



**The Competition Authority**  
An tÚdarás Iomaíochta

## **ACCESS TO THE FILE IN MERGER CASES**

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**Competition Act 2002**

**Procedures for Access to the File in Merger Cases**

**February 2006**

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This document provides guidance to businesses and legal practitioners on the Competition Authority's policy in relation to access to its file by the merging parties in the course of the Competition Authority's review of mergers and acquisitions. It is applicable from 1<sup>st</sup> March 2006.

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## ARTICLE 1

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### Introduction

- 1.1 This document is issued by the Competition Authority (“the Authority”), which is responsible for the administration and enforcement of the Competition Act 2002 (the “Act”). Its purpose is to give guidance to businesses and legal practitioners on the Authority’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

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### Definitions

- 2.1 For the purposes of these Procedures: -

“**Authority**” includes members of the Authority or any of them and members of staff.

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

“**Documents**” includes recordings.

## ARTICLE 3

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### Subject matter of the Procedures

- 3.1 The Authority 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, to which information access will be granted and how access will be afforded.
- 3.2 The Procedures take into account recent case law of the Court of Justice and the Court of First Instance of the European Communities on access to the file of the European Commission, the Commission’s draft Notice on Access to the File and the practice already developed by the Authority.

## ARTICLE 4

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### 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 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**

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### **When is access to the file granted?**

- 5.1 The parties will be given access to the Authority's file upon request, during the three week period between their receipt of the Assessment and their response thereto. Thereafter, they will be granted without further request access to any new information that raises issues not dealt with in the Assessment. Prior to the issue of the Authority's Assessment, the parties have no right of access to the file.

## **ARTICLE 6**

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### **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 Authority 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 Authority can rely in its assessment of a case. For that reason, they will not form part of the Authority'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 the Authority 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.
- 6.3 Parties will not be entitled to access every document in the Authority's file.

## **ARTICLE 7**

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### **Accessible documents**

- 7.1 The parties must be able to acquaint themselves with all the information on which the Authority 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 they will be granted access to all documents making up the Authority file as described in Article 6.1 above (including the results, terms of reference and methodology of any study commissioned in connection with the review of the merger or acquisition<sup>1</sup> and agreed minutes of meetings between the Authority, the parties 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.

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<sup>1</sup> Precautions may however be necessary in order to protect intellectual property rights.

## ARTICLE 8

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### Non-accessible documents

#### (a) Minutes of meetings

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

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### **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 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 Authority 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**

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### **Submission of confidential information**

- 10.1 Persons or undertakings who provide information or submit comments to the Authority, whether of their own motion, upon request, or under oath in the course of the 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**

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### **Treatment of confidential information**

- 11.1 Upon receipt of a properly substantiated claim for confidentiality, the Authority 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 Authority 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 it in writing of its views.
- 11.3 The Authority will take into account the written views duly submitted by the person or undertaking and the Authority 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 Authority's mergers functions.

## **ARTICLE 12**

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### **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 Authority, the Authority will protect the anonymity of the authors by providing access to a non-confidential version or summary of the responses in question.<sup>2</sup> 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**

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### **Provision of access to file**

- 13.1 In order to facilitate access to the file, the parties will, together with the Assessment, receive an enumerative list of documents setting out the content of the Authority 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 by sending copies of the accessible file in paper form by fax, mail, or courier.
- 13.3 The Authority is under no obligation to provide a translation of documents in the file.

## **ARTICLE 14**

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### **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. The legal advisers of the parties will be expected to advise their clients that such information shall be used solely for this purpose.

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<sup>2</sup> The Court of First Instance and the Court of Justice have acknowledged that it is legitimate to refuse to reveal to such undertakings certain letters received from their customers, since their disclosure might easily expose the authors to the risk of retaliatory measures. See, for example Case T-221/95 *Endemol v Commission* [1999] ECR II-1299, point 69, and Case T-5/02 *Laval v Commission* [2002] ECR II-4381, point 98 et seq.).