Guidance on the preparation of public versions of Commission Decisions adopted under the Merger Regulation

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.[1] Such exceptions include in particular the provisions ensuring compliance with the obligation of professional secrecy.[2]

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.[3]

3. Article 20 of Council Regulation (EC) No 139/2004[4] ("Merger Regulation") requires the Commission to publish the decisions which it takes pursuant to Articles 8(1) to (6), 14 and 15, together with the opinion of the Advisory Committee. The publication shall state the names of the parties and the main content of the decision. 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 20 of the Merger Regulation, the Commission publishes a non-confidential summary of the decisions taken pursuant to Articles 8(1) to 8(6), 14 and 15, together with the final report of the Hearing Officer and the opinion of the Advisory Committee[5], in the Official Journal of the European Union (OJ).[6] In line with established practice, it also publishes a non-confidential text of the decision (public

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1 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.

2 See Article 339 of the TFEU. The relevant provision on professional secrecy in the context of merger control is Article 17(2) of Council Regulation (EC) No 139/2004.

3 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.

4 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24,29.1.2004, p. 1-22.

5 Article 19(7) of the Merger Regulation.

6 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").

version) on the DG Competition website.[7] The documents published in the OJ are made available on the DG Competition website as well.

5. In application of the transparency principle mentioned above, and as an established practice,[8] the Commission also publishes on its website the non-confidential versions of decisions adopted pursuant to Article 6(1)(b) and to Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation.

6. This Guidance outlines:

   a) what undertakings can claim for redaction as business secrets and confidential information and what is not usually 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 the 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.

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. Claims can be put forward by the addressee/s of the decision or by any other undertaking[9] which submitted information to the Commission during the investigation of the merger.

1.1. Business secrets

9. **Business secrets** are confidential information about an undertaking's business activity,

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7 See the DG Competition website: http://ec.europa.eu/competition/index_en.html.

8 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.

9 Namely, parties to the concentration which are not notifying parties (within the meaning of paragraph 1.7 of Annex 1 of Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.04.2004, p. 1-39) or third parties which submitted information which could be disclosed to the parties / to the notifying party but not to the general public.

the disclosure of which could result in **serious harm** for the same undertaking.[10] The interests liable to be harmed by disclosure must, objectively, be worthy of protection.[11]

10. Typical examples of information that may qualify as business secrets in merger decisions are:

    a) cost structure and methods of assessing manufacturing and distribution costs;

    b) margins calculations and price structure;

    c) production secrets[12] and processes, as well as information relating to an undertaking's know-how;

    d) supply sources;

    e) quantities produced and sold;

    f) market shares;[13]

    g) customers and distributors lists;

    h) business and marketing plans, sales policy and strategy, strategic decisions; and

    i) information about the financial situation of a company, including financing agreements.

1.2. Other confidential information

11. **Other confidential information**[14] 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.[15] 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**.

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10 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).

11 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.

12 A secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of a product and that can be said to be the end product of either innovation or substantial effort.

13 Market shares must be replaced by ranges as indicated in Annex I to this document.

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

15 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.

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** :

    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 the content of internal documents and the Commission's analysis of the results of its market investigation, including quotes from participants in the market investigation;

    b) the Commission's general description of the **functioning of markets** object of the investigation;

    c) information which is **publicly available**, including information available only upon payment through specialised information services (however, copyright limitations must be respected in the latter example);

    d) 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;[16]

    e) information which is **common knowledge among specialists** in the field (for example common knowledge among engineers or medical doctors);

    f) **statistical or aggregate information** (also in the form of graphs, for instance);

    g) **a market share is above or below a certain level** and/or that **an undertaking is larger than its competitors**; and

    h) **arguments put forward by the notifying party(ies),** for example relating to market share data, so long as they do not explicitly refer to information falling under the category of "business secret" or "other confidential information".

14. A non-exhaustive list of examples of the information which shall not be considered confidential alongside the categories indicated above is provided in Annex II to this document.

15. **Detailed reasons** must be given for any request to derogate from these principles in exceptional cases.

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[16] 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.

2. HOW TO CLAIM CONFIDENTIALITY

16. An undertaking can claim confidentiality on the text of the decision or related publications within the deadline set by the Commission.

17. 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.

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

    a) **identify any information** in the decision which is stemming from the undertaking and which it considers as falling 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; and

        ii. how the publication of this information would cause **serious harm** to your undertaking or would significantly harm a person or undertaking; and

        iii. which interests worthy of protection would be harmed by the disclosure;

    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 (See Annex I "MARKET SHARE RANGES IN NON-CONFIDENTIAL VERSIONS OF MERGER DECISIONS"). Please indicate the category into which the information falls, "[BUSINESS SECRETS]" or "[CONFIDENTIAL]".

19. 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

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[17] See Articles 18(2) and 18(3) of the Merger Implementing Regulation: "[…] (2) Any person which makes known its views or comments pursuant to Articles 12, Article 13 and Article 16 of this Regulation, or supplies information pursuant to Article 11 of Regulation (EC) No 139/2004, or subsequently submits further information to the Commission in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission. (3) The Commission may also require persons referred to in Article 3 of Regulation (EC) No 139/2004, undertakings or associations of undertakings to identify any part of a [statement of objections,] case summary or a decision adopted by the Commission which in their view contains business secrets. Where business secrets or other confidential information are identified, the persons, undertakings and associations of undertakings shall give reasons and provide a separate non-confidential version by the date set by the Commission.[…]", Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p.1.

transparent manner possible; and (b) the legitimate interests in protecting confidential information.

20. For the sake of efficient handling, confidentiality claims should be presented in a "tabular" format according to the following model:

Recital number of original decision	***Information subject to the redaction request***	***Reasons for redaction request***	**Suggested non-confidential summary**
Recital 30, 2nd sentence		This is information not divulged outside the company. Its disclosure would …	[Last year´s production strategy]
Recital 31, 1st sentence			

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**.[18]

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 (for instance information relating to an identified or identifiable natural person);[19]

    b) 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;[20] and

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[18] See Article 18(4) of the Merger Implementing Regulation "If persons, undertakings or associations of undertakings fail to comply with paragraphs 2 or 3, the Commission may assume that the documents or statements concerned do not contain confidential information." See footnote 7 above.

[19] 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. 1–22.

[20] Point 19 of the Notice on access to file.

c) military secrets.

4. PROCEDURAL ASPECTS

23. Once all confidentiality claims have been settled, the Commission will send a consolidated public version of the decision in which the text of the confidential information will have been removed for approval for publication. 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.[21]

24. If the 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.[22] If the undertaking fails to address the Hearing Officer within the given deadline the Commission will be entitled to publish this redacted public version.

25. 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.[23]

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[21] See Article 18(4) of the Merger Implementing Regulation: "*If persons, undertakings or associations of undertakings fail to comply with paragraphs 2 or 3, the Commission may assume that the documents or statements concerned do not contain confidential information*".,

[22] Article 8 of the Hearing Officer Terms of Reference.

[23] 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.

ANNEX I

MARKET SHARE RANGES IN NON-CONFIDENTIAL VERSIONS OF MERGER DECISIONS

In order to prepare non-confidential versions of final decisions in merger cases the notifying party(ies) has/have to provide the Commission within seven days with a proposal for a non-confidential version of the decision by replacing all business secrets by […] and replacing market shares by ranges.

Save exceptional circumstances, DG Competition considers that the following market share ranges are suitable for protecting business secrets contained in a decision.

Ranges to be used in non-confidential version:

Between 0 and 4.99% [0-5]%
Between 5.0 and 9.99% [5-10]%
Between 10.0 and 19.99% [10-20]%
Between 20.0 and 29.99% [20-30]%
Between 30.0 and 39.99% [30-40]%
Between 40.0 and 49.99% [40-50]%
Between 50.0 and 59.99% [50-60]%
Between 60.0 and 69.99% [60-70]%
Between 70.0 and 79.99% [70-80]%
Between 80.0 and 89.99% [80-90]%
Between 90.0 and 100% [90-100]%

ANNEX II
EXAMPLES OF INFORMATION NOT CONSIDERED CONFIDENTIAL

By way of example, DG Competition considers that the following information is **not normally considered confidential:**

a) the **Commission's own assessment**, so long as it does not explicitly refer to information falling under the category of "business secret" or "other confidential information": this covers for instance the Commission's analysis of the content of internal documents and the Commission's analysis of the results of its market investigation, including quotes from participants in the market investigation;

Example	Confidentiality assessment
"Company A will not enjoy any veto rights over strategic decisions at Company B post-Transaction."	This information is based on the Commission's own analysis and cannot be redacted. Moreover, if Company A did enjoy a strategic veto right, it would have to be a notifying party whose identity would have to be published in the Official Journal of the EU and on DG COMP's website.
"In light of the above considerations and taking into account Company A's most recent business plans, the Commission concludes that Company A is most likely not able to continue financing Company B."	This type of information cannot be redacted because it is based on the Commission's own reasoning and <u>not</u> referring to any explicit business secret.
"Regarding the results of the study provided by the notifying party, the Commission considers that these are weakened by many elements, such as the reservations to representativeness of the samples and the precise circumstances of the surveys. The results of the surveys are weakened by the lack of information on the type of dolls that are used for playing or for decoration and the fact that some stores offer a wide range of items, such as dolls and other types of toys. The conclusion that there is a robust link between the time spent in a store and buying dolls for playing or for decoration cannot therefore be established."	
"Given that the target Company's offering is currently distributed by a third party in several countries, its market share is probably understated. After the merger, the acquiring Company would most likely distribute the target Company's offering with its own offering and would terminate the target Company's distribution agreements."	
"The notifying party argues that undertaking A's high EBITDA level is not an indication for a good business performance. There is a discrepancy in the notifying party's statements, because low EBITDA levels were claimed as an indication of a poor business performance in the past, whereas currently high EBITDA levels are not an indication of a good business performance."	

"The analysis invalidates the notifying party's claim that the terms of the agreements that Company A and Company B obtain from [accepted redaction] and [accepted redaction]* are equal. In addition, the Commission concludes that regarding all customers, Company A obtains better terms of the agreements on many important negotiation aspects. Finally, the terms of the agreements that Company A obtains from smaller customers are [accepted redaction]* than the terms of the agreements that Company A obtains from bigger customers."*	
'Suppliers established in Country A actively target customers across the border into the North-Eastern region of Country B. Imports thus play an important role as a competitive constraint on the Notifying parties, as confirmed by internal documents. See for instance Board presentation of 1 April 2002, 'Country B and Country A: Strategic outlook for the second quarter of 2002', page 208."	In a case such as this one, the title of the internal document cannot be redacted because it does not itself refer to any explicit business secret.

b) the Commission's **general description of the functioning of markets** object of the investigation;

Example	Confidentiality assessment
"As a result of the economic downturn, demand for this commodity has been constantly decreasing over the last three years. As a result, plants in the area are operating at reduced capacity utilisation levels. Spare capacities at plants owned by the parties and competitors in this Member State are on average 50% and in some cases as high as 60%. This sets in motion a downward pressure on prices, and lower margins for suppliers. Competitors and customers broadly confirmed this within the market investigation".	This type of information cannot be redacted because it generally describes the competitive dynamic in a given market and is not referring to any explicit business secret.
"Finally, the notifying party and its main competitors typically use market share estimations provided by the industry representative, when they negotiate with customers."	

c) information which is **publicly available**, including information available only upon payment through specialised information services (however, copyright limitations must be verified in the latter example);

Example	Confidentiality assessment
"1908 was a year of high financial losses for Company A plc. According to the company's financial annual report for 1908. Company A's net loss increased from EUR 999 million in 1907 to EUR 9 999 million in 1908. Company A attributes the bulk of the losses to the complete write-off of its investment in Company B Inc. (EUR 8 888 million) and other impairments, asset revaluations and losses from discontinued operations."	If the information included in this example were to be available from public annual account statements, it could not be redacted.
"Even the biggest customers that buy dolls, namely Company A and Company B, [accepted redaction], are not currently active in all EEA countries. This is also confirmed by customers and competitors."*	If the information included in this example were to be available to the market, it could not be redacted.
"The undertakings concerned have a combined world-wide turnover of more than EUR 5 000 million (A: EUR 1 234 million; B: [accepted redaction])."*	The turnover of the undertakings concerned is in most cases publicly available and therefore cannot be redacted. However, even if the turnover

	of an undertaking concerned is publicly available, the turnover of the group to which it belongs might be treated as confidential, if it is not publicly available. Also, sometimes the worldwide turnover is publicly available but the EEA-wide or national turnovers are not. As a consequence, in such cases the Commission would agree to redact but the EEA-wide or national turnovers.

d) Information which is **common knowledge among specialists in the field** (for example common knowledge among engineers or medical doctors);

Example	Confidentiality assessment
"*In the context of the market investigation, prescribers and medical specialists stated that drug A is usually prescribed as the first line of treatment for X type of disorders, while drug B is more suitable for Z type of disorders, thus not responding to the same medical needs. Drug A and B are therefore not substitutable from a medical perspective".*	This information is common knowledge for experts in the medical field and therefore cannot be redacted.

e) **Statistical or aggregate** information (even in the form of graphs, for instance).

Example	Confidentiality assessment
Table X: Overall Country A pumpkin consumption (Q1 of 1315 and 1316) **Pumpkins production Q1** / **Q1 1315** / **Q1 1316** / **Diff. %** Domestic consumption / 4 270 / 3 448 / −19.25% Export / 1 010 / 607 / −39.90% **Total** / **5 280** / **4 055** / **−23.20%**	This information would not be considered confidential because it would have been compiled from all the data submitted by competitors without specifying the individual shares.

f) a market share is above or below a certain level and/or that **an undertaking is larger than its competitors;**

Example	Confidentiality assessment
"In many countries the combined undertakings' biggest competitor will be half the size of, or even four or more times smaller than the combined undertaking."	This information is not confidential because it only reports a general threshold without specifying a precise figure.

g) arguments put forward by the notifying party(ies), for example relating to market share data, so long as they do not explicitly refer to information falling under the category of "business secret" or "other confidential information";

Example	Confidentiality assessment
"The notifying party challenges the reliability of the market share data collected by the industry representative. The notifying party states that, in some instances, the market share data understates the market position of the smaller stores and exaggerates the combined market share of the big stores. The notifying party points to limitations of the data. For example, the notifying party argues that since the market share	This information is not confidential because it relates to arguments of the notifying party(ies) in relation to data available to market participants.

estimations provided by the industry representative cannot cover the whole market (and the sales excluded from the scope of the surveys are probable sales made by smaller stores), the element used for estimation of the entire size of the market is merely a speculation of some staff members of the industry representative."	
"The notifying party declares that, according to the general view in the toys industry, the dancing dolls are the most important developing business model, and it will continue to develop and will be very significant in the future."	
*"The notifying party submits that: (a) It cannot otherwise fight the decline of the market and therefore it has an incentive to develop new stores that sell dolls and entice customers away from making their own dolls; (b) Stores selling certain types of dolls are generating significant revenues; and (c) The concern that the notifying party has any incentive to block the growth of stores selling certain types of dolls is inconsistent with the Commission's acknowledgement that the notifying party policy is to conclude agreements [*accepted redaction*]*."*	