

EXPLANATORY NOTE ON BUSINESS SECRETS AND OTHER CONFIDENTIAL INFORMATION

I. INTRODUCTION

1. If an investigation leads to the adoption of a Statement of Objections,¹ the EFTA Surveillance Authority (the “Authority”) makes available documents that the Competition and State Aid Directorate (“CSA”) has obtained during the course of its investigation. Only those undertakings to whom a Statement of Objections is addressed may request access to the file. Any parts of the file that contain business secrets, other confidential information or internal documents of the Authority or of the European Commission or of the competition authorities of the EFTA or EU Member States are not accessible.²
2. This note describes the obligation of undertakings to indicate business secrets and other confidential information in submissions and/or documents held on the Authority’s file that originate from them. In the absence of such indication, the Authority may assume that the information does not contain any business secrets or other confidential information³ and, consequently, that the undertaking in question has no objections to the disclosure of that information in its entirety. This note also explains the manner in which a non-confidential version must be supplied. This note does not replace the provisions in EEA law concerning professional secrecy and claims for confidentiality that apply to submissions/documents submitted to the Authority.⁴

II. WHAT MAY CONSTITUTE BUSINESS SECRETS AND OTHER CONFIDENTIAL INFORMATION

3. To claim confidentiality, the information must be known only to a limited number of persons and, if disclosed, be liable to cause serious harm to the person who

¹ Article 10 of Chapter III of Protocol 4 to the Surveillance and Court Agreement (“SCA”). In exceptional circumstances, the Authority may decide to grant access to certain documents also at other stages of the proceedings.

² Articles 27 and 28 of Chapter II of Protocol 4 to the SCA; Articles 15(2) and 16 of Chapter III of Protocol 4 to the SCA; point 10 of the EFTA Surveillance Authority Notice on the rules for access to the EFTA Surveillance Authority file in cases pursuant to Articles 53, 54 and 57 of the EEA Agreement, OJ C 250, 25.10.2007, p. 16 and EEA Supplement to the OJ No 50, 25.10.2007, p.1 (“Notice on access to file”). See Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 68. According to Article 6 of the EEA Agreement and Article 3(2) of the SCA, the case law of the Court of Justice and of the General Court of the European Union are relevant for the interpretation of the EEA Agreement and the SCA, and in particular for the interpretation of Articles 53 and 54 of the EEA Agreement.

³ Article 16(4) of Chapter III of Protocol 4 to the SCA.

⁴ Article 122 of the EEA Agreement; Chapter II of Protocol 4 to the SCA; Chapter III of Protocol 4 to the SCA; and the Notice on access to file.

provided it or to third parties with regard to interests which, objectively, are worthy of protection.⁵

4. **Business secrets**⁶ merit a very special protection.⁷ They are confidential information about an undertaking's business activity in respect of which not only disclosure to the public, but also mere transmission to a person/undertaking, other than the person/undertaking who provided the information, may seriously harm the latter's interests.⁸ 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.
5. **Other confidential information**⁹ is information other than business secrets, 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 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. The Court of Justice of the European Union has acknowledged that it is legitimate to refuse to reveal to such undertakings certain letters received from their customers, since disclosure might easily expose the authors to the risk of retaliatory measures.¹⁰ Therefore, the notion of other confidential information may include information that would enable the parties to identify complainants or other third parties where the latter have a justified wish to remain anonymous. The category of other confidential information also includes military secrets.

III. WHAT IS NOT NORMALLY CONSIDERED AS BUSINESS SECRETS AND OTHER CONFIDENTIAL INFORMATION

6. All other information in submissions/documents not covered by the above definitions of "business secrets" and "other confidential information" will not be considered confidential. More particularly, information relating to an undertaking which is already known outside the undertaking (in the case of a group, outside the group), or outside the association to which it has been communicated by that undertaking, will not normally be considered confidential. In order 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.¹¹ Information that has lost its commercial importance, for instance due to the passage of time, can also no longer be regarded as confidential. The assessment of whether a piece of information constitutes a business secret or other confidential

⁵ Case T-198/03 *Bank Austria Creditanstalt AG v Commission* [2006] ECR II-1429, paragraph 71.

⁶ Point 18 of the Notice on access to file.

⁷ Case 53/85 *Akzo Chemie a.o. v Commission* [1986] ECR 1965, paragraph 28.

⁸ Case T-353/94 *Postbank NV v Commission* [1996] ECR II-921, paragraph 87.

⁹ Points 19-20 of the Notice on access to file.

¹⁰ The Courts of the European Union have pronounced upon this question both in cases of alleged abuse of a dominant position (Article 102 of the TFEU) (Case T-65/89, *BPB Industries and British Gypsum v Commission* [1993] ECR II-389; and Case C-310/93P, *BPB Industries and British Gypsum v Commission* [1995] ECR I-865), and in merger cases (Case T-221/95 *Endemol v Commission* [1999] ECR II-1299, paragraph 69, and Case T-5/02 *Laval v Commission* [2002] ECR II-4381, paragraph 98 etc.).

¹¹ Order in Case T-89/96 *British Steel v Commission* [1997] ECR II-835, paragraphs 26 and 27.

information must be carried out on a case-by-case basis. In addition, the General Court has considered a period of five years in itself to be sufficient for information to lose its qualification as business secrets or other confidential information. Confidential treatment may only exceptionally be granted to such data, if it is shown that, notwithstanding their historical nature, they still constitute essential elements of the commercial position of the undertaking concerned.¹²

7. By way of example, the Authority does not, unless duly justified, accept the following type of information as business secrets and other confidential information:
 - data from and about another undertaking (such as price announcements, sales data etc). Exceptionally, however, data received pursuant to a contract with that other undertaking which envisages confidentiality may be considered confidential. General references to a non-disclosure agreement are insufficient to justify the confidentiality of such data;
 - information made known outside an undertaking (such as price targets, price increases, dates of implementation of such increases and customer names);
 - facts relating to an application for immunity from or a reduction in fines, where these facts aim to provide evidence of an alleged infringement, unless the disclosure of such facts could harm the Authority’s leniency policy;
 - names and positions of employees/other persons involved in an infringement;
 - in general, facts providing evidence of an alleged infringement.
8. It should be noted that oral corporate statements provided in an application for immunity from or a reduction in fines under the Leniency Notice¹³ cannot contain any business secrets or other confidential information.¹⁴

IV. HOW TO CLAIM CONFIDENTIALITY

9. Provide a **separate non-confidential version** of all submissions/documents in which information regarded as business secrets or otherwise confidential is blackened out with the indication “[BUSINESS SECRETS]” or “[CONFIDENTIAL]”. The non-confidential version of documents must otherwise mirror the confidential version of documents.
10. For administrative efficiency, the Authority may ask first for a draft non-confidential version of submissions/documents in which only the information considered confidential is highlighted in a way that it remains legible. A final non-confidential version in which information is blackened-out will then only be submitted after the Authority has provisionally accepted the confidentiality claims.

¹² See for example, Order in Case T-271/03, *Deutsche Telekom v Commission* [2006] ECR II-1747, paragraph 45.

¹³ EFTA Surveillance Authority notice on immunity from fines and reduction of fines in cartel cases, OJ C 294, 3.12.2009, p. 7 and EEA Supplement to the OJ No 64, 3.12.2009, p. 1 (the “Leniency Notice”).

¹⁴ The EFTA Surveillance Authority will require leniency applicants to make a declaration to that end at the time of a leniency application.

11. In general, confidentiality cannot be claimed for the entire or whole sections of a document/submission as it is normally possible to protect confidential information with limited redactions. As a minimum, the headings of documents and/or the headings of columns contained in tables and pictures as well as all annexes should be left unredacted irrespective of whether they contain any confidential information. Entirely blank pages will not be accepted. If confidentiality for any parts of a document/submission is claimed, **a non-confidential version of the ENTIRE document should be provided**, which must otherwise mirror the confidential version of documents.
12. **Justify all confidentiality claims.** Each claim for confidentiality must be substantiated in writing, explaining:
 - why the information at issue constitutes business secrets or other confidential information; and
 - how this information would cause serious harm to the undertaking making the claim or would significantly harm a person or undertaking (see the list below for examples).
13. For better understanding, a **meaningful non-confidential description** of the redacted information should be provided, for example: “sales strategy: [add details about the redacted item such as the time period, the area concerned, etc.]”. When redacting figures (such as market shares or turnover figures,) ranges should be indicated.¹⁵
14. The table below provides a suggestion as to how to structure descriptions of redacted information and justifications for each confidentiality claim.
15. Parties claiming confidentiality/business secrets are required to provide the Authority with all relevant details in order to enable it to balance (a) the need to preserve (other) parties’ rights of defence by granting as much access as possible to the file, and (b) the need to protect confidential information. The non-confidential versions of documents and the descriptions of redactions must be drafted to enable a party accessing the non-confidential versions to determine whether the redacted information is likely to be relevant for its defence. It is of paramount importance to provide accurate descriptions to permit parties to establish whether there are sufficient grounds to request the Authority to grant access to the information claimed to be confidential.
16. Non-confidential versions of submissions/documents, descriptions, summaries and justifications provided will be made accessible to the parties to the proceedings if access to the file is given. Parties should therefore ensure that the table containing meaningful summaries and justifications for confidentiality claims contain no confidential information. The properties of electronic documents should be thoroughly checked to ensure they do not contain any confidential information.
17. Standard confidentiality stamps on law firms letterheads and automatic disclaimers in e-mails are not regarded as a request for confidential treatment. The Authority

¹⁵ For example, market shares should normally be indicated in ranges not wider than 5%, for example [25% to 30%].

will make such documents accessible unless confidentiality has been claimed in accordance with all criteria set out in this note.

18. In the event a party is granted access to the file in a given case and thereafter submits a reasoned request for further access to confidential information provided by other undertakings, the Authority will assess whether the need to safeguard the rights of defence of the parties outweighs the concern to protect confidential information of other parties. In accordance with points 24 and 47 of the Notice on access to file, the Authority will assess whether such information is necessary to prove an alleged infringement ('inculpatory document') or to exonerate a party ('exculpatory document'). In order to determine whether the requested information constitutes confidential information in the first place, the Authority will normally assume that the party seeking access has acknowledged the confidential nature of such information if it has already made similar confidentiality claims in relation to information of the same type in its own documents.

19. If a party fails to comply with the provisions set out above, the Authority may assume that documents submitted by that party do not contain any business secrets or other confidential information and, consequently, that it has no objections to the disclosure of that information in its entirety.

Example list of confidentiality claims

ID # (if available)/Page # of original confidential version/paragraph # (please indicate annex # where relevant)	Reasons for confidentiality request	Suggested summary version