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COMMISSION NOTICE on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89 (97/C 23/03)

(Text with EEA relevance)

INTRODUCTION

Access to the file is an important procedural stage in all contentious competition cases (prohibitions with or without a fine, prohibitions of mergers, rejection of complaints, etc.). The Commission's task in this area is to reconcile two opposing obligations, namely that of safeguarding the rights of the defence and that of protecting confidential information concerning firms.

The purpose of this notice is to ensure compatibility between current administrative practice regarding access to the file and the case-law of the Court of Justice of the European Communities and the Court of First Instance, in particular the 'Soda-ash cases (1). The line of conduct thus laid down concerns cases dealt with on the basis of the competition rules applicable to enterprises: Articles 85 and 86 of the EC Treaty, Regulation (EEC) No 4064/89 (2) (hereinafter 'the Merger Regulation), and Articles 65 and 66 of the ECSC Treaty.

Access to the file, which is one of the procedural safeguards designed to ensure effective exercise of the right to be heard (3) provided for in Article 19 (1) and (2) of Council Regulation No 17 (4) and Article 2 of Commission Regulation No 99/63/EEC (5), as well as in the corresponding provisions of the Regulations governing the application of Articles 85 and 86 in the field of transport, must be arranged in all cases involving decisions on infringements, decisions rejecting complaints, decisions imposing interim measures and decisions adopted on the basis of Article 15 (6) of Regulation No 17.

The guidelines set out below, however, essentially relate to the rights of the undertakings which are the subject of investigations into alleged infringements; they do not relate to the rights of third parties, and complainants in particular.

In merger cases, access to the file by parties directly concerned is expressly provided for in Article 18 (3) of the Merger Regulation and in Article 13 (3) (a) of Regulation (EC) No 3384/94 (6) ('the Implementing Regulation).

I. SCOPE AND LIMITS OF ACCESS TO THE FILE

As the purpose of providing access to the file is to enable the addressees of a statement of objections to express their views on the conclusions reached by the Commission, the firms in question must have access to all the documents making up the 'file of the Commission (DG IV), apart from the categories of documents identified in the Hercules judgment (7), namely the business secrets of other undertakings, internal Commission documents (8) and other confidential information.

Thus not all the documents collected in the course of an investigation are communicable and a distinction must be made between non-communicable and communicable documents.

A. Non-communicable documents

1. Business secrets

Business secrets mean information (documents or parts of documents) for which an undertaking has claimed protection as 'business secrets, and which are recognized as such by the Commission.

The non-communicability of such information is intended to protect the legitimate interest of firms in preventing third parties from obtaining strategic information on their essential interests and on the operation or development of their business (9).

The criteria for determining what constitutes a business secret have not as yet been defined in full. Reference may be made, however, to the case-law, especially the Akzo and the BAT and Reynolds judgments (10), to the criteria used in anti-dumping procedures (11), and to decisions on the subject by the Hearing Officer. The term 'business secret must be construed in its broader sense: according to Akzo, Regulation No 17 requires the Commission to have regard to the legitimate interest of firms in the protection of their business secrets.

Business secrets need no longer be protected when they are known outside the firm (or group or association of firms) to which they relate. Nor can facts remain business secrets if, owing to the passage of time or for any other reason, they are no longer commercially important.

Where business secrets provide evidence of an infringement or tend to exonerate a firm, the Commission must reconcile the interest in the protection of sensitive information, the public interest in having the infringement of the competition rules terminated, and the rights of the defence. This calls for an assessment of:

(i) the relevance of the information to determining whether or not an infringement has been committed;

(ii) its probative value;

(iii) whether it is indispensable;

(iv) the degree of sensitivity involved (to what extent would disclosure of the information harm the interests of the firm?);

(v) the seriousness of the infringement.

Each document must be assessed individually to determine whether the need to disclose it is greater than the harm which might result from disclosure.

2. Confidential documents

It is also necessary to protect information for which confidentiality has been requested.

This category includes information making it possible to identify the suppliers of the information who wish to remain anonymous to the other parties, and certain types of information communicated to the Commission on condition that confidentiality is observed, such as documents obtained during an investigation which form part of a firm's property and are the subject of a non-disclosure request (such as a market study commissioned by the firm and forming part of its property). As in the preceding case (business secrets), the Commission must reconcile the legitimate interest of the firm in protecting its assets, the public interest in having breaches of the competition rules terminated, and the rights of the defence. Military secrets also belong in the category of 'other confidential information.

As a rule, the confidential nature of documents is not a bar to their disclosure (12) if the information in question is necessary in order to prove an alleged infringement ('inculpatory documents) or if the papers invalidate or rebut the reasoning of the Commission set out in its statement of objections ('exculpatory documents).

3. Internal documents

Internal documents are, by their nature, not the sort of evidence on which the Commission can rely in its assessment of a case. For the most part they consist of drafts, opinions or memos from the departments concerned and relating to ongoing procedures.

The Commission departments must be able to express themselves freely within their institution concerning ongoing cases. The disclosure of such documents could also jeopardize the secrecy of the Commission's deliberations.

It should, moreover, be noted that the secrecy of proceedings is also protected by the code of conduct on public access to Commission and Council documents as set out in Commission Decision 94/90/ECSC, EC, Euratom (13), as amended by Decision 96/567/ECSC, EC, Euratom (14) as are internal documents relating to inspections and investigations and those whose disclosure could jeopardize the protection of individual privacy, business and industrial secrets or the confidentiality requested by a legal or natural person.

These considerations justify the non-disclosure of this category of documents, which will, in future, be placed in the file of internal documents relating to cases under investigation, which is, as a matter of principle, inaccessible (see point II.A.2).

B. Communicable documents

All documents not regarded as 'non-communicable under the abovementioned criteria are accessible to the parties concerned.

Thus, access to the file is not limited to documents which the Commission regards as 'relevant to an undertaking's rights of defence.

The Commission does not select accessible documents in order to remove those which may be relevant to the defence of an undertaking. This concept, already outlined in the Court of First Instance judgments in Hercules and Cimenteries CBR (15), was confirmed and developed in the Soda-ash case, where the Court held that 'in the defended proceedings for which Regulation No 17 provides it cannot be for the Commission alone to decide which documents are of use for the defence. . . . The Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed. (Case T-30/91, paragraph 81).

Special note concerning studies:

It should be stressed that studies commissioned in connection with proceedings or for a specific file, whether used directly or indirectly in the proceedings, must be made accessible irrespective of their intrinsic value. Access must be given not only to the results of a study (reports, statistics, etc.), but also to the Commission's correspondence with the contractor, the tender specifications and the methodology of the study (16).

However, correspondence relating to the financial aspects of a study and the references concerning the contractor remain confidential in the interests of the latter.

II. PROCEDURES FOR IMPLEMENTING ACCESS TO THE FILE

A. Preparatory procedure - Cases investigated pursuant to Articles 85 and 86

1. Investigation file

1.1. Return of certain documents after inspection visits

In the course of its investigations pursuant to Article 14 (2) and (3) of Regulation No 17, the Commission obtains a considerable number of documents, some of which may, following a detailed examination, prove to be irrelevant to the case in question. Such documents are normally returned to the firm as rapidly as possible.

1.2. Request for a non-confidential version of a document

In order to facilitate access to the file at a later stage in proceedings, the undertakings concerned will be asked systematically to:

- detail the information (documents or parts of documents) which they regard as business secrets and the confidential documents whose disclosure would injure them,

- substantiate their claim for confidentiality in writing,

- give the Commission a non-confidential version of their confidential documents (where confidential passages are deleted).

As regards documents taken during an inspection (Article 14 (2) and (3)), requests are made only after the inspectors have returned from their mission.

When an undertaking, in response to a request from the Commission, claims that the information supplied is confidential, the following procedure will be adopted:

(a) at that stage of the proceedings, claims of confidentiality which at first sight seem justified will be accepted provisionally. The Commission reserves the right, however, to reconsider the matter at a later stage of the proceedings;

(b) where it is apparent that the claim of confidentiality is clearly unjustified, for example where it relates to a document already published or distributed extensively, or is excessive where it covers all, or virtually all the documents obtained or sent without any plausible justification, the firm concerned will be informed that the Commission does not agree with the scope of the confidentiality that is claimed. The matter will be dealt with when the final assessment is made of the accessibility of the documents (see below).

1.3. Final assessment of the accessibility of documents

It may prove necessary to grant other undertakings involved access to a document even where the undertaking that has issued it objects, if the document serves as a basis for the decision (17) or is clearly an exculpatory document.

If an undertaking states that a document is confidential but does not submit a non-confidential version, the following procedure applies:

- the undertaking claiming confidentiality will be contacted again and asked for a reasonably coherent non-confidential version of the document,

- if the undertaking continues to object to the disclosure of the information, the competent department applies to the Hearing Officer, who will if necessary implement the procedure leading to a decision pursuant to Article 5 (4) of Commission Decision 94/810/ECSC, EC of 12 December

1994 on the terms of reference of hearing officers in competition procedures before the Commission (18). The undertaking will be informed by letter that the Hearing Officer is examining the question.

1.4. Enumerative list of documents

An enumerative list of documents should be drawn up according to the following principles:

(a) the list should include uninterrupted numbering of all the pages in the investigation file and an indication (using a classification code) of the degree of accessibility of the document and the parties with authorized access;

(b) an access code is given to each document on the list:

- accessible document

- partially accessible document

- non-accessible document;

(c) the category of completely non-accessible documents esentially consists of documents containing 'business secrets and other confidential documents. In view of the 'Soda-ash case-law, the list will include a summary enabling the content and subject of the documents to be identified, so that any firm having requested access to the file is able to determine in full knowledge of the facts whether the documents are likely to be relevant to its defence and to decide whether to request access despite that classification;

(d) accessible and partially accessible documents do not call for a description of their content in the list as they can be 'physically consulted by all firms, either in their full version or in their non-confidential version. In the latter event, only the sensitive passages are deleted in such a way that the firm with access is able to determine the nature of the information deleted (e.g. turnover).

2. File of internal documents relating to ongoing cases

In order to simplify administration and increase efficiency, internal documents will, in future, be placed in the file of internal documents relating to cases under investigation (non-accessible) containing all internal documents in chronological order. Classification in this category is subject to the control of the Hearing Officer, who will if necessary certify that the papers contained therein are 'internal documents .

The following, for example, will be deemed to be internal documents:

(a) requests for instructions made to, and instructions received from, hierarchical superiors on the treatment of cases;

(b) consultations with other Commission departments on a case;

(c) correspondence with other public authorities concerning a case (19);

(d) drafts and other working documents;

(e) individual technical assistance contracts (languages, computing, etc.) relating to a specific aspect of a case.

B. Preparatory procedure - Cases examined within the meaning of the Merger Regulation

1. Measures common to the preparatory procedure in cases investigated pursuant to Articles 85 and 86

(a) Return of certain documents after an inspection

On-the-spot inspections are specifically provided for in Article 13 of the Merger Regulation: in such cases, the procedure provided for in point II.A.1.1 for cases examined on the basis of Articles 85 and 86 is applicable.

(b) Enumerative list of documents

The enumerative list of the documents in the Commission file with the access codes will be drawn up in accordance with the criteria set out in point II.A.1.4.

(c) Request for a non-confidential version of a document

In order to facilitate access to the file, firms being investigated will be asked to:

- detail the information (documents or parts of documents) they regard as business secrets and the confidential documents whose disclosure would injure them,

- substantiate their request for confidentiality in writing,

- give the Commission a reasonably coherent non-confidential version of their confidential documents (where confidential passages are deleted).

This procedure will be followed in stage II cases (where the Commission initiates proceedings in respect of the notifying parties) and in stage I cases (giving rise to a Commission decision without initiation of proceedings).

2. Measures specific to preparatory procedures in merger cases

(a) Subsequent procedure in stage II cases

In stage II cases the subsequent procedure is as follows.

Where a firm states that all or part of the documents it has provided are business secrets, the following steps should be taken:

- if the claim appears to be justified, the documents or parts of documents concerned will be regarded as non-accessible to third parties,

- if the claim does not appear to be justified, the competent Commission department will ask the firm, in the course of the investigation and no later than the time at which the statement of objections is sent, to review its position. The firm must either state in writing which documents or parts of documents must be regarded as confidential, or send a non-confidential version of the documents.

If disagreement regarding the extent of the confidentiality persists, the competent department refers the matter to the Hearing Officer, who may if necessary take the decision provided for in Article 5 (4) of Decision 94/810/ECSC, EC.

(b) Specific cases

Article 9 (1) of the Merger Regulation provides that 'the Commission may, by means of a decision notified without delay to the undertakings concerned . . . refer a notified concentration to the competent authorities of the Member State concerned . In the context of access to the file, the parties concerned should, as a general rule be able to see the request for referral from a national authority, with the exception of any business secrets or other confidential information it may contain.

Article 22 (3) of the Merger Regulation provides that 'If the Commission finds, at the request of a Member State, that a concentration (. . .) that has no Community dimension (. . .) creates or strengthens a dominant position (. . .) it may (. . .) adopt the decisions provided for in the second subparagraph of Article 8 (2), (3) and (4) . Such requests have the effect of empowering the Commission to deal with mergers which would normally fall outside its powers of review. Accordingly, the parties concerned should be granted right of access to the letter from the Member State requesting referral, after deletion of any business secrets or other confidential information.

C. Practical arrangements for access to the file

1. General rule: access by way of consultation on the Commission's premises

Firms are invited to examine the relevant files on the Commission's premises.

If the firm considers, on the basis of the list of documents it has received, that it requires certain non-accessible documents for its defence, it may make a reasoned request to that end to the Hearing Officer (20).

2. If the file is not too bulky, however, the firm has the choice of being sent all the accessible documents, apart from those already sent with the statement of objections or the letter rejecting the complaint, or of consulting the file on the Commission's premises.

As regards Articles 85 and 86 cases, contrary to a common previous practice, the statement of objections or letter of rejection will in future be accompanied only by the evidence adduced and documents cited on which the objections/rejection letter is based.

Any request for access made prior to submission of the statement of objections will in principle be inadmissible.

D. Particular questions which may arise in connection with complaints and procedures relating to abuse of a dominant position (Articles 85 and 86)

1. Complaints

While complainants may properly be involved in proceedings, they do not have the same rights and guarantees as the alleged infringers. A complainant's right to consult the files does not share the same basis as the rights of defence of the addressees of a statement of objections, and there are no grounds for treating the rights of the complainant as equivalent to those of the firms objected to.

Nevertheless, a complainant who has been informed of the intention to reject his complaint may request access to the documents on which the Commission based its position. Complainants may not, however, have access to any confidential information or other business secrets belonging to the firms complained of, or to third-party firms, which the Commission has obtained in the course of its investigations (Articles 11 and 14 of Regulation No 17).

Clearly, it is even more necessary here to respect the principle of confidentiality as there is no presumption of infringement. In accordance with the judgment in Fedetab (21), Article 19 (2) of Regulation No 17 gives complainants a right to be heard and not a right to receive confidential information.

2. Procedures in cases of abuse of a dominant position

The question of procedures in cases of abuse of a dominant position was referred to by the Court of First Instance and the Court of Justice in the BPB Industries and British Gypsum v. Commission case (22).

By definition, firms in a dominant position on a market 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 thus acknowledged the legitimacy of the reluctance displayed by the Commission in revealing certain letters received from customers of the firm being investigated.

Although it is of value to the Commission for giving a better understanding of the market concerned, the information does not in any way constitute inculpatory evidence, and its disclosure to the firm concerned might easily expose the authors to the risk of retaliatory measures.

(1) Court of First Instance judgments in Cases T-30/91, Solvay v. Commission, T-36/91, ICI v. Commission, and T-37/91, ICI v. Commission 1995 ECR II-1775, II-1847 and II-1901.

(2) OJ No L 395, 30. 12. 1989, p. 1, as corrected in OJ No L 257, 21. 9. 1990, p. 13.

(3) Judgment of the Court of First Instance in Joined Cases T-10, 11, 12 and 15/92, CBR and Others 1992 ECR II-2667, at paragraph 38.

(4) OJ No 13, 21. 2. 1962, p. 204/62.

(5) OJ No 127, 20. 8. 1963, p. 2268/63.

(6) OJ No L 377, 31. 12. 1994, p. 1.

(7) Court of First Instance judgment in Case T-7/89, Hercules Chemicals v. Commission 1991 ECR II-1711, paragraph 54.

(8) Internal Commission documents do not form part of the investigation file and are placed in the file of internal documents relating to the case under examination (see points I.A.3 and II.A.2 below).

(9) For example methods of assessing manufacturing and distribution costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plants, cost price structure, sales policy, and information on the internal organization of the firm.

(10) Case 53/85, Akzo 1986 ECR 1965, paragraphs 24 to 28, and paragraph 28 in particular on pp. 1991-1992. Cases 142 and 156/84, BAT and Reynolds v. Commission 1987 ECR 4487, paragraph 21.

(11) Order of the Court of 30. 3. 1982 in Case 236/81, Celanese v. Commission and Council 1982 ECR 1183.

(12) Here the procedure described in point II.A.1.3 should be followed.

(13) OJ No L 46, 18. 2. 1994, p. 58.

(14) OJ No L 247, 28. 9. 1996, p. 45.

(15) In paragraph 54 of Hercules, referred to in paragraph 41 of the Cimenteries judgment, the Court of First Instance held that the Commission has an obligation to make available to the undertakings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved.

(16) As a result of this provision, it is necessary, when drawing up a study contract, to include a specific clause stipulating that the study and the relevant documents (methodology, correspondence with the Commission) may be disclosed by the Commission to third parties.

(17) For example, documents which help to define the scope, duration and nature of the infringement, the identity of participants, the harm to competition, the economic context, etc.

(18) OJ No L 330, 21. 12. 1994, p. 67.

(19) It is necessary to protect the confidentiality of documents obtained from public authorities; this rule applies not only to documents from competition authorities, but also to those from other public authorities, Member States or non-member countries.

Any exception to the principle of non-disclosure of these documents must be firmly justified on the grounds of safeguarding the rights of the defence (e.g. complaint lodged by a Member State pursuant to Article 3 of Regulation No 17). Letters simply expressing interest, whether from a public authority of a Member State or of a third country, are non-communicable in principle.

A distinction must be made, however, between the opinions or comments expressed by other public authorities, which are afforded absolute protection, and any specific documents they may have furnished, which are not always covered by the exception. In the latter case, it is advisable in any event to proceed with circumspection, especially if the documents are from a non-member country, as it is considered of prime importance for the development of international cooperation in the application of the competition rules, to safeguard the relationship of trust between the Commission and non-member countries.

There are two possibilities in this context:

a) There may already be an agreement governing the confidentiality of the information exchanged.

Article VIII (2) of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws (OJ No L 95, 27. 4. 1995, p. 45) stipulates that exchanges of information and information received under the Agreement must be protected 'to the fullest extent possible. The article lays down a point of international law which must be complied with.

b) If there is no such agreement, the same principle of guaranteed confidentiality should be observed.

(20) Special procedure provided for in Decision 94/810/ECSC, EC.

(21) Cases 209-215 and 218/78, Fedetab 1980 ECR 3125, paragraph 46.

(22) Judgment of the Court of First Instance in Case T-65/89, BPB Industries and British Gypsum 1993 ECR II-389, and judgment of the Court of Justice in Case C-310/93 P in BPB Industries and British Gypsum 1995 ECR I-865.