



Coimisiún um  
Iomaíocht agus  
Cosaint Tomhaltóirí

Competition and  
Consumer Protection  
Commission

# ACCESS TO THE FILE IN MERGER CASES

Competition Act 2002, as amended (the “2002 Act”)

Procedures for Access to the File in Merger Cases

31 October 2014

This document (the “Procedures”) provides guidance to businesses and legal practitioners on the policy of the Competition and Consumer Protection Commission (“Commission”) in relation to access to its file by the merging parties in the course of the Commission’s review of mergers and acquisitions. It is applicable from 31 October 2014.

## **ARTICLE 1 - Introduction**

1.1 This document is issued by the Commission, which is responsible for the review of notified mergers and acquisitions in accordance with the 2002 Act. Its purpose is to give guidance to businesses and legal practitioners on the Commission’s policy in relation to access to its file in the course of the review of mergers and acquisitions. The document is not intended to be a binding statement of how discretion will be exercised in a particular situation and should not be taken as such.

## **ARTICLE 2 - Definitions**

2.1 For the purposes of these Procedures: -

“Commission” includes Members of the Commission or any of them, and members of staff of the Commission.

“the Commission’s file” or “the file” means the file to which access will be allowed.

“Documents” includes recordings.

## **ARTICLE 3 - Subject Matter of the Procedures**

3.1 The Commission grants access to the file in the course of its review of mergers and acquisitions. This document deals with the following issues: who has access to the file, at what stage access takes place, the content of the file, the information to which access will be granted, and how access will be afforded.

3.2 The Procedures take into account relevant case law of the Court of Justice and of the General Court of the EU on access to the file of the European Commission, the European Commission’s Notice on the rules for access to the European Commission file and the practice developed by the Competition Authority before the establishment of the Commission.

#### **ARTICLE 4 - Who May Have Access to the File?**

4.1 Access to the file in the context of merger review is intended to enable undertakings to whom an Assessment (within the meaning of the Commission's Procedures for the Review of Mergers and Acquisitions) has been addressed to reply to it in a fully-informed manner. Access is granted, upon request, to such undertakings (hereinafter referred to as 'the parties').

#### **ARTICLE 5 - When is Access to the File Granted?**

5.1 The parties will be given access to the Commission's file upon request, during the 15 working day period following the receipt by the parties of the Commission's Assessment. Thereafter, the parties will be granted without further request access to any new information received or obtained by the Commission that raises issues relating to the notified merger or acquisition not dealt with in the Assessment. Prior to the issue of the Commission's Assessment, the parties have no right of access to the file.

#### **ARTICLE 6 - The Content of the File**

6.1 The file in a merger review case consists of all documents (except internal documents) which have been obtained, produced and/or assembled by the Commission during the review of a merger or acquisition. Internal documents can neither be incriminating nor exculpatory. They do not constitute part of the evidence on which the Commission can rely in its assessment of a case. For that reason, they will not form part of the Commission's file, but instead will be held in an internal file to which the parties will not have access.

6.2 In the course of its review of the notified merger or acquisition the Commission may collect documents which, following a more detailed examination, prove to be unrelated to the subject matter of the review in question. Such documents may be returned to the persons or undertakings from which they have been obtained, and will thereafter no longer constitute part of the file.

#### **ARTICLE 7 - Accessible Documents**

7.1 The parties must be able to acquaint themselves with all the information on which the Commission has relied in making its Assessment, so that, on the basis of this information, they can respond in an informed manner to the issues raised in the Assessment. For this

purpose the parties will be granted access to all documents making up the Commission file as described in Article 6.1 above (including the results, terms of reference and methodology of any study commissioned by the Commission in connection with the review of the merger or acquisition and agreed minutes of meetings between the Commission and the parties, or between the Commission and third parties – see Article 8.1 below), with the exception of documents provided by the party seeking access, business secrets of other undertakings and other confidential information.

## **ARTICLE 8 - Non-Accessible Documents**

### **(a) Minutes of meetings**

8.1 There is no obligation on the Commission to keep any minutes of meetings with the parties or with third parties. If the Commission chooses to keep such minutes, they constitute the Commission's own interpretation of what was said at the meetings, are included in the category of internal documents referred to in Article 6.1 above and thus do not form part of the Commission's file as described in Article 6.1 above. Where, however, the person or undertaking in question has agreed to the minutes, such minutes will constitute part of the evidence on which the Commission can rely in its assessment of a merger. Such agreed minutes will be placed on the Commission's file and made accessible (after redaction of any business secrets or other confidential information).

### **(b) Business secrets**

8.2 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. Access will be granted, where possible, to non-confidential versions of the original information. Where confidentiality can only be assured by summarising the relevant information, access will be granted to a summary.

### **(c) Other confidential information**

8.3 This category 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 about undertakings which are able to place very considerable

economic or commercial pressure on their competitors or on their trading partners, customers or suppliers. Therefore the concept of “confidential information” may include in this context information that would enable the parties to identify complainants or other third parties where those complainants or other third parties have a justified wish to remain anonymous. Access will be granted, where possible, to non-confidential versions of the original information. Where confidentiality can only be assured by summarising the relevant information, access will be granted to a summary.

#### **ARTICLE 9 - Information that will not be Considered Confidential**

9.1 Information which is already known outside the undertaking (in case of a group, outside the group) making the claim for confidentiality will not normally be considered confidential.

9.2 Information that has lost its commercial importance, due for instance to the passage of time, can no longer be regarded as confidential. 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 five years old is no longer confidential.

#### **ARTICLE 10 - Submission of Confidential Information**

10.1 Persons or undertakings who provide information or submit comments to the Commission, whether of their own motion, upon request, or under oath in the course of the Commission's review of a merger or acquisition, will be asked to identify clearly at the time when the information is provided any material in respect of which they claim confidentiality (whether business secrets or other matter) giving reasons to substantiate the claim. Such persons or undertakings will generally be asked to provide a separate non-confidential version. If not, a summary of the information may be requested. Where data is redacted, this must be done in a manner which permits the sense of the overall document to be maintained.

#### **ARTICLE 11 - Treatment of Confidential Information**

11.1 Upon receipt of a claim for confidentiality, the Commission will either accept the claim (subject to the provisions of Article 10 above) or inform the person or undertaking in question that it does not agree with the claim in whole or in part.

11.2 Where the Commission intends to reject a claim, it will inform the person or undertaking in writing of its intention, give its reasons and set a time-limit within which such undertaking may inform the Commission in writing of its views.

11.3 The Commission will take into account the written views duly submitted by the person or undertaking and the Commission will reject the claim for confidentiality, whether the information has been submitted voluntarily or under summons, if the information is necessary for the proper performance of the Commission's merger review functions.

#### **ARTICLE 12 - Requests for Anonymity**

12.1 Where there is a reasonable risk that an undertaking will be able to place considerable economic or commercial pressure on its competitors or on its trading partners, customers or suppliers, as a consequence of their collaboration in the investigation carried out by the Commission, the Commission will protect the anonymity of such competitors, trading partners, customers or suppliers by providing access to a non-confidential version or summary of any information provided by such persons. Requests for anonymity should be made in accordance with the provisions of Article 10, and will be dealt with in accordance with the provisions of Article 11.

#### **ARTICLE 13 - Provision of Access to File**

13.1 In order to facilitate access to the file, the parties will, together with the Assessment (or as soon as practicable thereafter), receive an enumerative list of documents setting out the content of the Commission file, as described in Article 6.1 above. Non-accessible documents will be clearly indicated. Any party who wishes to seek access should then within the time limit specified in Article 5.1 above indicate which of the accessible documents they wish to inspect.

13.2 Access to the file will be granted in one of the following ways, or in any combination of them, taking due account of the technical capabilities of the parties: electronically (by email or otherwise) or by sending copies of the accessible file in paper form by fax, post, or courier.

13.3 The Commission is under no obligation to provide a translation of documents in the file.

## **ARTICLE 14 - Caveat**

14.1 Access to the file in accordance with these Procedures is granted on condition that the information thereby obtained may only be used for the purpose of replying to the Assessment or otherwise in connection with the Commission's review of the notified merger or acquisition. The legal advisers of the parties will be expected to advise their clients that such information shall be used solely for this purpose.