

Unclassified**English - Or. English**

7 November 2019

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by
Lithuania**

3 December 2019

This document reproduces a written contribution from Lithuania submitted for Item 4 of the 130th OECD Working Party 3 meeting on 2-3 December 2019.
More documents related to this discussion can be found at
www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

Please contact Ms Despina PACHNOU if you have any questions about this document
[Despina.Pachnou@oecd.org, +(33-1) 45 24 95 25]

JT03454291

Lithuania

1. Introduction

1. The right to access the case file in antitrust proceedings is enshrined in the Law on Competition of the Republic of Lithuania (Law on Competition)¹ whereas rules regarding accessing the file in merger proceedings are set forth in Resolution on the approval of merger notification and examination procedure of the Competition Council of the Republic of Lithuania (Resolution on the approval of merger notification and examination procedure in merger proceedings).² In accordance with these provisions, the Competition Council of the Republic of Lithuania (the Competition Council) gives the undertakings an opportunity of making known their views on the objections against them and they are entitled to have access to the case file. This legal framework ensures respect of parties' rights of defense in the proceedings.

2. Additionally, the right to access the case file is also balanced against the need to protect confidential information in the case file. As a general rule, the Competition Council protects confidential information of the undertakings and does not disclose it to the third parties.

2. Access to file

2.1. The case file in the antitrust proceedings

3. In antitrust cases³ access is granted, upon request, to the undertakings to which the Competition Council addresses its objections as well as the complainants (hereinafter – the parties).

¹ Article 29 (2) of the Law on Competition.

² Paragraph 47 of the Resolution on the approval of merger notification and examination procedure.

³ Under Article 5 of the Law on Competition all agreements which have the purpose of restricting competition or which restrict or may restrict competition shall be prohibited and shall be void from the moment of conclusion thereof, including: 1) agreements to directly or indirectly set (fix) prices of certain goods or other conditions of purchase or sale; 2) agreements to share the product market on a territorial basis, according to groups of buyers or suppliers or in any other way; 3) agreements to fix production or sale volumes for certain goods as well as to restrict technical development or investment; 4) agreements to apply dissimilar (discriminating) conditions to equivalent contracts with individual undertakings, thereby placing them at a competitive disadvantage; 5) agreements to require other undertakings to assume supplementary obligations which, according to their commercial nature or purpose, have no direct connection with the subject of the contract.

Article 7 of the Law on Competition stipulates that it shall be prohibited to abuse a dominant position within a relevant market by performing any acts which restrict or may restrict competition, limit, without due cause, the possibilities of other undertakings to act in the market or violate the interests of consumers, including: 1) direct or indirect imposition of unfair prices or other conditions of purchase or sale; 2) restriction of trade, production or technical development to the prejudice of consumers; 3) application of dissimilar (discriminating) conditions to equivalent contracts with certain undertakings, thereby placing them at a competitive disadvantage; 4) the conclusion of a

4. The parties to the proceedings carried out by the Competition Council have the right of access to the case file after the completion of the investigation⁴. The parties to the proceedings are granted access to the investigation case file, except for the documents containing state or official secrets, commercial and professional secrets of another undertaking in the absence of the consent of that undertaking, internal documents of the Competition Council, other parties' replies to the statement of objections (non-confidential versions of replies may be provided if the Competition Council believes it will help it to clarify important circumstances), information which, based on the assessment of the Competition Council if disclosed, could negatively impact competition (e.g. future pricing information even if the undertaking itself is not requesting to protect it as a confidential) and other information the disclosure of which is restricted under other laws.⁵ The leniency statements and settlement submissions applications are only disclosed to the suspected undertakings enabling them to exercise their right of defense⁶.

5. The case files typically contain the Competition Council's decision to open an investigation and other decisions adopted by the Competition Council (e.g. to extend the term of the investigation, to supplement the investigation, etc.), court warrants, documents and evidence collected during dawn raids, leniency statements and settlement submissions and accompanying documents, requests for information to the parties, other undertakings and administrative bodies as well as information, explanations and data provided by them, etc.

6. The full case file contains confidential information (categories of the information mentioned above). The parties to the proceedings are granted access to the non-confidential versions of the case file as well as the confidential part of the case file consisting of information provided by the undertaking requesting access.

7. Documents prepared by the Competition Council while carrying out its functions, any opinions intended for the internal use of the Competition Council, documents prepared by the Competition Council related to issues on which no final decision or other decision of the Competition Council has been made and other documents of internal use do not form part of the investigation case files⁷. Such internal documents of the Competition Council may be submitted only to law enforcement institutions for the purposes of conducting their enforcement functions under law.

8. Upon completion of the investigation, the suspected undertakings are provided with the access to the leniency statements or settlement submissions. The access to these documents is only granted at the premises of the Competition Council. Under no circumstances copies or transcripts of cartel leniency statements or cartel or abuse of dominance settlement submissions are made except when they are provided to court for the

contract subject to acceptance by the other party of supplementary obligations which, according to their commercial nature or purpose, have no direct connection with the subject of such contract.

⁴ Article 29 (2) of the Law on Competition.

⁵ Paragraph 69 of the Rules of the Procedure of the Competition Council of the Republic of Lithuania (Rules of Procedure of the Competition Council).

⁶ Article 21 (8) and (9) of the Law on Competition.

⁷ Article 21 (7) of the Law on Competition.

sole purpose of ensuring that their contents correspond to the definition provided in the law.⁸

2.2. The case file in the merger proceedings

9. The file in the merger proceedings contains documents, electronic data or other information, which have been obtained and/or assembled by the Competition Council, during the examination of a merger. Typically, the file consists of merger notification and all of the other information provided by the parties, third parties, market participants, public authorities as well as other information which is relevant and used in the case (e.g. information from public domains which is used for evaluation of the merger). Additionally, documents reflecting economic analysis done by Competition Council is also included in the file. However, there are some documents that are excluded from the file – Competition Council’s internal documents (e. g. working documents, any expressed opinions intended for the internal needs of the Competition Council, documents prepared by the Competition Council related to issues on which no final decision or other decision of the Competition Council has been made).

2.3. The access to the case file

10. The access to the case file is granted to the participants in the procedure after statement of objections is issued and sent to the undertaking suspected of the infringement or merger notifying party.⁹ If Competition Council decides to reopen its investigation, all documents added in additional investigation are added and participants have access to those files after second statement of objections is issued. Most of the time the parties request for access to the case file immediately after statement of objections is received. Interested third parties cannot access the case file at all during the proceedings before the final decision is adopted.

11. The access to the case file for the parties to the proceedings is granted using electronic storage devices. In cases when there is no possibility to provide access to the case file using electronic storage devices, the parties to the proceedings are informed that they can access the case file at the premises of the Competition Council.¹⁰

12. If the merging parties request access to the file, it is provided at the agency’s premises or by making a copy on an electronic storage device. In addition to accessing the non-confidential versions of the case file, the merging parties also have the right to access the table of contents of confidential part of the case file.

3. Protection of confidential information

13. The Competition Council has a statutory obligation to protect commercial secrets collected in the course of antitrust investigations or merger proceedings.¹¹ Additionally,

⁸ Article 21 (8), (9) and (11) of the Law on Competition.

⁹ Article 29 (2) of the Law on Competition and Paragraph 47 of the Resolution on the approval of merger notification and examination procedure

¹⁰ Paragraph 68 of the Resolution on the approval of merger notification and examination procedure

¹¹ Article 21 (1) of the Law on Competition.

documents containing state or official secrets, information provided by other agencies if they contain confidential information are also protected and deemed to be confidential.

3.1. Definition of commercial secrets

14. Although no definition of commercial secrets is provided in the Law on Competition, under Civil Code of the Republic of Lithuania commercial secret means information which meets all of the following requirements: (i) it is a secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (ii) it has commercial value because it is secret; (iii) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.¹²

15. The court has recognized that various information about customers, suppliers, shippers and consignees, freight data, conditions of carriage, characteristics of goods, special permits, agreed freight rates, business entity customer list, customer information covering a wide range of data obtained through long-term business relationships, specific needs of each client, their solvency, financial condition, reliability, under what conditions and price services or goods are provided, information on the proposed purchasers, business partners, preparation and participation in public tenders are considered commercial secrets.¹³

16. Documents or other information submitted by an undertaking and requested by an undertaking to be treated as a commercial secret shall not be considered to be a commercial secret if, under the laws of the Republic of Lithuania, such information is public or has been publicly available before submission to the Competition Council.¹⁴

17. Special protection is also applicable to other types of information, which is not considered confidential, but merits a separate protection mechanism (for example, personal data).

3.2. Procedure of ensuring protection of confidential information

18. In order to ensure protection of their commercial secrets an undertaking must submit a request on the protection of commercial secrets when providing documents and other information to the Competition Council or as soon as it learns that the Competition Council has documents and information which contains its commercial secrets.¹⁵

19. In the application on the protection of commercial secrets the undertakings must identify (i) which information the Competition Council should consider to be the commercial secret of the undertaking and (ii) state whether identified information should be considered as commercially sensitive information *vis-à-vis* all third parties. If the identified commercial secrets should not be considered as confidential in relation to all

¹² Art. 1.116 of the Civil Code.

¹³ Judgement of the Supreme Court of Lithuania, 17 December 2013, Case No. 3K-3-676/2013; Judgement of the Supreme Court of Lithuania, 27 October 2014, Case No. 3K-3-447/2014; Judgement of the Supreme Court of Lithuania, 3 July 2015, Case No. 3K-3-421-695/2015.

¹⁴ Paragraph 169 of the Rules of the Procedure of the Competition Council.

¹⁵ Article 21 (2) of the Law on Competition.

third parties (e.g. in a vertical relationship), undertakings must identify undertakings that can access particular commercial secrets.¹⁶

20. An undertaking whose information constituting a commercial secret is available to the Competition Council may be required to submit within the term specified by the Competition Council a version of a document or another information without a commercial secret (hereinafter – also non-confidential version of the document) and the description of the information it wants to be protected.¹⁷ The description of the information which contains commercial secrets must be drafted in such a way as to make it possible to understand the nature of the information which is classified in the non-confidential versions of the documents or information.¹⁸

21. In the non-confidential versions of the documents the confidential information is covered (blackened-out or otherwise covered) or, in cases when the whole document is confidential, the summary of such document is prepared.

22. The Competition Council can ask the undertakings to substantiate their request on the protection of commercial secrets. Additionally, if the undertaking claims confidentiality, but does not identify which exact information should be regarded as commercial secrets, the Competition Council may oblige the undertaking to identify commercial secrets within a specified time limit.¹⁹

23. If the undertaking fails to submit an application for protection of commercial secret or indicate within a specified time period what specific information the Competition Council should treat as an undertaking's commercial secrets or does not provide a non-confidential versions of the documents and the description of the confidential information, it shall be assumed that the information held by the Competition Council does not constitute a commercial secret.²⁰

24. The Competition Council in advance (within a reasonable time) informs the undertaking in writing of its decision and reasoning not to recognize documents or other information as confidential, despite the request of the undertaking to do so.²¹

25. Documents and other information are treated as commercial secrets of the undertaking from the moment they are added in a separate volume of the file and shall not be made available to unauthorized persons. A table of contents of the case file containing the documents constituting commercial secrets of the undertaking are drawn up.²²

26. The decision of the Competition Council on the applications on the protection of commercial secrets must be taken no later than at the day decision of the Competition Council or any other final decision on the issue is adopted. Requests for the protection of

¹⁶ Paragraph 164 of the Rules of the Procedure of the Competition Council.

¹⁷ Article 21 (5) of the Law on Competition.

¹⁸ Paragraph 164 of the Rules of the Procedure of the Competition Council.

¹⁹ *Ibid.*, paragraph 165.

²⁰ Article 21 (3) and (5) of the Law on Competition and Paragraph 168 of the Rules of the Procedure of the Competition Council.

²¹ Paragraph 170 of the Rules of the Procedure of the Competition Council.

²² *Ibid.*, paragraph 171.

trade secrets submitted by undertakings after the final resolution of the Competition Council or other final decision on the issue under consideration shall not be satisfied.²³

27. The body handling the relevant proceedings²⁴ in the agency decides on the basis of the application on the protection of commercial secrets whether information should be regarded as containing commercial secrets.²⁵ The undertakings who believe that their rights have been violated have the right to appeal to the Competition Council regarding decisions taken during the proceedings of the officials and other employees no later than 10 days after the day on which the act or decision complained of has become known. The Competition Council's decision on such complaint must be taken within ten days of receipt of the complaint.²⁶ If undertakings or other persons, who filed a complaint, object to the decision of the Competition Council or if the Competition Council fails to make a resolution within ten days, they have the right to file an appeal with Vilnius Regional Administrative Court. Filing of an appeal does not suspend the procedure for the violation of Law on Competition.²⁷

28. Parties are granted access to the table of contents of confidential part of the case file. As to the disclosure of confidential information, Supreme Administrative Court of Lithuania has stated that if the Competition Council does not grant the parties access to the confidential information and the parties believe their right to a defense was infringed, they must identify what specific confidential information is held by Competition Council and why the exclusion of that particular confidential information does not allow them to protect their rights.²⁸ Additionally, Supreme Administrative Court of Lithuania has noted that right of the defense is not breached if the confidential information, to which party did not have access, does not substantially affect the legal assessment of undertaking's conduct and its liability. There would be no breach of the right of the defense if the motives of the decision could be clearly understood from the non-confidential decision of the Competition Council.²⁹ For example, Supreme Administrative Court of Lithuania stated that the parties' rights were not breached in relation to the access to the confidential information because parties were provided the table of contents of the confidential part of the case as well as non-confidential versions of confidential documents. As it was not found that confidential information had affected the legal assessment of the conduct, and the undertakings did not

²³ Article 21 (6) of the Law on Competition.

²⁴ Currently in case of mergers and abuse of dominant position cases – Head or Senior Adviser of Dominant Undertakings and Mergers Supervision Group, in case of anti-competitive agreements cases – Head or Senior Adviser of Anti-competitive Agreements Investigation Group.

²⁵ Paragraph 15 subparagraph 12 of the Rules of the Procedure of the Competition Council.

²⁶ *Ibid.*, Article 32 (1).

²⁷ *Ibid.*, Article 32 (3).

²⁸ Judgement of the Supreme Administrative Court of Lithuania, 22 December 2016, Case No. eA-2330-520/2016.

²⁹ Judgement of the Supreme Administrative Court of Lithuania, 20 June 2016, Case No. A-741-552/2016.

explain how their rights were breached in that instance by non-disclosure of confidential information, no breach of right of defence was established.³⁰

29. Additionally, the Competition Council does not disclose leniency statements and settlement submissions. Under Article 21 (8) of the Law on Competition, the Competition Council shall not disclose leniency applications for the cartels referred to in Article 44 (3)³¹ and settlement submissions made for the alleged infringements of Article 5 (national provisions prohibiting anti-competitive agreements) and 7 (national provisions prohibiting abuse of dominance) of the Law on Competition as well as Article 101 (provisions of European Union law prohibiting anti-competitive agreements) and 102 (provisions of European Union law prohibiting abuse of dominance) of *Treaty on the Functioning of the European Union* including citations from these applications. The Competition Council can only disclose such documents: 1) to the undertakings suspected of the same infringement as the undertaking submitting the leniency and settlement application for the procedure and purposes of the exercise of the rights of defense of the undertakings; (2) to the court, for the sole purpose of ensuring that their contents correspond to the definitions. In no case shall the national court permit other parties or third parties access to that evidence.³²

30. The Competition Council cannot disclose leniency statements and settlement submissions for other infringements (not mentioned in previous paragraph)³³ except: 1) to the undertakings suspected of the same infringement as the undertaking submitting the leniency application for the procedure and purposes of the exercise of the rights of defense of the undertakings and court when the Competition Council's decision is appealed; 2) the court which, having considered the proportionality of the request, decides to demand these documents in damages cases.³⁴

31. The restrictions described above apply only to leniency and settlement applications, but not to the pre-existing evidence provided with the applications.³⁵

3.3. Disclosure of confidential information to courts and other authorities

32. The Competition Council cannot share confidential information with foreign or domestic agencies, government or legislative bodies except other competition authorities of the European Union for the purpose of applying Articles 101 and 102 of the Treaty on the Functioning of the European Union.³⁶ In order to disclose confidential information to institutions other than competition authorities of the European Union, the Competition

³⁰ Judgement of the Supreme Administrative Court of Lithuania, 20 June 2016, Case No. A-741-552/2016.

³¹ Article 44 (3) refers to cartel agreements.

³² The rules concerning balancing of rights of private claimants against the need to protect leniency statements are brought into law from the directive 2014/104/EU and do not differ substantially from the provisions of the directive.

³³ I.e. agreements between competitors distorting competition by effect, vertical agreements.

³⁴ Article 21 (9) of the Law on Competition.

³⁵ *Ibid.*, Article 21 (10).

³⁶ Article 12(1) of the Regulation 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 2003 L1/1).

Council must acquire a waiver from the undertakings whose confidential information would be disclosed in that instance.

33. In case a resolution of the Competition Council is appealed and the case file contains commercial secrets, under Article 42(2) of Law on Administrative Proceedings of the Republic of Lithuania the party or the institution submitting documents or material to the court, which contain data constituting commercial secret, may request that the court refrain from granting access to the data and allowing to make copies thereof. Additionally, Article 46(2) of Law on Administrative Proceedings stipulates that the court may hold a closed hearing seeking to protect commercial secret. In both of these instances, the court issues a justified order on the matter in question. As a standard procedure, the Competition Council requests to protect confidential information contained in documents provided to courts pursuant to Article 42(2) of Law on Administrative Proceedings. In such cases, as a rule, courts *ex officio* decide to hold a closed hearing according to Article 46(2) of Law on Administrative Proceedings.