

**Case T-383/03
(publication by extracts)**

Hynix Semiconductor Inc.

v

Council of the European Union

(Confidentiality — Dispute)

Order of the President of the Fourth Chamber of the Court of First Instance,
22 February 2005 II - 627

Summary of the Order

1. *Procedure — Intervention — Disclosure of pleadings to interveners — Derogation — Confidential treatment — Application for confidentiality — Conditions — Specification of confidential material — Statement of reasons*

(Rules of Procedure of the Court of First Instance, Art. 116(2))

2. *Procedure — Intervention — Disclosure of pleadings to interveners — Derogation — Confidential treatment — Application for confidentiality — Examination by the President in the event of a dispute — Determination whether the material is secret or confidential — Weighing up of the interests*
(Rules of Procedure of the Court of First Instance, Art. 116(2); Council Regulation No 2026/97, Art. 29)
3. *Procedure — Intervention — Disclosure of pleadings to interveners — Derogation — Confidential treatment — Information reproduced a number of times in the pleadings — Need for the application for confidentiality to refer to all the relevant passages*
4. *Procedure — Intervention — Disclosure of pleadings to interveners — Derogation — Confidential treatment — Information which cannot be regarded as secret or confidential*
5. *Procedure — Intervention — Disclosure of pleadings to interveners — Derogation — Confidential treatment — Information which can be regarded as secret or confidential*
6. *Procedure — Intervention — Disclosure of pleadings to interveners — Derogation — Confidential treatment — Application for confidentiality relating to information that is in fact secret or confidential, but is necessary for the exercise of the interveners' procedural rights — Refusal*

1. Article 116(2) of the Rules of Procedure of the Court of First Instance lays down the principle that interveners are to receive a copy of every pleading served on the parties and permits only by way of derogation that certain secret or confidential documents or information not be sent to them.

the documents or information covered and of duly stating the reasons for which they are confidential.

The party who makes an application for confidentiality has the task of specifying

The requirement to specify the material is not satisfied by an application for confidentiality which does not at any time specify the information requested to be omitted from the copies of the pleadings to be sent to the interveners, although the latter must be able to identify that information so as to be able to put forward their observations on its confidentiality or the need that might exist for it to be disclosed to them.

The requirement to state reasons is assessed in light of the nature of each of the documents and pieces of information covered. A distinction may be drawn between, first, information which is by nature secret, such as business secrets of a commercial, competition-related, financial or accounting nature, or confidential, such as purely internal information, and, second, other documents or information which may be secret or confidential, for a reason that is for the applicant to furnish.

In the case of information which consists of figures and specific elements of a commercial, competition-related or financial nature, it is sufficient, in order to satisfy the requirement to state reasons, to describe them briefly, indicating as appropriate whether they are secret or confidential.

(see paras 17-18, 31-32, 34-35)

2. When a party makes an application under the second sentence of Article 116(2) of the Rules of Procedure of the Court of First Instance, the President is to give a decision solely on the documents and information the confidenti-

ality of which is disputed by the other party or by an intervener. In so far as an application is not contested there is no need to give a decision on it.

Where the President is called upon to give a decision, he has the task first of all of examining whether the documents and information whose confidentiality is disputed are secret or confidential. In this examination, the President cannot be bound by a confidentiality agreement which the applicant for confidential treatment may have concluded with a person not party to the dispute relating to documents or information that concern that person and are included in the pleadings. Nor can the President be bound by the fact that certain documents and information were accorded confidential treatment by the Commission during the administrative procedure which has led to the adoption of the contested act. On the contrary, he has the task of examining whether the document or information in question is in fact secret or confidential.

None the less, in proceedings concerning an act adopted under Regulation No 2026/97 on protection against subsidised imports from countries not members of the European Community it may prove relevant to take account of the fact that, in the course of the administrative procedure which has led to the adoption of that act, the institutions, after receiving an application for which good cause was shown, agreed to treat documents or

information produced by a party as confidential or as provided on a confidential basis, pursuant to Article 29 of that regulation.

Where his examination leads him to conclude that some of the documents and information whose confidentiality is disputed are secret or confidential, the President is then to assess and weigh up the competing interests, for each document and piece of information. In this connection, the assessment of the circumstances in which use may be made of the derogation provided for by the second sentence of Article 116(2) of the Rules of Procedure differs according to whether confidential treatment is requested in the interests of the applicant for confidential treatment or in the interests of a person not party to the dispute.

Where confidential treatment is requested in the interests of the applicant, this assessment leads the President to weigh in the balance, for each document or piece of information, the applicant's legitimate concern to prevent serious harm to his interests and the equally legitimate concern of the interveners that they should have the information necessary for exercising their procedural rights.

Where confidential treatment is requested in the interests of a person not party to the dispute, this assessment leads the President to weigh in the balance, for each document or piece of information, the interest of that person that the secret or confidential documents or information which concern him should be protected and the interest of the interveners in having them for the purpose of exercising their procedural rights.

In any event, an applicant for confidential treatment must, given the adversarial and public nature of the judicial proceedings, envisage the possibility that some of the secret or confidential documents or information which he has decided to place on the file appear necessary for the exercise of the interveners' procedural rights and, consequently, must be disclosed to them.

Finally, it is irrelevant that an intervener suggests undertaking not to disclose the documents or information whose omission is requested from the copies of the pleadings to be sent to him, and to use them solely for the purposes of his intervention. The parties and interveners in proceedings are in any event to use the pleadings of which copies are sent to them solely for the purpose of

exercising their respective procedural rights.

information treated in that way is repeated in passages of the pleadings disclosed to the interveners.

(see paras 36, 38-47, 83)

(see paras 49-53)

3. When the same information is reproduced a number of times in the pleadings and a party neglects to request that each of the passages in which it appears be treated confidentially, so that that information will in any event be disclosed to the interveners, the request concerning it can only be refused, given that it is pointless.
4. Information is neither secret nor confidential where it (i) concerns the interveners and is necessarily known to them, (ii) is available to the public at large or to specialist circles, (iii) is largely apparent, or may be deduced, from information of which the interveners are already legitimately aware or which will be disclosed to them, (iv) is not sufficiently specific or precise, (v) is five or more years old and may therefore be regarded as historic, unless the applicant for confidential treatment demonstrates that, despite their age, those data still constitute essential elements of his commercial position or of that of the third person concerned, or (vi) is such as to keep the interveners in doubt as to the strategic decisions adopted or to be adopted by the applicant and not to reveal the content thereof to them. On the other hand, information cannot be regarded as legitimately brought to the knowledge of the interveners where the applicant requested confidential treatment for it from the outset and was reasonably quick in claiming that its disclosure to

Where the submissions and the documents annexed to them comprise a very large number of pages and the application for confidential treatment relates to a very large amount of information, it is not possible to examine systematically whether each piece of information covered by the application is mentioned in the pleadings in places other than those set out by the applicant. Consequently, it must be understood that the confidential treatment accorded to certain information will have effect only in so far as it does not turn out subsequently that

the interveners resulted from a clerical error on his part and in requesting that they be ordered to return the document containing it to the Court.

(see paras 54-60, 75, 88, 90)

5. Figures and technical information are secret where they relate to the business policy and competitive position of the applicant for confidential treatment or of the third party whom they concern, or to the applicant's financial position or commitments entered into by him in this connection with persons not party to the dispute, in so far as they are specific, precise and recent.

Other documents or information may be confidential where the applicant has duly explained the reasons why that is so in the case in point. Such reasons may, *inter alia*, consist in the fact that a document is an indivisible body of specific, precise and recent commercial information constituting the applicant's business secrets by nature, and of assessments made regarding those business secrets on a confidential basis. Also,

certain documents may, exceptionally, have to be regarded as confidential in their entirety because they are devoted to highly confidential strategic and financial arrangements covering a future period.

(see paras 62-67, 86)

6. An application relating to secret or confidential information which appears necessary for the exercise of the interveners' procedural rights must be refused. If they were not aware of this information, they would discuss in vain the pleas relating to it.

On the other hand, secret or confidential information cannot appear necessary for the exercise of the interveners' procedural rights where there is a synthesis of it in the parties' pleadings and other information also on the file gives a sufficient idea of it.

(see paras 70-73)