not related to the investigation
ID 717	Page 12	Internal strategic planning information on quantity and costs of raw materials, contractual obligations, technical processes, patents etc..	Internal strategic planning information
ID 1204	Page 1	Internal discussion on company's financial situation (debt/assets policy terms of finances, salary policy, etc.).	Internal discussion on company's financial situation
ID 1212	Page 18	Information regarding products/services that are not related to the current investigation.	Information regarding [PRODUCT X; SERVICES Z] that are not related to the current investigation
ID 1581	Page 14	Information regarding bilateral commercial relations with a customer (a meeting report), that was not disclosed to other competitors.	Information regarding bilateral commercial relations with a customer