

Confidentiality and relevance are bedfellows

THE Competition Commission's investigations usually require an economic assessment to determine the effect that a merger or a party's conduct will have on the competitive landscape.

These economic assessments are largely fact-based and require the commission to have access to relevant business or market-related information.

Since the information sought by the commission in relation to its investigations is often sensitive or confidential, parties are understandably nervous about providing this information to the commission.

In response to these concerns, two issues must be considered:

- First, the power of summons and the consequential notion of relevance; and
- Second, the protection of confidentiality.

While the prevailing view is that parties are obliged to provide information to the commission on receipt of a summons, it is important to note that the commission's powers to seek information are not unfettered but are limited to requiring the delivery of any book, document or other object that has



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a bearing on the subject of an investigation. This is a clear indication that the commission can only call for documentation that is relevant to its investigation.

Put another way, the commission has no right to any document or any portion of any document that is not relevant. This principle applies equally to information sought co-operatively.

On this basis, the commission cannot use its powers of summons as a means to go on a fishing expedition by seeking access to all and any confidential information that it desires. Conversely, a party

will find it difficult to oppose production of information that has been shown to be relevant to the commission's investigation.

Insofar as confidentiality is concerned, the Competition Act recognises that the effectiveness of the commission's investigations is dependent on the submission of information (whether voluntarily or pursuant to a summons) and hence provides for a detailed regime for the protection of confidential information.

Importantly, protection is provided only to information that falls within the definition of confidential information, namely "trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others".

A person who submits information to the competition authorities may identify any portion of that information as confidential. Such a claim must be supported by a written statement explaining why the information is considered to be confidential. Practically speaking, this is done by way of form CC7 and the schedule thereto, whereby the party wishing to claim confi-

dentiality identifies, explains and claims confidentiality over such information.

The commission is bound by such a claim, but may at any time during its proceedings challenge the claim by referring it to the Competition Tribunal. In addition, a person who seeks access to information that is subject to a confidentiality claim may apply to the tribunal. On receipt of a referral from the commission, or an application from a person seeking access to the confidential information, the tribunal may:

- Determine whether or not the information is confidential; and
- If it finds that the information is confidential, make any appropriate order concerning access to that information.

From the time information comes into the possession of the commission or the tribunal until a final determination has been made concerning it, the commission and tribunal must treat as confidential any information that:

- The tribunal has determined is confidential; or
- Is the subject of a claim under the Competition Act.

Most importantly, it is a crim-

inal offence for any person to disclose any confidential information obtained in carrying out any function in terms of the Competition Act or from participating in any proceedings in terms thereof.

The confidentiality regime is intended to provide the necessary protection so that parties submitting confidential information to the commission may do so with confidence. As a result, parties cannot use confidentiality as a shield against furnishing information to the commission.

If information is relevant it must be produced, whether or not it is confidential.

Confidentiality and relevance are two separate but related concepts. Parties cannot hide behind the shield of confidentiality to withhold relevant information from the commission.

Conversely, the commission cannot force the production of irrelevant information on the basis that its confidentiality will be protected.

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