



Draft Guidelines on the Commission's handling of confidential information

The Competition Commission hereby, in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended), which allows the Competition Commission to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction, issues these draft guidelines on the Commission's handling of confidential information in terms of the Competition Act, for public comment.

Written comments are invited by the Competition Commission from any interested person.

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CLOSING DATE FOR SUBMISSION OF COMMENTS: 7 MARCH 2025 at 16h30.



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south africa

**Guidelines on the Commission's handling of confidential information in terms
of the Competition Act No.89 of 1998 (as amended)**

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Persons Responsible:

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1. PREFACE

- 1.1. These Guidelines have been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended) (“the Act”) which, *inter alia*, empowers and authorises the Competition Commission (“Commission”) to prepare, amend, replace, and issue guidelines to indicate its policy approach to any matter falling within its jurisdiction in terms of the Act. These Guidelines are not binding on the Commission, the Competition Tribunal, or the Competition Appeal Court in the exercise of their respective discretions and of their interpretation of the Act but must be taken into account when interpreting or applying this Act.
- 1.2. The Commission identified a need to provide guidance to merger parties, complainants, respondents, market inquiry participants, exemption applicants and third-party informants on the process for claiming confidentiality over information; and the need to provide guidance on the Commission’s appraisal and treatment of confidential information.
- 1.3. The principles set out herein are not intended to be applied mechanically, as the determination of the Commission’s handling of confidential information in mergers, prohibited practices, market inquiries and exemption applications is evaluated on a case-by-case basis. The Commission may from time to time amend the Guidelines where necessary.

2. DEFINITIONS

Unless the context indicates otherwise, the following terms are applicable to these Guidelines-

2.1. “**Acquiring Firm**” means a firm —

- (a) that, as a result of a transaction in any circumstances set out in section 12 of the Act, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another firm;
- (b) that has direct or indirect control over the whole or part of the business of a firm contemplated in paragraph (a); or
- (c) the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a) or (b);

2.2. “**Act**” means the Competition Act No. 89 of 1998, as amended;

2.3. “**CAC**” means the Competition Appeal Court as established in terms of section 36 of the Act empowered to adjudicate competition matters in accordance with the Act;

2.4. “**CAC Rules**” means the Competition Appeal Court Rules published under Government Notice R857 in Government Gazette 21504 of 1 September 2000, as amended;

- 2.5. “**Commission**” means the Competition Commission, a juristic person established in terms of section 19 of the Act, empowered to regulate competition matters in South Africa in accordance with the Act;
- 2.6. “**Commission Rules**” means the Competition Commission Rules published under Government Notice 1 in Government Gazette 22025 of 1 February 2001, as amended;
- 2.7. “**Complainant**” means a person who has submitted a complaint in terms of section 49B(2)(b) of the Act;
- 2.8. “**Competition Authorities**” means the Commission, Tribunal and CAC;
- 2.9. “**Confidential Information**” means business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others;
- 2.10. “**Confidentiality Undertaking**” means a duly executed written undertaking made by any person in terms of which the person undertakes not to disclose confidential information;
- 2.11. “**Firm**” includes a person (juristic or natural), partnership or a trust. This may include a combination of corporate entities that form part of a single economic entity, a division and/or a business unit of a corporate entity;

2.12. “**Guidelines**” mean these guidelines which have been prepared and issued in terms of section 79(1) of the Act;

2.13. “**Intervenor**” means any person who, in terms of section 53 of the Act or Rule 46 of the Tribunal Rules, has been granted leave to participate in proceedings before the Tribunal;

2.14. “**Merger**” means a proposed transaction where one or more firms directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another firm which may be achieved in any manner, including through—

- (a) purchase or lease of the shares, an interest or assets of the other firm in question; or
- (b) amalgamation or other combination with the other firm in question.

2.15. “**Merger Parties**” means both the Acquiring Firm and the Target Firm;

2.16. “**Respondent**” means a firm against whom a complaint of a prohibited practice has been initiated in terms of the Act;

2.17. “**Target Firm**” means a firm—

- (a) the whole or part of whose business would be directly or indirectly controlled by an acquiring firm as a result of a transaction in any circumstances set out in section 12 of the Act;

- (b) that, as a result of a transaction in any circumstances set out in section 12 of the Act, would directly or indirectly transfer direct or indirect control of the whole or part of, its business to an acquiring firm; or
- (c) the whole or part of whose business is directly or indirectly controlled, by a firm contemplated in paragraph (a) or (b);

2.18. **“Third party”** means any (natural or juristic) person, who submits information to the Commission, or seeks access to confidential information in the possession of the Commission, who is not any of the merger parties, complainant, respondent, or intervenor;

2.19. **“Tribunal”** means the Competition Tribunal, a juristic person established in terms of section 26 of the Act empowered to adjudicate competition matters in accordance with the Act;

2.20. **“Tribunal Rules”** means the Competition Tribunal Rules published under Government Notice 2 in Government Gazette 22025 of 1 February 2001, as amended;

3. INTRODUCTION

3.1. These Guidelines provide guidance to merger parties, complainants, respondents, market inquiry participants, exemption applicants and third parties on the Commission’s handling of confidential information.

- 3.2. These Guidelines do not deal with the other classes of information that the Commission handles, namely, restricted information (of which confidential information forms a part), legally privileged information or personal information protected in terms of the Protection of Personal Information Act No. 4 of 2013. These Guidelines also do not deal with applications for access to information in terms of discovery proceedings nor applications for access in terms of the Promotion of Access to Information Act No. 2 of 2000.
- 3.3. These Guidelines must be read alongside any regulations issued by the Minister regarding the handling of confidential information.
- 3.4. As part of its investigative mandate, the Commission is empowered to request information from merger parties; complainants and respondents in prohibited practices; as well as, from third parties. The regime for protecting confidential information in terms of the Act applies to all the functions that Competition Authorities' perform in terms of the Act. It is imperative for Competition Authorities to treat confidential information in a manner that also give claimants confidence in their ability to handle confidential information as prescribed by the Act. Further this enables the Competition Authorities to secure crucial information in order to perform their functions. Further to this, the Tribunal must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice.¹ Accordingly, there will be a need to make confidential information

¹ Section 52(2)(a) of the Act.

accessible within certain prescripts regarding who can access the information and for what purpose.

- 3.5. The Act sets out the processes for claiming confidential information and the Competition Authorities' powers to adjudicate such claims. The Act also sets out the instances when confidential information may be disclosed by the Competition Authorities. In particular, the Act provides for a mediated regime of access to confidential information by independent advisors of firms or persons requesting the confidential information. This access regime applicable to the requestor's independent advisors is subject to the independent advisors signing of appropriate confidentiality undertakings.
- 3.6. Access to confidential information is most often requested to enable the consideration of the merits of the main matter subject to adjudication. As such, there is an interest in the swift adjudication of disputes about confidential information to enable the expeditious consideration of the merits of competition cases. It is also in accordance with the principles of natural justice that a party to proceedings be able to meaningfully engage with allegations and evidence that are prejudicial to its interests.
- 3.7. Furthermore, the public also has an interest in being able to meaningfully engage with Competition Authorities' decisions and reasons which form the basis of competition law jurisprudence. In some cases, the decisions and reasons issued by the Competition Authorities are heavily redacted due to overly-liberal and blanket confidentiality claims submitted by parties' during proceedings. This

practice does not serve the public interest and the principle of the accessibility of Competition Authorities' decisions. Further, this practice also hinders parties' Constitutional rights to a fair hearing.

3.8. In attempts to balance a party's right to claim confidentiality over information submitted to Competition Authorities, as against counterparties' interests in a fair process, competition law practitioners have amongst themselves developed useful practices. In particular, since the commencement of the Act it has become a practice between competition practitioners that, instead of bringing applications to the Tribunal for access to documents claimed to be confidential, the practitioners exchanged the confidential documents amongst themselves subject to appropriate confidentiality undertakings, which gives the party supplying the documents comfort that their confidential information would not be disclosed to the practitioners' clients.²

3.9. These Guidelines aim to formalise the above helpful practices which are in line with the Act. Furthermore, these Guidelines provide the public with transparency on how the Commission intends on exercising its powers to determine the nature of, and access to, confidential information in terms of the Act.

3.10. These Guidelines are intended to provide clarity on how the Commission will approach a claim of confidentiality and how the Commission will treat confidential information, while also ensuring that a fair process is followed in the disclosure

² *Allens Meshco (Pty) Ltd and others v Cape Gate (Pty) Ltd and others* [2015] 2 CPLR 699 (CT) as discussed at para 34.

of confidential information, without resulting in undue delay of the main proceedings. The sections of these Guidelines which follow cover the topics outlined below:

- 3.10.1. Legal framework;
- 3.10.2. Commission's guidance on claiming confidentiality over information;
- 3.10.3. Treatment of confidential information submitted to the Commission;
- 3.10.4. Commission's principles in assessing access to confidential information.

3.11. These Guidelines are general and are not market, sector, or industry specific.

4. OBJECTIVES

4.1. The primary objective of these Guidelines is to provide any party seeking to claim confidentiality over information ("claimant") submitted to the Commission with guidance on (i) how to do so effectively; (ii) how the Commission will assess such claims for confidentiality; (iii) how regimes of access to confidential information work; and (iv) what rights a claimant has to challenge a Commission decision on the determination of confidentiality of information submitted and access thereto. These Guidelines also detail, for those seeking access to confidential information ("requestor"), how an application for access should be brought.

4.2. The principles outlined in these Guidelines are based on the Commission's experience in handling confidential information in mergers and prohibited

practices, exemption applications, market inquiries, and on competition law jurisprudence from the Tribunal and CAC, as well as guidance from other jurisdictions where appropriate.

5. LEGAL FRAMEWORK

- 5.1. The Act grants any person (juristic or natural), the right to claim confidentiality.³ The disclosure of confidential information is an offence⁴ except when disclosed for the purpose of the proper administration or enforcement of the Act, and for the purpose of the administration of justice.⁵
- 5.2. For a confidentiality claim to be valid it must be supported by a written statement in the prescribed form, explaining why the information is confidential,⁶ as defined by the Act.⁷ From the time information subject to a confidentiality claim comes into the possession of the Commission, until a final determination has been made concerning that information, the Commission must treat that information as confidential.⁸ The final determination of the confidential nature of the information submitted may be made by the Commission itself, the Tribunal or the CAC (depending on the appeal path of the application).

³ Section 44(1)(a).

⁴ Section 69(1).

⁵ Section 69(2)(a) and (b).

⁶ Section 44(1)(b).

⁷ See definition of confidential information at section 1(1).

⁸ Section 44(2).

5.3. There are multiple regimes of access applicable to the disclosure of confidential information. The Act circumscribes that the disclosure of confidential information to the external, independent legal representatives and economic advisors of the requestor, in a manner determined by the circumstances and subject to the provision of appropriate confidentiality undertakings; is an appropriate determination concerning access to confidential information.⁹

5.4. Section 45(1) the Act provides mechanism for a “*person*”, who seeks a determination on whether claimed information is indeed confidential information or seeks access to information claimed as confidential, to apply to the Tribunal for determination. If the Tribunal finds that the information is confidential, it may make any appropriate order concerning access to that confidential information.¹⁰ This means that even in instances where information is accepted as confidential, a decision can be made to provide merger parties, respondents, intervenors and/or third parties with access to that information. A person aggrieved by the Tribunal ruling in this regard, may (within the prescribed period and in accordance with the CAC Rules) refer the Tribunal’s ruling to the CAC if the Tribunal grants leave to appeal; or, where the Tribunal refuses leave to appeal, by way of petition to the President of the CAC for leave to refer the Tribunal’s ruling to the CAC.¹¹

5.5. In the performance of its investigative functions the Commission may, of its own accord, or by way of request from a third party, need to determine whether

⁹ Section 44(9).

¹⁰ Section 45(1)

¹¹ Section 45(2) read with 44(8).

information claimed as confidential is indeed confidential and, where it finds that the information is confidential, it may also make any appropriate determination concerning access to that information.¹² When doing so, the following processes will apply:

5.5.1. Prior to making a determination on the confidential nature of the information or the terms of its access, the Commission will issue a prescribed notice and will consider any representations made by the claimant of the confidential information.¹³ The notice is issued to inform a claimant that the Commission intends to make a determination on the nature of and/or access to information submitted to it which is a subject of a confidentiality claim.

5.5.2. If a claimant aggrieved by the Commission's determination of confidentiality decides to refer the Commission's decision to the Tribunal in terms of section 44(5) of the Act, the Commission is required to still treat the information as confidential until a final determination is made by either the Tribunal or the CAC.

5.6. In market inquiries when confidential information is submitted to the Commission, the Commission may, in terms of section 43B(A3) of the Act, make a determination of whether the information is confidential, within 20 business days

¹² Section 44(3)

¹³ Section 44(4). *The New Reclamation Group (Pty) Ltd v The Competition Commission* [2007] 2 CPLR 503 (CT) at para 19, page 507.

"However, as a public body engaged in law enforcement, elementary fairness requires the Commission to at least advise the party concerned that its claims were considered inadequate and allow them to rectify the situation or debate it with the Commission, before it made them public."

of receipt of that information. The claimant will be given an opportunity to make representations to the Commission for purposes of its determination. Further, the Commission is also empowered to make determinations in relation to access to confidential information submitted during a market inquiry process.¹⁴

5.7. Where the Commission intends on making public confidential information contained in any of its reasons, section 45A of the Act applies. The Commission must provide a copy of the proposed reasons for publication to the claimant 10 business days before publishing those reasons.¹⁵ Within this period, the claimant may apply to the Tribunal for an order to protect the confidential information intended to be published in the Commission's reasons.¹⁶ The Tribunal's decision may be appealed to the CAC. Therefore, until a final determination has been made, the Commission may not publish those reasons and it must still treat that information as confidential.¹⁷ As a matter of practice, the Commission will always strive not to include confidential information when publishing outcomes of its investigations and/or reasons for its decisions.

6. COMMISSION GUIDANCE ON CLAIMING CONFIDENTIALITY OVER INFORMATION

6.1. To assess whether information claimed as confidential is indeed confidential, the Commission will apply the Act's definition of confidential information which states that:

¹⁴ Section 43B(A3)(c).

¹⁵ Section 45A(1)(b).

¹⁶ Section 45A(2).

¹⁷ Section 45A(3) and (4).

“Confidential information means trade, business or industrial information that belongs to a firm, has a particular economic value, and is no[t] generally available to or known by others”¹⁸

- 6.2. The elements of this definition must be cumulatively met. The Commission encourages claimants not to merely assert that the information is not generally known by others without stating *why and how* the information holds *particular economic value*.¹⁹ As such, when determining whether the claimed information is indeed confidential, the Commission will consider whether the trade, business or industrial information belongs to the firm making the claim; and the nature of the information, in that, it must (i) have *“particular economic value”* and (ii) be generally unavailable or unknown by others.
- 6.3. As a guide, if only a part of a document, or certain quantitatively small parts of it – for example, a few statistics – are considered to be confidential, then a party should not claim the entire submission as confidential.²⁰ Successful confidentiality claims are claims that provide precise and clear reasons why the information has the *“particular economic value”*; by stating quite specifically the nature of the economic value of the information and refraining from using general descriptions.²¹

¹⁸ Section 1(vii) of the Act.

¹⁹ *Imperial Group (Pty) Ltd / Clover South Africa (Pty) Ltd* [2004] 1 CPLR 133 (CT) at page 139.

“The Act does not protect information merely because it is not generally known and would not normally be made public. The inclusion of the word “and” implies that this is an additional factor to the fact that the information has “a particular economic value”.

²⁰ *Imperial Group* at page 139.

²¹ *Imperial Group* at page 139.

6.4. The Commission will consider the following types of information (amongst others) to have particular economic value, and will be considered confidential if is generally unavailable or known by others:

6.4.1. information pertaining to a firm's intellectual property, know-how, trade secrets, techniques, and secret formulas or processes;

6.4.2. a firm's current manufacturing, production or marketing costs for its goods or services;

6.4.3. financial information such as bank statements, as well as audited annual financial statements, turnover and sales data of unlisted firms;

6.4.4. information relating to prices, output, costs or the business strategy of a firm; and

6.4.5. information which, if disclosed may adversely affect the competitive process in markets.

6.5. The form of the information can render it less likely to have an economic value removing it from the realm of information classifiable as confidential. For example, historical information,²² aggregated information, or numerical information expressed as a range.²³

6.6. The Commission will generally not consider the following types of information to be confidential, unless it can be shown that there are special circumstances which require the information to be treated as confidential and that the

²² *Allens Meshco* at para 20.

²³ Competition News Edition of 20 June 2005 (article entitled "*Looking at Confidentiality Claims*").

information does fall within the realm of information covered by the definition of confidential information as per the Act:

- 6.6.1. any information submitted to the Commission that is already publicly available, for example on a firm's website;
- 6.6.2. general information about the company, such as company name, nature of business activities, products manufactured etc;
- 6.6.3. shareholding information and identities of shareholders which is available from public sources;
- 6.6.4. annual reports of publicly listed firms;
- 6.6.5. annual audited financial statements of publicly listed firms;
- 6.6.6. the fact that one firm holds interest in another or other firms;
- 6.6.7. price notification letters published by the company;
- 6.6.8. information shared with large groups of customers through chain emails, WhatsApp messages or in public platforms such as conferences (e.g., marketing pack/ information);
- 6.6.9. aggregated industry data, especially historic in nature (e.g, historic pricing); and
- 6.6.10. remedies, conditions and/or penalty amounts imposed on firms by Competition Authorities which do not relate to information that may adversely affect the competitive process in markets or other information which may be classifiable as confidential.

6.7. To claim confidentiality over information submitted to the Commission, the claimant must file the prescribed Form CC7 supported by a written statement

explaining why the information is confidential. The Form is accessible via the Commission's website.²⁴ The Form CC7 is a one page form to be populated by a claimant in support of a confidentiality claim. The Form also provides guidance on how to prepare a written statement in support of the confidentiality claim, and should be attached to the duly completed Form CC7. In particular, the Form states that on a separate sheet of paper to be attached to the Form CC7, the claimant must set out in a table format the facts and contentions supporting its claim that the identified information is confidential.

6.8. The prescribed Form CC7 requires that the facts and contentions supporting the claim of confidential information state the following:

- 6.8.1. the name of the document that contains the confidential information;
- 6.8.2. the page and line number at which the confidential information begins and ends;
- 6.8.3. the name of the firm that owns the confidential information;
- 6.8.4. the nature of the economic value of the information; and
- 6.8.5. the existing restrictions on access to the information.

6.9. The confidentiality claim must outline, as prescribed above, the justification for why the information should be considered to be confidential. See **Annexure A** of these Guidelines for a copy of the Form CC7 and a template for the supporting statement to be attached to the Form.

²⁴ See <https://www.compcom.co.za/wp-content/uploads/2014/09/CC-7-Claim-for-confidentiality.pdf>.

6.10. In market inquiries, the Commission publishes participants' submissions for the public on the market inquiry website in order to enhance transparency in market inquiries. Therefore, blanket claims over full submissions are not permissible, for example, by claiming an entire submission and all annexures as confidential without specifying the parts of the documents that are actually confidential in nature. Therefore, in the context of market inquiries, the Commission requires participants to properly claim confidentiality as prescribed in the Act; and, in addition to this, the participant must file redacted, public versions of all submissions within five days of filing the main submission. The non-confidential version filed should only contain redactions of information that is confidential in nature.

6.11. However, during these processes the Commission remains bound by the obligation to treat such all claims of confidentiality as confidential until such time that a final determination is made whether the information is in fact confidential or not.

7. COMMISSION GUIDANCE ON THE TREATMENT OF CONFIDENTIAL INFORMATION

7.1. The Commission typically receives submissions with confidential information when parties file merger notifications, prohibited practices complaint statements, exemption applications and submissions made in relation to market inquiries and advocacy projects of the Commission. Furthermore, in conducting its investigative functions relating to mergers, prohibited practices, market inquiries

and exemptions, the Commission may issue information requests or summons to parties, and in response thereto, these parties may submit confidential information.

7.2. Information that is subject to a confidentiality claim continues to be protected from disclosure to any person who does not own the information. It is advised that a party submitting confidential information to the Commission should simultaneously submit a duly completed Form CC7 upfront. In instances where a party submits confidential information to the Commission without having submitted the prescribed Form CC7, the Commission will provide the party an opportunity to submit a duly completed confidentiality claim as prescribed in terms of the Act.

7.3. The non-confidential record of the Commission's investigation which excludes all information claimed as confidential in prescribed Form CC7 is, for all intents and purposes, a public record which any member of the general public can access. Accordingly, claimants should ensure that their confidentiality claims are exhaustive and specific since any non-confidential document forming part of such records can be made available to any member of the public without seeking consent of the claimant.

Parties to proceedings' access to third party confidential information

7.4. Often times the Commission's record of investigation contains information claimed as confidential by the third parties that the Commission engaged to

assess the main matter's merit. At the point of referral to the Tribunal and/or the CAC, parties will most often attempt to gain access to the entire record. The Tribunal and the CAC have in the past often directed the Commission to facilitate the attainment of a waiver of confidentiality from third parties *vis-a-vis* the parties' external advisors that have specifically signed the requisite confidentiality undertakings.

7.5. The confidentiality undertakings will require the legal representatives and experts to undertake not to divulge, or cause confidential information to be divulged to any person, including the parties, without obtaining the prior written consent of the owner of that confidential information. The undertaking will also provide that the confidential information can only be utilised for the purpose of preparation for the proceedings before the Tribunal and/or the CAC. These undertakings will also oblige the external and independent legal representatives and economic experts of the parties to destroy all confidential information in their possession upon completion of proceedings. The Commission will send an email to this effect to the claimant.

7.6. Where a claimant persists with their claim, parties are entitled to vindicate the right to request access in terms of section 45(1) of the Act. On account of this, the claimant's name or (the claimant's representatives' name) and contact details will be sent to the requestor to enable them to bring an access application.

7.7. Confidential information submitted by a claimant who wishes to be anonymous will be treated in the same manner as any other confidential information in terms

of disclosure. There could be instance where the disclosure of confidential information to the legal representatives of the requestor (even non-confidential information) could easily lead to the inference of who the anonymous claimant is. In such instance the Commission will endeavour not use the information in support of any finding. If disclosure will betray who the anonymous claimant is, then anonymity will dictate that even the legal representatives of the requestor be denied access. Accordingly, the Commission may not be in a position to use such information in support of any finding.

Intervenors' access to parties' and third parties' confidential information

- 7.8. After an analysis of the Commission's record of its investigation, the Competition Authorities may reach out to certain third party informants to either appraise them of the outcome of the investigation (in the case of the Commission) or, where appropriate, to ask those certain third parties to indicate whether they intend to participate in the hearing (in the case of the Tribunal). Where third party informants are admitted as intervenors in proceedings before the Tribunal or the CAC, they too will ordinarily seek access to the Commission's recommendation (in the case of mergers) or reasons and record of investigation.
- 7.9. In relation to information belonging to other third parties, the Commission will again approach each claimant for a confidentiality waiver *vis-a-vis* the intervenors' external advisors having signed the requisite confidentiality undertakings.

7.10. Given the established precedent, intervenors and parties to proceedings are encouraged to reach agreement on access to confidential documents among themselves in order to narrow the scope of, or obviate the need for, an access application being brought by intervenors. The principles set out above regarding various ways to approach disclosure will be applicable in respect of intervenor.

Minister's access to the parties' and third parties' confidential information

7.11. In terms of section 45(3)(a) of the Act the Minister is entitled to receive confidential information in order to effectively participate in merger proceedings.²⁵ The Minister, like the Competition Authorities, is similarly obliged by the Act, from the time information comes into his/her possession until a final determination has been made concerning that information, to treat as confidential any information subject to a claim of confidentiality.²⁶ On the basis of 45(3)(a) the Commission provides the Minister with confidential information for the purposes of facilitating his participation; and after he provides his notice to participate in merger proceedings. In order to facilitate the Minister's decision to participate, the Minister can be sent the confidential merger filing. Where the Minister has filed the notice to participate he may automatically participate where merger proceedings go before the Tribunal.²⁷

²⁵ Subject to the proviso to treat claimed information as confidential until final determination is made, and for the purposes of his participation in proceedings (including merger proceedings) the Minister may have access to a firm's confidential information, which information may only be used for the purposes of the Act unless required to be disclosed in terms of any other law or the Minister has reasonable grounds to believe the information discloses a potential criminal offence (section 45(3)(a)).

²⁶ Section 44(2).

²⁷ Section 53(c)(iv).

Trade unions' and employee representatives' access to confidential information

7.12. According to the Act, merger parties are required to file their merger notice with the registered trade unions, the employees concerned or the employee representative.²⁸ The unions or employee representatives have participation rights in merger proceedings before the Tribunal.²⁹ However, the merger parties, often file heavily redacted non-confidential versions of the merger notice and its annexures with the unions or employee representatives. This hinders their ability to meaningfully participate in merger proceedings. In light of the fact that merger parties are required to give the merger notice to trade unions or employee representatives in support of their explicit rights to participate in merger proceedings, such merger notification should not be overly redacted so as to enable the trade unions and employee representatives to meaningfully participate in the proceedings. The Commission requires the merger parties to consider creating a confidential version of the filing that can be seen by the applicable union or employee representative. This union-specific version will be less redacted than the public, non-confidential version; and may contain the following information, amongst others:

- 7.12.1. A full description of the activities of the merger parties;
- 7.12.2. The most recent annual report of the merger parties;

²⁸ Section 13A(2).

²⁹ Section 53(c)(iii).

7.12.3. The most recent strategic plan of the merger parties or other documents reflecting future activities and strategic focus and the anticipated impact on jobs;

7.12.4. A description of the post-merger integration plans and the anticipated impact on jobs; and

7.12.5. A description of the merger parties' respective job grading system and an overview of remuneration, rewards, and any non-financial benefits.

7.13. Trade unions tend to be self-represented in merger proceedings, accordingly their internal representatives in merger proceedings tend not to have access to a union-specific confidential record unlike other parties whose external legal representatives will normally have the full confidential record on provision of confidentiality undertakings. In this regard, the Commission will seek from claimants that the representative(s) that will appear on behalf of the union before the Tribunal and/or the CAC be provided with access to union-specific confidential record on provision of confidentiality undertaking.

8. COMMISSION'S PRINCIPLES IN ASSESSING ACCESS TO CONFIDENTIAL INFORMATION

8.1. Generally, a determination on whether information submitted to the Commission is confidential or not, will precede a determination on regimes of access to that information by a requestor. However, it is often most judicially expedient to assume the confidential nature of the information and skip to a determination on regimes of access to that information.

- 8.2. Competition law jurisprudence has presented multiple regimes of access to confidential information, applicable in different circumstances: (i) access for the purposes of refuting a claim of confidentiality; (ii) access granted to independent, external legal and economic advisors; and (iii) access granted to a limited group of officials or employees of the requestor (who may be a merger party, respondent, intervenor or third party).
- 8.3. The CAC has previously ruled that confidential information may be disclosed to the merger parties' independent advisors, subject to appropriate confidentiality undertakings, in order to enable the merger parties to refute the validity of a confidentiality claim.³⁰ In doing so, the CAC in *Unilever* held that "*In short, section 69(2) envisages that information can be made available for the proper administration of the Act and for the purpose of the administration of justice. Thus the Act does not place absolute bar upon disclosure of confidential information.*"³¹
- 8.4. *Unilever* framed how the determination of access to confidential information is a balancing act between a requestor seeking access' right to a fair hearing, while recognising the importance of the right to privacy which is also protected in terms of the Act.³² The Tribunal in *Vodacom/Frogfoot*,³³ provides as follows regarding the balancing act to be struck:

³⁰ *Competition Commission v Unilever PLC and Others* 13/CAC/Jan02 [2001–2002] CPLR 29 (CAC).

³¹ *Unilever* at page 34.

³² *Unilever* at page 34.

³³ *Vodacom (Pty) Ltd and another v Frogfoot Networks (Pty) Ltd and another and another related matter* [2024] 2 CPLR 17 (CT).

“The general principle is that the manner of access or access conditions are determined through a process of balancing or weighing the right to a fair process/hearing and the right to protect confidential information. This requires an assessment of the circumstances in each case when deciding the appropriate manner of access to the documents/data claimed as confidential. There will ordinarily be a tension between the requestor’s right to a fair process and the information owner’s interest in confidentiality. In each case, consideration needs to be given to the relevant facts supporting the competing interests, which includes factors such as the Tribunal’s interest in ensuring a fair and expeditious hearing; the information owner’s interest in ensuring the confidentiality of the information is protected; the requestor’s interests in obtaining meaningful access to the documents to be able to prepare for and present its case and deal with the submissions/allegations of other parties in an efficient and effective manner. The tension between these competing interests will be resolved in the interests of justice.”³⁴

8.5. Section 44(9) of the Act provides as an appropriate determination concerning access the disclosure of confidential information to the external, independent legal representatives and economic advisors of the requestor; in a manner determined by the circumstances and subject to the provision of appropriate confidentiality undertakings. In interpreting this section, the Tribunal in *Vodacom/Frogfoot* held “[n]otably, the default position is disclosure”³⁵ and it is

³⁴ *Vodacom/Frogfoot* at para 38.

³⁵ *Vodacom/Frogfoot* at para 35.

“clear from section 44(9) that the appropriate manner of access in any particular case is fact-specific and context-specific since it is determined by the circumstances. In other words, the facts of each case determine which manner of access or access conditions are appropriate.”³⁶

8.6. The manner of access could be limited to (i) inspection solely by the legal representatives at the offices of the Commission with or without rights to reproduce the inspected material;³⁷ (ii) verbal/written proffers of the contents of the document without provision of the document itself; or (iii) allowing the independent advisors to take full possession of confidential material.

8.7. *Nutri-Flo*³⁸ added further nuance to the balancing exercise. By way of interpretation of the Act and the Tribunal Rules, the Tribunal observed that parties’ rights, and indeed even who may be recognised as a party, varies according to what function the Tribunal is performing. The legislature appreciated that functional heterogeneity requires procedural variation. Therefore, the Tribunal opined, reference has to be had to the nature of the function being performed in order to determine the extent of the rights to be accorded a participant. Therefore, when exercising the complex balancing in a section 45(1) application, the Tribunal may exercise its discretion differently depending on the procedure for which the confidential information is being sought.

³⁶ *Vodacom/Frogfoot* at para 36.

³⁷ See for example *Unilever*.

³⁸ *Nutri-Flo CC and another v Sasol Ltd and others* [2004] 1 CPLR 248 (CT).

“This is because unlike a prohibited practice complaint, a merger is a non-adversarial procedure, without formalities in respect of adducing or constraining evidence such as pleadings or rules regulating the admission or denial of allegations. The prejudice to a third party intervenor who receives access to confidential information on some limited basis is not the same as that of the party in prohibited practice proceedings. Both are entitled to fairness, but it will be measured differently according to the context of the particular proceeding.”³⁹

8.8. Thus, the Tribunal provided as an example, a third party seeking to be an intervenor in a merger proceeding is not to be regarded as being on all fours with a complainant that has referred a complaint to the Tribunal. The rights to procedural fairness of an intervenor in a merger proceeding seeking access to the merging parties' business plans might be less compelling than an applicant's or a respondent's rights to unrestricted access to its opponent's affidavits or supporting documents in a prohibited practice case. *“Fairness requires that an applicant or, for that matter, a respondent in prohibited practice proceedings is entitled to have sight of allegations made by its opponent and which may be prejudicial to its interest.”⁴⁰*

8.9. When considering the requestor's interests in obtaining meaningful access to the documents to be able to prepare for, and to present its case and deal with the submissions/allegations of other parties in an efficient and effective manner;

³⁹ *Nutri-Flo* at para 68.

⁴⁰ *Nutri-Flo* at para 73.

fairness, in certain circumstances,⁴¹ may dictate that access be provided to the requestor-client so that its lawyers are in a position to consult on the contents of allegations contained in the main proceedings. This is because it is common in competition law cases that the confidential information relates to a matter within the experience or competence of the party from whom it is withheld. It is often the case that a client's instruction to its advisors is crucial to the understanding the workings of the industry.⁴²

8.10. In all these cases, what will substantively swing the dial towards a particular regime of access is the ability to convince the Competition Authorities on the following test.

8.10.1. *Applicants requiring access should allege why:*

8.10.1.1. *the information is relevant;*

8.10.1.2. *the information is of probative value; and*

8.10.1.3. *the applicant will be prejudiced by not having access, or access in a form that is not being allowed by the claimant.*

8.10.2. *Once an applicant has established these elements, the onus is then on the claimant to demonstrate that it is not appropriate for the confidential information to be released in the form proposed by the applicant because it will suffer harm.*

8.10.3. *The degree of proof required in respect of each of these stages and the onus on the claimant will vary as suggested earlier in relation to*

⁴¹ See for example, *Orion Cellular (Proprietary) Limited v Telkom South Africa Limited, The Standard Bank of South Africa Limited and Edgars Consolidated Stores Limited* Tribunal Case no.19/R/April 2003.

⁴² *Nutri-Flo* para 76.

*the specific procedure where the balance between fairness and privacy will be weighed differently. Thus, while in a merger case the first three elements will be more burdensome for an applicant and the onus to allege harm less burdensome on the claimant, in a prohibited practice case the reverse will apply.*⁴³

9. CONCLUSION

9.1. These Guidelines present the general approach that the Commission will follow in handling and assessing confidential information. These Guidelines are not exhaustive and will not affect Competition Authorities' discretion to consider issues of confidential information on a case-by-case basis, taking into account, amongst other criteria the information placed before the Commission at the time the decision is made.

9.2. Should market participants be uncertain regarding the process to claiming or seeking access to confidential information or the Commission's treatment or appraisal of confidential information; such market participants should approach the Commission for further guidance.

10. EFFECTIVE DATE AND AMENDMENTS

10.1. These Guidelines become effective on the date indicated in the Government Gazette and may be amended by the Commission from time to time.

⁴³ *Nutri-Flo* at paras 87, 88 and 89.



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ANNEXURE A: DULY COMPLETED FORM CC7 AND SCHEDULE



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Form CC 7

About this Form

- This form is issued in terms of section 44 (1) of the Competition Act.
- The Commission must treat confidentially any information identified by you in this form, but may refer it to the Competition Tribunal to determine whether the information is confidential in terms of the Act. You will be notified if your claim is referred to the Tribunal.
- Until the Tribunal makes a decision about your information, it will be treated as confidential by the Commission, subject to any public notice requirements set out in the Act or Rules. Please see sections 44, 45 and 45A of the Act.
- Confidential information means 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.

Contacting the Commission

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Lynnwood Ridge
Pretoria 0040
Republic of South Africa
tel: 27 012 394 3226
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Confidentiality Claim

To: The Competition Commission and the Competition Tribunal

Concerning:

(Name and file number:)

[COMPANY A] AND [COMPANY B]
2025Jan00003

On a separate sheet of paper, list the following information, and set out the facts and contentions supporting your claim that the identified information is confidential.

- Column 1 - name of the document that contains the confidential information.
- Column 2 - the page and line number at which the confidential information begins and ends.
- Column 3 - the name of the firm that owns the particular information.
- Column 4 - the nature of the economic value of the information.
- Column 5 - the existing restrictions on access to the information.

Statement of Confidentiality:

I, Mpumelelo Tshabalala compiled, or supervised the persons who compiled, the attached list. I believe that the information identified in that list is confidential information as defined in section 1(1) of the Competition Act.

Name and Title of Person authorised to sign:

Mpumelelo Tshabalala, Legal Officer at [COMPANY A]

Authorised Signature:

Date:

X X X

28 January 2025

For Office
Use Only:

Commission file number:

Date filed:



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south africa

Name of the document that contains confidential information	Page & line number at which the confidential information begins & ends	Name of firm that owns the particular information	Nature of the economic value of the information	Existing restrictions on access to the information
Supply agreement	Page 3 to 5, Clauses 4-6	[COMPANY A]	This information relates to supply terms and quantities which is information of strategic value in respect of the company's operations.	[COMPANY A] and the counterparty's internal and external legal counsel, and its management.
Management Pricing Report	Page 2, line 6, figures 3 and 4	[COMPANY A]	This relates to internal discussions on future price increases.	[COMPANY A]'s internal and external legal counsel, and its management.
Management Production Cost Report	Page 3 to 5	[COMPANY A]	This information relates to the costs incurred by the firm in procuring material and as such is information of strategic value in respect of the company's operations.	[COMPANY A]'s internal and external legal counsel, and its management.