



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Access to the File Policy

In respect of investigations by ComReg under the
Competition Act 2002

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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Amendments to this Policy

ComReg may amend this Policy from time to time and where the Policy has been amended, an updated version will be published on ComReg's website.

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1 Introduction

- 1.1 On 29 June 2022, the Competition (Amendment) Act 2022 (no. 12 of 2022) (the “2022 Act”) was enacted by the Oireachtas¹. The 2022 Act implements Directive (EU) 2019/1 of the European Parliament and of the Council (also known as the ECN+ Directive) and amends the Competition Act 2002 (as amended) (“Competition Act 2002”). This document sets out the procedures adopted by ComReg for providing access to its file in the context of investigations carried out by ComReg under the Competition Act 2002.
- 1.2 The file consists of documents which have been obtained, produced and/or assembled by ComReg during an investigation and which have been relied upon by ComReg for the purposes of issuing a Statement of Objections/Investigation Report under section 15L of the Competition Act 2002 or referring the matter to an adjudication officer pursuant to section 15M of the Competition Act 2002 (the “File”).
- 1.3 The procedures set out in this document apply in:
- (a) investigations into suspected breaches of Sections 4 and 5 of the Competition Act 2002 and/or Articles 101 and 102 of the Treaty on the Functioning of European Union (“TFEU”) carried out under Part 2C of the Competition Act 2002 (an “Antitrust Investigation”); and
 - (b) other investigations in which ComReg issues a statement of objections under section 15L(1) of the Competition Act 2002, being an investigation of: (i) a suspected breach of a procedural requirement imposed by ComReg in connection with an investigation under Part 2C of the Competition Act 2002; (ii) a suspected failure to comply with commitments entered into under section 15AE of the Competition Act 2002; (iii) a suspected failure to comply with a structural or behavioural remedy imposed under section 15X of the Competition Act 2002 in accordance with section 15Z of the Competition Act 2002; and (iv) a suspected failure to comply with a prohibition notice issued under section 15H of the Competition Act 2002 (together, referred to as an “Other Investigation”).
 - (c) Antitrust Investigations and Other Investigations are together referred to in this Policy as “Investigations”.
- 1.4 This document is intended to provide guidance to undertakings and their advisors on ComReg’s policy and practice in relation to ComReg’s provision of access to

¹ See [Competition \(Amendment\) Act 2022 \(irishstatutebook.ie\)](https://www.irishstatutebook.ie/eli/2022/act/12/2022-06-29).

the File in the course of an Investigation. It 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.

- 1.5 ComReg's approach to the provision of access to the File as set out in this document is without prejudice to the provisions of existing or future legislation, including but not limited to, the Freedom of Information Acts and data protection legislation.

2 Who is entitled to access to the File

- 2.1 ComReg grants access to the File, upon request, to the persons², undertakings³ or associations of undertakings to which ComReg addresses a Statement of Objections⁴ (together the “Parties”, or each a “Party”).

² The term ‘person’ encompasses natural and legal persons. Where entities without legal personality which are also not undertakings become involved in ComReg’s Investigations, ComReg applies, where appropriate, the principles set out for Third Parties (as defined in footnote 9).

³ As defined in section 3 of the 2002 Act.

⁴ As particularised in section 15L(1) of the 2002 Act.

3 When is access to the File granted

- 3.1 The Parties gain the right of access to the File only following their receipt of ComReg's Statement of Objections. Prior to the issue of Statement of Objections, the Parties have no right of access to the File.
- 3.2 Where ComReg decides to make a referral⁵ to an adjudication officer in an Investigation following issuance of a Statement of Objections, ComReg will prepare a full investigation report to the adjudication officer setting out the findings of ComReg's Investigation (the "Investigation Report"). A copy of the Investigation Report will also be provided to the Parties. In such circumstances the Parties gain the right to access any additional material not already provided, which is relied on by ComReg for the purposes of the referral. In circumstances where ComReg agrees a settlement with a Party and prepares a simplified investigation report pursuant to section 15L(8) of the Competition Act 2002 for the purpose of making a referral to an adjudication officer, the settling Party will not gain any additional right of access to the File.
- 3.3 In order to facilitate access to the File, ComReg will issue to the Party or the Parties an enumerative list of documents setting out the content of the file (the "Schedule"). The Schedule will be provided either at the same time as the Statement of Objections or as soon as practicable thereafter and no later than 2 working days following issuance of the Statement of Objections. A Party who wishes to seek access to documents on the File must then indicate in writing to ComReg which of the accessible documents (as described in paragraphs 4.4 to 4.6) listed in the Schedule they wish to request access to. A Party will be given access to these documents as soon as is practicable after the request.
- 3.4 In circumstances where a referral is made to an adjudication officer and to the extent that additional documents are added to the File, ComReg will issue to the Party or the Parties an updated Schedule of the additional documents in order to facilitate further access to the File. This Schedule will be provided without the requirement for the Parties to make a further request and will be issued either at the same time when a copy of the Investigation Report is provided, or as soon as practicable thereafter and no later than 2 working days following issuance of a copy of the Investigation Report.
- 3.5 Access to documents on the File is subject to such redactions as ComReg may judge necessary and appropriate in order to protect confidential information (see paragraphs 4.13 to 4.25), protect the rights of the parties or any other person, or for any other good and sufficient reason. Where redactions have been made for

⁵ See section 15L(9)(b) of the 2002 Act.

other good and sufficient reason, ComReg will endeavour to provide the reason for the relevant redactions to the Parties but will not be under any obligation to provide that reason.

- 3.6 The redaction or qualification of a piece of information as confidential is not a bar to its disclosure if such information is necessary to prove an alleged infringement ('inculpatory document') or could be necessary to exonerate a party ('exculpatory document'). In this case, the need to safeguard the rights of the defence of the Party(ies) through the provision of the widest possible access to the File may outweigh the concern to protect confidential information of other parties. It is for ComReg to assess whether those circumstances apply to any specific situation.
- 3.7 Access to the File is granted subject to the condition that the information thereby obtained can only be used for the purpose of replying to the Statement of Objections or the Investigation Report, or in connection with ComReg's Investigation⁶, and ComReg will have regard to the conditions set out in section 15AV of the Competition Act 2002⁷. In certain circumstances, ComReg may seek to enter into a data sharing agreement with Parties to ensure compliance with its obligations under relevant data protection laws.
- 3.8 ComReg allows addressees of the Statement of Objections a reasonable opportunity to access the File. The time given for addressees will take into consideration a number of factors including the size of the File, the nature of the documents and the access to File process being used.

⁶ This includes for the purpose of proceedings under Part 2D or 2H of the 2002 Act.

⁷ See in particular, the conditions set out in sections 15AV(7), (8) and (10) of the 2002 Act.

4 Documents to which access may be granted

4.1 The File

- 4.1 Access to the File is granted to afford a Party(ies) the opportunity to acquaint themselves with information in ComReg's File, in order to fully express their views on the preliminary conclusions reached by ComReg in its Statement of Objections (and the Investigation Report in circumstances where ComReg makes a referral to an adjudication officer), and to fully respect their rights of defence in the proceedings.
- 4.2 In the course of an Investigation, ComReg may gather documents which, following a more detailed examination, prove to be unrelated to the subject matter of the Investigation. Such documents will be removed from, and no longer constitute, part of the File. Identical copies of documents may also be removed by ComReg, in particular duplicate emails.
- 4.3 As a general rule, the Parties will not be granted access to the replies of other Parties⁸ to the Statement of Objections (or Investigation Report in circumstances where ComReg makes a referral to an adjudication officer). ComReg may, however, in the interests of fair and effective enforcement, give one or more of the Parties a copy of the non-confidential version (or a summary/specific excerpts thereof) of the (other) Parties' written replies to the Statement of Objections or Investigation Report and give them the opportunity to submit their comments.

4.2 Accessible documents

- 4.4 The Parties will be granted access to all documents making up the File, as described in Paragraph 1.4, with the exception of internal documents (as described in detail in paragraphs 4.7 to 4.12) and documents containing commercially sensitive information or other confidential information of the other Parties, or of Third Parties⁹. Access will be granted, where possible, to accessible versions of non-accessible confidential documents. In certain circumstances

⁸ Other Parties refers to other persons, undertakings and associations of undertakings under Investigation.

⁹ Third Parties refers to any persons, undertakings and associations of undertakings other than the Parties and public bodies.

where confidentiality can only be assured by summarising the relevant information, an accessible document may take the form of a non-confidential summary. Non-confidential versions of confidential information relied upon by ComReg in its Statement of Objections/Investigation Report, as well as non-confidential versions of confidential information of an exculpatory nature, will be made accessible to the Parties.

- 4.5 Accessible documents will include the results, terms of reference and methodology of any study commissioned by ComReg in connection with its Investigation.
- 4.6 ComReg is not obliged to grant the Party or Parties access to documents which they themselves have provided to ComReg during the Investigation, as those documents will already be accessible to that Party or Parties.

4.3 Non-accessible documents

4.3.1 Internal documents

- 4.7 ComReg's internal documents do not constitute part of the evidence on which ComReg can rely in its Statement of Objections/Investigation Report and as such are not accessible to Parties that request access to the File. Given the lack of evidential value of such internal documents, this approach does not prejudice the proper exercise of the Parties' rights of defence in an Investigation. Internal communications are considered to be internal documents and therefore, do not form part of the File.
- 4.8 Documents which are considered to be internal also include¹⁰:
- (a) documents and correspondence relating to ComReg's procurement of contractors or studies, including evaluation of contractors;
 - (b) ComReg's correspondence with its contractors or service providers, including draft reports and studies; and
 - (c) ComReg's correspondence with public bodies¹¹ in or outside the State, including the European Commission, other NCAs, the Director of Public

¹⁰ Examples provided in this document are intended to form guidance only, and are not exhaustive.

¹¹ Public bodies include, but are not limited to, a Department of State, An Garda Síochána, the Revenue Commissioners, statutory bodies and authorities including the Competition and Consumer Protection Commission and the Central Bank of Ireland, and Semi-State Bodies.

Prosecutions and the Chief State Solicitor's Office, and the internal documents received from such bodies.

- 4.9 In certain exceptional circumstances access may be granted to non-confidential versions of internal documents where those documents are deemed to no longer possess a purely internal character, namely:
- (a) internal documents relied upon in ComReg's Statement of Objections/Investigation Report; and
 - (b) internal documents containing exculpatory information, that is information which may support the Parties' position that a breach has not occurred.
- 4.10 In such cases ComReg will consult the Third Party (e.g., ComReg's contractor or a public body) submitting the document to identify any confidential information prior to granting access.
- 4.11 There is no obligation on ComReg to keep any minutes or notes of meetings with the Parties or with Third Parties. If ComReg chooses to keep such minutes or notes of meetings, they constitute ComReg's own interpretation of what was said at the meetings and are included in the category of internal documents.
- 4.12 Where, however, the Party or Third Party in question has agreed to the minutes or notes of a meeting, that record may constitute part of the File if ComReg relies on it as evidence in its the Statement of Objections/Investigation Report and become accessible as part of the File.

4.3.2 Confidential information¹²

- 4.13 Documents in the File that contain confidential information are non-accessible. The File may include confidential documents containing two distinct categories of confidential information, namely: "commercially sensitive information" and "other confidential information".

¹² The confidentiality provisions set out in this document are separate from those set out in ComReg's Guidelines on the treatment of confidential information (Doc 05/24). The latter does not apply in the context of investigations carried out by ComReg under Competition Act 2002.

4.3.3 Commercially sensitive information

- 4.14 Pursuant to section 3(1) of the Competition Act 2002, “*commercially sensitive information*” means information the disclosure of which could reasonably be expected to:
- (a) substantially and materially prejudice or harm the commercial, financial or industrial interests of the undertaking or person to which it relates;
 - (b) substantially prejudice or harm any other interests of a person in the conduct of the person's business, profession or occupation; or
 - (c) substantially prejudice or harm the interests of the State or a public body.
- 4.15 Examples of information that may qualify as commercially sensitive information include, but are not limited to: cost and price structures; technical and/or financial information; methods of assessing costs; market shares; customer and distributor lists; marketing plans; sales strategy; strategic plans; and network development plans.
- 4.16 Confidentiality claims can normally only pertain to information obtained by ComReg from the same Party or Third Party making the claim and not to information from any other source.
- 4.17 As correspondence on the confidentiality of any document is so closely interrelated to the issue of confidentiality, such correspondence may also be considered as non-accessible.

4.3.4 Other confidential information

- 4.18 Other confidential information covers information other than commercially sensitive information which may be considered as confidential insofar as its disclosure would significantly harm the Party or Third Party that provided the information. Depending on the specific circumstances of each case, this may apply to information provided about a Party or Third Party that would be able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers, including on the Party or Third Party that provided the information.
- 4.19 Therefore, the concept of “confidential information” may include in this context information that would enable the identification of Parties or Third Parties (including complainants) where those Parties or Third Parties have made an

anonymity request and ComReg has determined to provisionally accept the claim in accordance with Paragraph 6.4 below.

- 4.20 The category of other confidential information also includes military secrets and information related to network security.
- 4.21 Information will be regarded as confidential, when the following conditions are met: i) disclosure of such information must be liable to cause serious harm to the Party or Third party which provided the information; and, ii) the interests liable to be harmed by the disclosure must be objectively worthy of protection.
- 4.22 ComReg's assessment of whether information constitutes commercially sensitive information or other confidential information is made on a case-by-case basis.

4.3.5 Information that will not be considered confidential

- 4.23 Information which is not considered to constitute either "commercially sensitive information" or "other confidential information" as described in Paragraphs 4.13 to 4.21 will not be considered confidential.
- 4.24 Information which is already known outside the Party or the Third Party providing the information (in the case of a group, outside the group) will not normally be considered confidential. For information to lose its confidential nature, it is sufficient for it to be available to, or known outside, the Party or the Third Party or capable of being inferred from publicly available information.
- 4.25 Information that has lost its commercial importance, for example due to the passage of time, can no longer be regarded as confidential. As a general rule, ComReg presumes that information pertaining to turnover, sales, market share data and similar information ceases to be confidential five years after the period to which it relates or when that information become available in the public domain, whichever is earlier.

5 Submission of Confidential Information

5.1 Making confidentiality claims

- 5.1 Where information is submitted to ComReg, whether on an own-initiative basis or upon request in the course of an Investigation, any material in respect of which confidentiality is claimed (whether commercially sensitive information or other confidential information) should be identified clearly at the time when the information is submitted and reasons given to substantiate each claim of confidentiality. The reasons given must be sufficiently detailed to enable ComReg to assess the validity of the confidentiality claim.
- 5.2 Standard confidentiality stamps in letterheads from law firms, or automatic disclaimers in e-mails, or set out as a header/footer, etc., of each page of the document submitted to the ComReg are not regarded as reasoned requests for confidentiality.
- 5.3 Parties and Third Parties may request that their material be treated anonymously in very limited cases (See Paragraph 6.4 for further detail).

5.2 Submission of non-confidential versions of documents

- 5.4 Parties and Third Parties must submit a non-confidential version of each submission/document in respect of which they wish to claim confidentiality.
- 5.5 In general, confidentiality cannot be claimed for an entire document or whole sections of it when it is possible to protect confidential information with limited redactions. Entirely blank or blacked-out pages will not be accepted. At a minimum, headings of the documents and/or the headings of the columns contained in tables and pictures, as well as any list of annexes, must be left intact. Where any Party or Third Party redacts confidential information, they must do so in a manner that maintains the overall sense of the document (see Paragraph 5.11). The method of redaction used to draw up non-confidential versions of documents depends in part on the type of confidential information involved. Combinations of different techniques, such as extracting and summarising, may

be used. If confidentiality stems from the precision of given figures (for example, commercial data), sufficiently indicative ranges must be used.

- 5.6 Where appropriate, restricted access (typically in the form of a confidentiality ring or a data room procedure, or counsel to counsel access only) may be used in combination with, or as an alternative to, the provision of non-confidential versions or summaries (see Paragraph 7.6).
- 5.7 Where an Investigation involves more than one Party, each Party must clearly identify its confidential information, and the reasons for each confidentiality claim, for all documents submitted to ComReg. All non-confidential versions of all documents submitted to ComReg by the Party will be made available to the other Party/Parties when access to the File is granted.
- 5.8 In a similar way, Parties and Third Parties seeking anonymity must also highlight information which they consider could reveal their identities (see Paragraph 6.4).

5.3 Submission of non-confidential summaries and descriptions

- 5.9 Where alternative methods of redaction are not effective or appropriate, the non-confidential version of a document may take the form of a sufficiently comprehensible and precise non-confidential summary of its content. Non-confidential summaries must hold the same evidential value as the non-accessible document or redacted information to which they pertain.
- 5.10 Where non-confidential versions of documents contain redactions, the non-confidential version and any accompanying descriptions of redacted information must be provided in a manner that enables the Parties to determine whether the redacted information is likely to be relevant for their defence and therefore whether there are sufficient grounds to request ComReg to grant access to the information claimed to be confidential.
- 5.11 Where a non-confidential version of a non-accessible document is not provided, a succinct description of the document will be provided in the Schedule to allow the Parties to understand the nature of the document and enable them to put forward arguments as to why the document should be disclosed notwithstanding its confidential character.
- 5.12 In certain circumstances, such as where confidentiality is claimed but the Party or Third Party does not provide adequate non-confidential summaries or

descriptions, or where ComReg considers it necessary to facilitate the Parties' rights of defence, ComReg may provide its own non-confidential summaries or descriptions of redacted information or non-accessible documents.

6 Treatment of Confidential Information and Anonymity Requests

6.1 Treatment of Confidential Information Requests

- 6.1 Upon receipt of a claim for confidentiality, ComReg will either provisionally accept the claim or inform the Party or Third Party in question that it does not agree with the claim in whole or in part. Where ComReg has provisionally accepted the claim of confidentiality it may reverse its provisional acceptance in whole or in part at a later stage (see Paragraph 6.7).
- 6.2 Where ComReg rejects a claim of confidentiality it will inform the Party or Third Party in writing of its intention to disclose the information, give its reasons for rejecting the claim of confidentiality and set a time-limit within which such Party or Third Party may inform ComReg in writing of its views.
- 6.3 Where either a Party or Third Party has not requested confidential treatment of certain information it has provided to ComReg, but where ComReg considers that information to be confidential, for example, because the disclosure of the information to the Parties could result in the unintended or inappropriate sharing of commercially sensitive information between competitors, ComReg may, at its discretion, treat that information as confidential.

6.2 Treatment of anonymity requests

- 6.4 As noted above, in exceptional circumstances ComReg will consider requests for anonymity where a Party or Third Party providing information faces a real risk of retaliation. Upon receipt of a request for anonymity, ComReg will either provisionally accept the claim or inform the Party or Third Party in question that it does not accept the claim. Where ComReg has provisionally accepted the claim of anonymity it may reverse its provisional acceptance in whole or in part at a later stage (see Paragraph 6.7).
- 6.5 Parties and Third Parties must explicitly state why anonymity is necessary. The justification provided must be sufficient to enable ComReg to assess the request for anonymity. In assessing a request for anonymity, ComReg will consider

whether the Party or Third Party providing the information faces a real risk of retaliatory measures from another Party or Third Party due to having provided the information. ComReg will reject a claim for anonymity where it considers that: (i) the requesting Party or Third Party does not face a real risk of retaliation; or (ii) anonymisation could not effectively protect the identity of the requesting Party or Third Party.

- 6.6 Where ComReg rejects a claim of anonymity, it must inform the Party or Third Party in writing of its decision, give its reasons for rejecting the claim of anonymity and set a time-limit within which such Party or Third Party may inform ComReg in writing of its views.
- 6.7 ComReg must balance the Parties' rights of defence with the right to protect commercially sensitive information, confidentiality, and the anonymity of Party/Third Parties at risk of reprisals; none of which rights are absolute. ComReg must also reconcile these rights with the need to conclude an Investigation within a reasonable timeframe, and the statutory requirements on ComReg to carry out its functions. In this context the need to safeguard the rights of the defence of the Parties through the provision of the widest possible access to the File may outweigh the right to protect the confidential information of other Parties or Third Parties. It is for ComReg to assess whether those circumstances apply to any specific situation. Where those circumstances apply, and where non-confidential versions, summaries, or descriptions of the relevant confidential information are not sufficient, ComReg may disclose that confidential information to the Party/Parties.
- 6.8 The acceptance or refusal of a confidentiality/anonymity claim is done with a view to determining the Party/Parties' access to the documents or evidence relied on by ComReg in establishing a Statement of Objections/Investigation Report and in no way precludes a later assessment of the confidentiality of the information/anonymity in the version of the decision that will be published by ComReg.

7 Provision of Access to the File

7.1 General approach

- 7.1 Any Party which wishes to seek access to documents on the File must indicate which of the accessible documents listed in the Schedule it wishes to inspect.
- 7.2 Access to documents on the File will be granted in any of the following ways, or in any combination of them, taking due account of the technical capabilities of the Parties: electronically (by email or otherwise) or by providing copies of the accessible documents in paper form. ComReg is under no obligation to provide a translation of documents in the File¹³.
- 7.3 If a Party considers that, after having obtained access to documents on the File, it wishes to gain access to a non-accessible document, or specific confidential information, it must make a written request to ComReg outlining why the document or redacted information is likely to be necessary to allow the Party to exercise its rights of defence. ComReg will assess whether the need to safeguard the rights of defence of the requesting Party outweighs the need to protect the confidential information of another Party or Third Party (see Paragraph 6.7).
- 7.4 ComReg will assess whether such information as discussed in paragraph 7.3 may tend to prove that a breach has occurred. ComReg will also assess whether such information as discussed in paragraph 7.3 may tend to disprove that a breach has occurred.

7.2 Exceptional circumstances

- 7.5 In certain cases, ComReg may grant access to confidential information through the use of a negotiated disclosure procedure. Under this procedure, ComReg will seek consent from a Party or Third Party to voluntarily waive their right to the claimed confidentiality. This waiver is provided on the basis of the Parties limiting access to confidential information to a restricted circle of persons (to be decided by the Parties and the affected Party or Third Party, under the supervision of ComReg) who are required to enter into confidentiality undertakings.

¹³ This includes documents or records provided to ComReg in either of the official languages of the State.

- 7.6 In exceptional cases, and at ComReg's sole discretion, ComReg may also arrange for parts of the File to be made accessible through a data room procedure if it considers such an approach necessary to safeguard the Party's rights of defence. In such cases, ComReg will provide the Party with detailed rules and procedures for the operation of a data room.
- 7.7 ComReg would envisage that a confidentiality ring or data room may also be appropriate where the disclosure of a specific category of confidential information or data would enable a defined group to further their understanding or prepare confidential submissions on behalf of their client regarding ComReg's analysis – for example, in relation to certain (confidential) quantitative data.
- 7.8 The use of confidentiality rings or data rooms by ComReg in this way, as means of making disclosure of confidential information only to a Party's external advisers, will be ComReg's functions by ensuring due process.
- 7.9 ComReg has discretion as to whether to use confidentiality rings or data rooms in an Investigation, either (i) as a means of facilitating access to the File or (ii) to disclose a specific category of confidential information or data to allow a party's external advisers to further their understanding or prepare confidential submissions. ComReg will do so only where it is proportionate, there are clearly identifiable benefits, and where any potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned.
- 7.10 In exceptional cases, such as when ComReg and a Party persistently disagree on whether that Party is entitled to access redacted or confidential information, at its sole discretion, ComReg may, if it considers such an approach necessary to safeguard the Party's rights of defence, consider referring the matter to an independent arbiter.

7.3 Access to Leniency Statements and Settlement Submissions

- 7.11 In circumstances where access to a leniency statement or settlement submission may be granted pursuant to section 15AV(6) of the Competition Act 2002, such access is granted only at the premises of ComReg and on a single occasion. In accordance with section 15AV(7) of the Competition Act 2002, access to a leniency statement or settlement submission is granted to a Party solely for the purposes of defending itself in proceedings before ComReg under Part 2D or 2E of the Competition Act 2002 or in any subsequent proceeding under Part 2H of the Competition Act 2002. In accordance with section 15AV(8) of the Competition Act

2002, where a Party is given access to a leniency statement or settlement submission, the Party shall be deemed to have given an undertaking that any such information to which it has been given access will only be used in proceedings that are directly related to those in which access has been granted, and will not be retained, stored or otherwise kept following the end of the said proceedings or any subsequent proceeding under Part 2H of the Competition Act 2002.