

Client Alert

A bulletin
for clients
and friends
of the firm

December 2005

European Commission Expands File Access by Targets of Statements of Objections

The European Commission ("EC") announced, on December 13, 2005, that it has revised its rules to expand access to its competition investigative files by recipients of EC Statements of Objections, *i.e.*, the EC's explanation as to why it has reached the preliminary view that a proposed merger or conduct by the targets of an EC investigation may violate the EC's competition rules.¹ The EC announcement notes that "Access to the file is an important procedural step in all contentious antitrust and merger cases." By affording recipients of Statements of Objections access to both incriminating and potentially exonerating evidence in the EC's file, the parties may better understand the factual basis for the Statement of Objections and can use evidence in the file in their defense and in arguments to the EC. EC Competition Commissioner Neelie Kroes commented: "These new rules will increase the transparency and efficiency of our merger and antitrust procedures. They reflect the Commission's long-standing commitment to guarantee full respect for the rights of defence of parties in competition procedures [*i.e.*, the EC's merger or antitrust investigations]."

The EC's action is well timed. In a ruling issued the same day as the EC announcement, the European Court of First Instance held that

- if its is shown that an applicant was not granted access, during the administrative procedure, to a document favorable to its case, *i.e.*, a document which could have been useful to its defence and which could therefore have changed the outcome of the administrative procedure if the applicant had been able to make use of it, the reasoning in the contested decision affected by that document must, in principle be regarded as vitiated by error.

General Electric v Commission, Case T-210/01 ¶ 649.² At the same time, the court upheld protection from disclosure of internal documents and confidential information and found that the EC's use of summaries to protect confidential information is an appropriate, balanced response. Further, the court held that the EC is not required to provide access to the case-file, for purposes of defense, until after the EC issues a Statement of Objections.

According to the EC Notice, the "Commission file" includes all documents that are part of the specific procedure on which the Statement of Objections has been based. The Notice describes the procedures for the treatment of confidential information and for implementing access to the file, including the procedure for resolution of disagreements on confidentiality claims and for balancing confidentiality claims against rights of recipients of Statements of Objections to mount a defense. The Notice excludes from access "internal documents," including both Commission documents and documents exchanged between the Commission and other public authorities, and "business secrets and other confidential information" covered by a legitimate claim for confidentiality. The Notice defines "business secrets" as information about a

¹ The EC press release appears at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1581&format=HTML&aged=0&language=EN&guiLanguage=en>. The EC action updates the EC's 1977 Notice on the rules governing file access by the targets of an EC investigation. See IP/97/50.

² The *GE* decision of the Court of First Instance appears at <http://curia.eu.int/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79948785T19010210&doc=T&ouvert=T&seance=ARRET>.

company's business the disclosure of which could result in serious harm to the company, including information relating to a company's know-how, methods of assessing costs and production secrets and processes, and defines "other confidential information" as information the disclosure of which would significantly harm a person or undertaking (i.e., a company or other entity), including information that would enable the parties to identify complainants and other third parties who have requested anonymity.

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