

## **Guidance on the preparation of public versions of Commission Decisions adopted under Articles 7 to 10, 23 and 24 of Regulation 1/2003**

1. Decisions are taken as openly as possible within the European Union, according to the second subparagraph of Article 1 of the Treaty on European Union. This principle is reflected in Article 15 of the Treaty on the Functioning of the European Union ("TFEU"), which requires the Union's institutions to conduct their work as openly as possible. The ability of the institutions to make acts which they adopt public is therefore the rule. EU law may provide for exceptions to this rule and prevent the disclosure of such acts or certain information contained therein.<sup>1</sup> Such exceptions include in particular the provisions ensuring compliance with the obligation of professional secrecy.<sup>2</sup>
2. In line with the general principles recalled above, the Commission makes as much information as possible available to the public, and only refrains from disclosing information to the extent that this is covered by its duty of professional secrecy or other public policy exceptions. According to the case law, three cumulative conditions must be met in order for information to fall, by its nature, within the ambit of the obligation of professional secrecy and thus to enjoy protection against disclosure to the public: (i) that it is known only to a limited number of persons, (ii) that its disclosure is liable to cause serious harm to the person who has provided it or to third parties and (iii) that the interests liable to be harmed by disclosure are, objectively, worthy of protection.<sup>3</sup>
3. Article 30 of Council Regulation (EC) No 1/2003<sup>4</sup> requires the Commission to publish the decisions which it takes pursuant to Articles 7 to 10, 23 and 24. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets and other confidential information.
4. In compliance with Article 30 of Council Regulation (EC) No 1/2003, the Commission

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<sup>1</sup> See Judgment of the General Court of 28 January 2015, *Akzo Nobel NV and Eka v Commission*, T-345/12, ECLI:EU:T:2015:50, paragraph 60, Judgment of the General Court of 28 January 2015, *Evonik Degussa v Commission*, T-341/12, ECLI:EU:T:2015:51, paragraph 89 and Judgment of the Court of First Instance of 30 May 2006, *Bank Austria Creditanstalt v Commission*, T-198/03, ECLI:EU:T:2006:136, paragraph 69.

<sup>2</sup> See Article 339 TFEU. The relevant provisions on professional secrecy in the context of antitrust proceedings are Article 28(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) and Article 16(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, (OJ L 123, 27.4.2004, p. 18).

<sup>3</sup> Judgment of the Court of First Instance of 30 May 2006, *Bank Austria Creditanstalt v Commission*, T-198/03, ECLI:EU:T:2006:136, paragraph 71, Judgment of the General Court of 28 January 2015, *Evonik Degussa v Commission*, T-341/12, ECLI:EU:T:2015:51, paragraph 94 and Judgment of the General Court of 28 January 2015, *Akzo Nobel NV and Eka v Commission*, T-345/12, ECLI:EU:T:2015:50, paragraph 65.

<sup>4</sup> 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).

publishes a non-confidential summary of the decisions taken pursuant to Articles 7 to 10, 23 and 24, together with the final report of the Hearing Officer and the opinion of the Advisory Committee<sup>5</sup> in the Official Journal of the European Union (OJ).<sup>6</sup> In line with established practice, it also publishes a non-confidential text of the decision (public version) on the DG Competition website.<sup>7</sup> The documents published in the OJ are made available on the DG Competition website as well.<sup>8</sup>

5. The General Court has confirmed the right of the Commission to publish its decisions in the OJ and on the DG Competition website.<sup>9</sup> Addressees of decisions adopted under Articles 7 to 10, 23 and 24 of Council Regulation (EC) No 1/2003 cannot prevent the Commission from publishing such decisions. It is the Commission's practice to publish as much detail as possible in order to allow those interested to understand fully the reasoning behind such a decision.
6. This Guidance outlines:
  - a) what undertakings can claim for redaction as business secrets and confidential information and what is usually not considered to be confidential information;
  - b) how confidentiality for business secrets and other confidential information can be claimed;
  - c) what the Commission usually redacts on its own initiative in the public version of a decision; and
  - d) the procedure that should be followed to settle confidentiality claims in the context of publication of the Commission decision and related publications.
7. This Guidance only concerns the preparation of the public version of Commission decisions and related publications and does not cover the preparation of non-confidential submissions by undertakings in the context of the Commission's access to file procedure.

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<sup>5</sup> If the Advisory Committee so recommends, see Article 14(6) of Council Regulation (EC) No 1/2003.

<sup>6</sup> Article 17(3) of the Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, (OJ L 275, 20.10.2011) p. 29 ("Hearing Officer Terms of Reference").

<sup>7</sup> See paragraph 149 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ, C 308, p. 6-32.

<sup>8</sup> See the DG Competition website: [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html).

<sup>9</sup> See Judgment of the Court of First Instance of 30 May 2006, *Bank Austria Creditanstalt v Commission*, T-198/03, ECLI:EU:T:2006:136, paragraph 77, Judgment of the General Court of 28 January 2015, *Akzo Nobel NV and Eka v Commission*, T-345/12, ECLI:EU:T:2015:50, paragraph 90 and Judgment of the General Court of 28 January 2015, *Evonik Degussa v Commission*, T-341/12, ECLI:EU:T:2015:51, paragraph 120.

## 1. WHAT CAN AND CANNOT BE CLAIMED FOR REDACTION

8. Undertakings can claim confidentiality for business secrets and other confidential information that should not appear in the public version of the Commission decision and in the related publications.<sup>10</sup>

### 1.1 Business secrets

9. **Business secrets** are confidential information about an undertaking's business activity the disclosure of which could result in **serious harm** for the same undertaking.<sup>11</sup> The interests liable to be harmed by disclosure must, objectively, be worthy of protection.<sup>12</sup>
10. Examples of information that may qualify as business secrets in antitrust decisions include: technical and/or financial information relating to an undertaking's know-how; margins calculations and price structure; production secrets and processes; supply sources; quantities produced and sold; market shares; customers and distributors lists; marketing plans; cost and methods of assessing costs; and sales strategy.

### 1.2 Other confidential information

11. **Other confidential information**<sup>13</sup> is information other than business secrets, insofar as its disclosure would significantly harm a person or undertaking. The interests liable to be harmed by disclosure must, objectively, be worthy of protection.<sup>14</sup> Depending on the specific circumstances of each case, this may include information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous.

### 1.3 Information not considered confidential

12. The assessment whether a piece of information constitutes a business secret or other confidential information is carried out by the Commission on a **case-by-case basis**. Generally, information that is not covered by the above definitions of “business secrets” and “other confidential information” will not be considered confidential.
13. By way of example, DG Competition considers that the following categories of information are normally **not considered confidential**:

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<sup>10</sup> Article 16(1) of Commission Regulation (EC) No 773/2004.

<sup>11</sup> Point 18 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 (“Notice on access to file”) (OJ C 325, 22.12.2005, p.7).

<sup>12</sup> Judgment of the Court of First Instance of 30 May 2006, *Bank Austria Creditanstalt v Commission*, T 198/03, ECLI:EU:T:2006:136, paragraph 71.

<sup>13</sup> Points 19-20 of the Notice on access to file.

<sup>14</sup> Judgment of the Court of First Instance of 30 May 2006, *Bank Austria Creditanstalt v Commission*, T 198/03, ECLI:EU:T:2006:136, paragraph 71.

- a) the **Commission's own assessment**, as long as it does not explicitly refer to information falling into the category of "business secret" or "other confidential information". This covers for instance the Commission's analysis of evidence and of the results of its investigation;
  - b) information relating to an undertaking which is **publicly available** or made **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 (including information such as price targets, price increases, dates of implementation of such increases and customer names). 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 information.<sup>15</sup>
  - c) information that has **lost its commercial importance**, for instance due to the passage of time. The General Court has considered a period of five years in itself to be sufficient for information to lose its qualification as a business secret or other confidential information. Confidential treatment of information may only exceptionally be granted to such data, if its provider can show that, notwithstanding its historical nature, it still constitutes an essential element of the commercial position of the undertaking concerned;<sup>16</sup>
  - d) data from or about **another undertaking** (such as price announcements, sales data etc). Exceptionally, data received pursuant to a contract with that undertaking which envisages confidentiality might be considered as confidential. General references to a non-disclosure agreement are insufficient to justify the confidentiality of such data; and
  - e) **statistical or aggregate information** (also in the form of graphs, for instance).
14. **Detailed reasons** must be given for any request to derogate from these principles in exceptional cases.

## 2. HOW TO CLAIM CONFIDENTIALITY

- 15. An undertaking can claim confidentiality on the text of the decision or related publications within the deadline set by the Commission.
- 16. In general, an undertaking cannot claim confidentiality for an entire document or whole sections thereof as it is normally possible to protect confidential information with limited redactions.

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<sup>15</sup> Order of the Court of First Instance of 29 May 1997, *British Steel v Commission*, T-89/96, ECLI:EU:T:1997:77, at paragraphs 26 and 27.

<sup>16</sup> See, e.g., Judgment of the General Court of 28 January 2015, *Evonik Degussa v Commission*, T-341/12, ECLI:EU:T:2015:51, paragraphs 84-85.

17. If an undertaking wants to claim confidentiality for information that should not appear in the public version of the decision or related publications, it is required to:<sup>17</sup>

- a) **identify any information** in the decision which is stemming from the undertaking and which it considers to fall within the ambit of professional secrecy as described in Sections 1.1 and 1.2 above;
- b) **substantiate each claim** for confidentiality in writing, explaining in particular:
  - i. why the information in question constitutes a business secret or other confidential information;
  - ii. how the publication of this information would cause **serious harm** to the undertaking or a third party; and
  - iii. which interests worthy of protection would be harmed by the disclosure;

<p><b>Note:</b> Generic and unsubstantiated claims (e.g. "<i>this is a business secret as its disclosure would harm my commercial interests</i>") will not be taken into consideration.</p>
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- c) **highlight** in the text of the decision, in a way that it remains legible, any text which contains information that it regards as business secrets or otherwise confidential; and
  - d) **provide** a concise but meaningful **non-confidential summary** of the redacted information, e.g.: "sales strategy: [add details about the redacted item such as the time period, the area concerned, etc.]". For figures (such as market shares or turnover figures) please indicate ranges. Please indicate the category into which the information falls, "[BUSINESS SECRETS]" or "[CONFIDENTIAL]".
18. The undertaking is required to provide the Commission with all relevant details in order to enable it to assess the confidentiality of a piece of information and to weigh up: (a) the public interest in ensuring that the activities of the EU institutions take place in the most transparent manner possible; and (b) the legitimate interests in protecting confidential information.
19. For the sake of efficient handling, confidentiality claims should be presented in a "tabular" format according to the following model:

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<sup>17</sup> See Articles 16(2) and 16(3) of Commission Regulation (EC) No 773/2004.

Type of the document (decision, summary of the decision, final report of the hearing officer etc.) / page #, recital #  (please indicate annex # if relevant)	Reasons for confidentiality request	Suggested non-confidential summary
Decision, page 28, recital 235, 2nd sentence	Business secret: Last year's production strategy. This is information not divulged outside the undertaking. Its disclosure would seriously harm (...)	[Last year's production strategy]

20. Further information on the administrative procedure for establishing a public version of the Commission decision, the summary of the decision, the final report of the Hearing Officer and the opinion of the Advisory Committee can be found on the DG Competition website.<sup>18</sup>
21. If the undertaking fails to identify the information which it considers to be confidential, **the Commission** may **assume** that the decision, and, where relevant, the summary of the decision, the final report of the Hearing Officer and the opinion of the Advisory Committee do not contain any business secrets or other confidential information and, consequently, that **the undertaking has no objections to the disclosure of the information in those documents.**<sup>19</sup>

### 3. WHAT THE COMMISSION REDACTS IN THE PUBLIC VERSION OF A DECISION

22. Irrespective of claims for confidentiality, other information redacted by the Commission in the public version of the decision (and the related publications) may include:
- a) personal data, in line with the requirements of Regulation (EC) No 45/2001<sup>20</sup> (for instance information relating to an identified or identifiable natural person);
  - b) information relating to undertakings participating in the infringement that are not mentioned in the operative part of the Decision. This information is covered by the

<sup>18</sup> [http://ec.europa.eu/competition/antitrust/antitrust\\_manproc\\_3\\_2012\\_en.pdf](http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf)

<sup>19</sup> See Article 16(4) of Commission Regulation (EC) No 773/2004: "*If undertakings or associations of undertakings fail to comply with paragraphs 2 and 3, the Commission may assume that the documents or statements concerned do not contain confidential information*".

<sup>20</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

presumption of innocence and the obligation of professional secrecy within the meaning of Article 339 TFEU;<sup>21</sup>

- c) information which, if published, may jeopardise Commission investigations, including the leniency program. This includes:
  - a. quotes from corporate statements submitted under the Leniency Notice;<sup>22</sup>
  - b. information which could, directly or indirectly, allow for the identification of an applicant as the source of specific information submitted under the Commission Leniency program;
  - c. voluntary admissions of the participation in an infringement made during the inspections, in replies to requests for information or the statement of objections and during the oral hearing.
- d) depending on the specific circumstances of each case: 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;<sup>23</sup> and
- e) military secrets.

#### **4. PROCEDURAL ASPECTS**

- 23. In cases with several addressees, if possible, the Commission deals with all confidentiality claims in parallel.
- 24. Once all confidentiality claims have been settled with all parties to the case, the Commission will send a consolidated public version of the decision to all addressees of the decision. In this text the confidential information will have been removed. Any confidential information will have been redacted and replaced by the corresponding non-confidential descriptions, summaries or square brackets. Absent a reply within the deadline set by the Commission, the Commission will be entitled to publish this redacted public version.<sup>24</sup>
- 25. If an undertaking considers that this public version of the decision still contains business secrets or other confidential information, it can refer the matter to the Hearing Officer within the deadline that will be set by the Commission.<sup>25</sup> If the undertaking fails to

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<sup>21</sup> Judgment of the Court of First instance of 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse v Commission*, T-474/04, ECLI:EU:T:2007:306.

<sup>22</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17).

<sup>23</sup> Point 19 of the Notice on access to file.

<sup>24</sup> See Article 16(4) of Commission Regulation (EC) No 773/2004: "*If undertakings or associations of undertakings fail to comply with paragraphs 2 and 3, the Commission may assume that the documents or statements concerned do not contain confidential information*"

<sup>25</sup> Article 8 of the Hearing Officer Terms of Reference.

address the Hearing Officer within the given deadline the Commission will be entitled to publish this redacted public version.

26. The publication of a public version of the decision on the DG Competition website does not preclude the Commission from publishing a more complete version at a later stage, provided that this publication does not contain confidential information.<sup>26</sup>

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<sup>26</sup> Judgment of the General Court of 28 January 2015, *Akzo Nobel NV and Eka v Commission*, T-345/12, ECLI:EU:T:2015:50, paragraph 123.