

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 2 November 2018

Working Party No. 3 on Co-operation and Enforcement**Treatment of legally privileged information in competition proceedings – Note by
South Africa**

26 November 2018

This document reproduces a written contribution from South Africa submitted for Item 2 of the 128th Working Party 3 meeting on 26 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm

Please contact Ms. Despina Pachnou if you have any questions about this document.
Email: Despina.pachnou@oecd.org.

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South Africa

1. These submissions focus on legal professional privilege in South Africa and address, *inter alia*, the extent of recognition thereof and the manner in which protection is afforded thereto, with reference to relevant judicial authority. Reference is also made to the practical steps involved when privilege is claimed during dawn raids with respect to both hard copy and electronic documents.

1. The competition authorities in South Africa

2. The Competition Commission of South Africa (Commission) is a statutory body constituted in terms of the Competition Act, No. 89 of 1998, as amended (the Act). It is one of three independent competition regulatory authorities established in terms of the Act, with the other two being the Competition Tribunal (Tribunal) and the Competition Appeal Court (CAC).

3. While the Commission is the investigative and enforcement agency, the Tribunal is the adjudicative body and the CAC, which has the status of a High Court, reviews or considers appeals against any decisions of the Tribunal. The Constitutional Court (the highest court in South Africa), in turn, hears appeals from the CAC.

2. Competition law and procedure in South Africa

4. In South Africa competition law is regulated by the Act. The Act prescribes certain procedural and evidentiary matters.¹

5. Section 44 of the Act² recognises the right of informants to claim confidentiality. The Commission or a third party may approach the Tribunal to determine whether access

¹ SECTION 55(3)(A) OF THE ACT AUTHORISES THE TRIBUNAL TO, WITHIN ITS DISCRETION, ACCEPT AS EVIDENCE ANY RELEVANT TESTIMONY, DOCUMENT OR THING, REGARDLESS OF WHETHER OR NOT IT WOULD BE ADMISSIBLE AS EVIDENCE IN COURT.

² Section 44. Right of informants to claim confidentiality.—(1) (a) A person, when submitting information to the Competition Commission or the Competition Tribunal, may identify information that the person claims to be confidential information.

(b) Any claim contemplated in paragraph (a) must be supported by a written statement in the prescribed form, explaining why the information is confidential.

(2) The Competition Commission is bound by a claim contemplated in subsection (1), but may at any time during its proceedings refer the claim to the Competition Tribunal to determine whether or not the information is confidential information.

(3) The Competition Tribunal may—

(a) determine whether or not the information is confidential; and

(b) if it finds that the information is confidential, make any appropriate order concerning access to that information.”

may be granted to information claimed confidential.³ From the time information comes into the possession of the Commission or Tribunal, until a final determination has been made concerning it, the Commission and Tribunal are required to treat as confidential, any information that the Tribunal has determined is confidential information, or is the subject of a claim of confidentiality.⁴ The Commission may, however, take confidential information into account in making any decision in terms of the Act.

6. Unannounced inspections or search and seizure operations, colloquially referred to as ‘dawn raids’ are regulated by sections 46 and 47 of the Act. Section 46 authorises entry and search with a warrant, while section 47 authorises entry and search without a warrant, where there are reasonable grounds to believe that a warrant may be issued if applied for.

7. The Commission’s and the Tribunal’s published Rules of Procedure provide guidance in respect of the procedural and evidentiary matters generally encountered in the Commission and the Tribunal. Commission Rule 14(1)(d) recognises that certain documents, information and things constitute “restricted information” that need not be disclosed.⁵ Rule 14 casts a wider net of protection than is ordinarily available under the

³ Section 80(1) of the Promotion of Access to Information Act 2 of 2000 authorises the courts to have regard to all information in the hands of public and private bodies in order to determine disclosure thereof is appropriate.

⁴ Section 45 of the Act. Section 45A of the Act affords the party claiming confidentiality an opportunity to apply to the Tribunal to protect such confidential information being disclosed in any published reasons for the decision.

⁵ Rule 14. Restricted information

(1) For the purpose of this Part, the following five classes of information are restricted:

(a) Information -

- (i) that has been determined to be confidential information in terms of section 45 (4), or
- (ii) that, in terms of section 45 (3), must be treated as confidential information.

(b) Identity of a complainant, in the following circumstances:

(i) A person who provides information in terms of section 49B (2)(a) may request that the Commission treat their identity as restricted information; but that person may be a complainant in the relevant matter only if they subsequently waive the request in writing.

(ii) If a person has requested in terms of sub-paragraph (i) that the Commission treat their identity as restricted information –

(aa) The Commission must accept that request; and

(bb) That information is restricted unless the person subsequently waives the request in writing.

(c) Information that has been received by the Commission in a particular matter, other than that referred to in paragraphs (a) and (b), as follows:

(i) The Description of Conduct attached to a complaint, and any other information received by the Commission during its investigation of the complaint, is restricted information until the Competition Commission issues a referral or notice of non-referral in respect of that complaint, but a completed form CC 1 is not restricted information.

(ii) A Statement of Merger Information and any information annexed to it, or received by the Commission during its investigation of that merger, is restricted information until the Commission

common law principle of litigation privilege. A single document may enjoy protection under both Rule 14 and a claim of legal privilege, but it is sufficient that it meets the requirements of one of these grounds to warrant its non-disclosure. Commission Rule 15 prescribes the manner in which access to information may be sought from the Commission.⁶

has issued a certificate, or been deemed to have approved the merger, in terms of section 13 or 14, or made a recommendation in terms of section 14A, as the case may be;

(iii) An application and any information received by the Commission during its consideration of the application, or revocation of an exemption granted to the applicant, is restricted information only to the extent that it is restricted in terms of paragraph (a).

(d) A document -

(i) that contains -

(aa) an internal communication between officials of the Competition Commission, or between one or more such officials and their advisors;

(bb) an opinion, advice, report or recommendation obtained or prepared by or for the Competition Commission;

(cc) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed on the Commission by law; or

(ii) the disclosure of which could reasonably be expected to frustrate the deliberative process of the Competition Commission by inhibiting the candid -

(aa) communication of an opinion, advice, report or recommendation; or

(bb) conduct of a consultation, discussion or deliberation; or

(iii) the disclosure of which could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

(e) Any other document to which a public body would be required or entitled to restrict access in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

⁶ Rule 15. Access to information

(1) Any person, upon payment of the prescribed fee, may inspect or copy any Commission record -

(a) if it is not restricted information; or

(b) if it is restricted information, to the extent permitted, and subject to any conditions imposed, by

(i) this Rule; or

(ii) an order of the Tribunal, or the Court.

(2) In a particular complaint the Commission may release otherwise restricted information, other than confidential information, relating to a possible agreement of terms of an appropriate order, or the consent of a complainant for an order to include an award of damages, to -

(a) The respondent; or

(b) Any person who has filed Form CT 3 in respect of that complaint.

8. All proceedings conducted in South African courts are conducted in an open and public manner, unless (in rare instances) the court directs otherwise. All pleadings and documents filed during the course of court proceedings are deemed to be public documents after the matter has been called in open court.

9. The South African legal system generally, and competition law in particular, is structured to avoid any surprises at the hearing of any matter. For this reason, the parties undertake a legal process of providing all documents relevant to the issues in dispute to their opponent before the hearing of the matter, including tapes and other electronic recordings (“discovery” procedure).

10. Documents that are protected by legal privilege are not subject to discovery and remain private. Even in the exercise of its discretion regarding the admissibility of otherwise inadmissible evidence, the Tribunal will not admit testimony, documents or things that are subject to legal privilege.

3. Legal Professional Privilege in South Africa

3.1. The definition

11. *Legal privilege* is the term given to documents or information that South African law recognises as worthy of protection against public disclosure.⁷ The right to *legal professional privilege* is a general rule of South African common law that communications between a legal advisor and his/her client are protected from disclosure, provided that certain requirements are met. This protection is required in order to facilitate the proper

(3) In addition to the provisions of sub-rule (1) and (2), the Commission may release restricted information to, or permit access to it by, only the following persons:

- (a) the person who provided that information to the Commission;
- (b) the firm to whom the confidential information belongs;
- (c) a person who requires it for a purpose mentioned in section 69(2)(a) or (b);
- (d) a person mentioned in section 69(2)(c);
- (e) the Minister, if the information concerns a merger;
- (f) the Minister of Finance, if the information concerns a merger referred to in section 18(2); or
- (g) any other person, with the written consent of the firm to whom the information belongs.

(4) When the Commission submits a Complaint Referral to the Tribunal, makes a recommendation to the Tribunal in respect of a large merger, or supplies any other information to the Tribunal, the Minister, or the Minister of Finance, the Commission must identify any information included in its submission –

- (a) in respect of which a claim has been made in terms of Section 44, that has not yet been determined by the Tribunal; or
- (b) that has been finally determined to be confidential information.

⁷ This includes documents and information that may incriminate or expose someone to the risk of penalty or forfeiture, are communications between spouses, or communication that is by its very nature, “without prejudice” (whether marked as such or not).

functioning of an adversarial system of justice, as it encourages full and frank disclosure between advisers and clients. This, in turn, promotes fairness in litigation. In the context of criminal proceedings, the right to have privileged communications with a lawyer protected is necessary to uphold the right a fair trial in terms of section 35 of the Constitution, and is taken very seriously.⁸

12. Professional privilege is a substantive rule of law and not merely a rule of evidence. *Legal professional privilege* consists of two components: Legal Advice Privilege and Litigation Privilege.⁹

13. *Legal Advice Privilege* protects communications between legal advisers and their clients, provided that:

- The legal adviser was acting in his/her professional capacity as a legal professional;
- The communication was made in confidence;
- The communication was made for the purpose of obtaining or giving legal advice; and
- The advice was not sought for an unlawful purpose.

14. *Litigation Privilege*: protects communications between legal advisers and/or their clients on the one hand, and third parties on the other hand provided that:

- The legal adviser was acting in his/her professional capacity as a legal professional;
- The communication was made in confidence;
- The communication was made for purposes of being placed before the legal adviser in order to enable him/her to advise;
- The communication was made for the purpose of intended or contemplated litigation; and
- The communication/advice was not for an unlawful purpose.

15. No distinction is drawn between legal professional privilege in the context of litigation, criminal investigations and investigations by the competition authority, as long as the requirements for either component have been satisfied.¹⁰

16. Legal professional privilege and confidentiality are not the same, although privileged documents are also confidential.¹¹ Generally, the rights and duties under a contract of mandate, including the duty to preserve the confidentiality of any

⁸ *Thint (Pty) Ltd v NDPP* [2008] ZACC 13; 2009 (1) SA 1 at [183] – [184]

⁹ *Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others* (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA); 2013 (5) SA 538 (SCA) (31 May 2013); *S v Safatsa* 1988 (1) SA 868 (A)

¹⁰ Section 73A of the Act provides for criminal liability for individuals in relation to contraventions of the Act.

¹¹ Information may be confidential even though it is not protected by legal professional privilege. A duty of confidentiality may arise from contract, either as an express term or as an implied term or by virtue of a fiduciary relationship, or it may arise from a delictual duty to refrain from disclosing confidential information.

communications between the principal and the agent, are enforceable and binding only between these parties and the duty of confidence is not a defence to a legal testimonial duty.

17. The Promotion of Access to Information Act, No. 2 of 2000, also recognises the right to privilege. This Act upholds privilege by excluding its application to pending litigation, where the rules of discovery remain unchanged, and prohibiting access to privileged records.

18. The right to legal professional privilege is not an absolute right, nor is it a positive human right,¹² enforceable against the whole world. It will not be raised by a court or the Tribunal on behalf of a litigant, but must be claimed as a defence.¹³ The party claiming legal professional privilege should generally be able to provide a rational justification for its claim without needing to disclose the content or substance of the matter in respect of which the privilege is claimed.¹⁴ In South Africa the courts are loathe to go beyond a rational explanation provided by the party claiming privilege.¹⁵

19. The privilege belongs to the client/litigant and may be waived only by the client/litigant.¹⁶

3.2. Parties

20. In South African legal professional privilege applies not only to practising attorneys and advocates, but also to professional legal advisers operating in alternative roles. Communications with a salaried in-house legal advisor in the employ of government or a private body (i.e. an admitted attorney or advocate, although not necessarily practising as such) are privileged, provided the requirements for legal professional privilege are met.¹⁷ A distinction is however drawn between the salaried legal adviser's advisory functions and any other functions he/she may perform as part of his/her employment (even if it concerns antitrust matters), as the latter will not be protected by the rule of privilege.¹⁸

21. In South Africa many legal advisers who have law degrees are not admitted as attorneys or advocates. The South African courts have not yet pronounced on whether or not privilege extends to non-enrolled attorneys or advocates.

¹² In terms of the Constitution of the Republic of South Africa, 1996

¹³ *South African Airways Soc v BDFM Publishers (Pty) Ltd and Others* (2015/33205) [2015] ZAGPJHC 293; [2016] 1 All SA 860 (GJ); 2016 (2) SA 561 (GJ) (17 December 2015) at [48]

¹⁴ *Company and Others v Commissioner for the South African Revenue Services* (16360/2013) [2014] ZAWCHC 33; 2014 (4) SA 549 (WCC) (17 March 2014) at [39]

¹⁵ *Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others* (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA); 2013 (5) SA 538 (SCA) (31 May 2013) at [30]

¹⁶ *Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others* (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA); 2013 (5) SA 538 (SCA) (31 May 2013) at [20]

¹⁷ *Mohamed v President of the Republic of South Africa* 2001 2 SA 1145 (C); *Van den Heever v Die Meester & Andere* 1997 (3) SA 102 (T).

¹⁸ *Mohamed v President of South Africa and Others* 2001 2 SA 1145 (C)

22. Similarly, the South African courts have not yet considered whether or not communications with foreign qualified lawyers, that satisfy the requirements of legal professional privilege, will be protected.

23. Privilege is however not extended to persons giving legal advice who do not have a law degree qualifying them for admission as an attorney or advocate, although there are statutory exceptions to this rule in limited instances.¹⁹

24. The privilege extends to communication with, or from agents of the legal advisor. Such communication must, however, have been made with the primary purpose of being brought to the attention of the legal advisor so that he/she may give advice on it²⁰ and it must have been made at a time when litigation had commenced or was contemplated personally by the litigant (or in the case of a juristic person, a relevant official).

25. The privilege extends to communications between third parties and lawyers if the communications were made in confidence for the primary purpose of being laid before the legal adviser at a time when litigation was pending or contemplated.²¹

3.3. Scope of legal professional privilege

26. It is the information contained in a document and not the document itself that becomes privileged if the requirements for privilege are met. Information is, thus, never more than the subject matter of a claim of privilege.²² Privilege cannot be created by simply handing over a document that is not privileged in a confidential manner to a legal adviser.

27. A claim to privilege is not confined to the time of trial. It may be made when documents are being seized under a search warrant or during the discovery process. Since the right is not absolute, countervailing considerations arising from the facts of the matter may outweighed the preservation of that right.²³

28. Once a communication is privileged, it remains privileged once claimed by the client²⁴ and that privilege applies in favour of any successor in title, and continues to bind a legal advisor, regardless of any change in legal representation or the nature of subsequent proceedings.

29. The party asserting legal professional privilege is required to provide a rational justification for such claim without needing to disclose the content or substance of the

¹⁹ For example, in South Africa bankers enjoy limited privilege. Section 236(4) of the Criminal Procedure Act 51 of 1977 s 236(4) provides that no bank may be compelled to produce any accounting record referred to in s 236(1) at criminal proceedings unless the court concerned orders that such record be produced.

²⁰ *General Accident, Fire & Life Assurance Corporation Ltd v Goldberg* 1912 TPD 494

²¹ *Goodyear South Africa (Pty) Ltd and another vs the Competition Commission* (CR053Aug10/DSC063May17) at para 23

²² *South African Airways Soc v BDFM Publishers (Pty) Ltd and Others* (2015/33205) [2015] ZAGPJHC 293; [2016] 1 All SA 860 (GJ); 2016 (2) SA 561 (GJ) (17 December 2015)

²³ *Thint (Pty) Ltd v NDPP* [2008] ZACC 13; 2009 (1) SA 1 at [185]

²⁴ Not every employee in a firm will, however, necessarily be considered as the client, for the purpose of attracting privilege, even if they have direct knowledge of the facts or matters in issue.

matter in respect of which the privilege is claimed. An objective test is applied in assessing such claim.²⁵ The court or Tribunal determining the issue of privilege may inspect the document in order to determine whether or not to uphold the claim.²⁶

30. Legal professional privilege only protects information that is confidential. Documents containing a legal analysis that are already in the public domain or that have been shared with third parties will not be privileged.

31. The privilege is not confined only to the final document, but includes everything called into existence for incorporation in the document in its completed form. A draft document is protected even if the final version was not sent, as long as it was intended, if sent, to seek or give legal advice. A lawyer's notes made in order to advise a client will be privileged even if they have not been communicated.

32. Legal advice privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice.²⁷ Privilege is thus also available within the general commercial sphere, even where litigation is not specifically contemplated. Litigation privilege, however, affords a higher level of protection than legal advice privilege, which does not provide a complete protection from disclosure obligations.

33. Legal advice privilege requires a relevant legal context. It will not attach to advice which is purely commercial or strategic and business or management input from an in-house legal advisor lawyer.

34. For litigation privilege to apply, the communications must have come into existence for the sole or dominant purpose of litigation. This is determined by a factual enquiry.²⁸ Litigation must be pending, reasonably contemplated or existing before the communication comes into existence.²⁹ A statement by a potential independent witness will be privileged, but the witness may still be compelled to testify.³⁰

²⁵ *A Company and Two Others v The Commissioner for the South African Revenue Service* 2014 (4) SA 549 (WCC) In this matter the court held that, where a fee note sets out the substance of the privileged communications in respect of the person seeking or giving of legal advice or contained sufficient particularity of their substance to constitute secondary evidence thereof, those parts, but not the document as a whole, would be amenable to the privilege. The privilege should be asserted by blacking out the information, so as to disclose those parts of the document that were not subject to the privilege and covering up those that were.

²⁶ *Lenz Township Co (Pty) Ltd v Munnick* 1959 4 All SA 475 (T); 1959 4 SA 567 (T)

²⁷ *S v Safatsa* (1988 (1) SA 868 (A)

²⁸ *ArcelorMittal, Competition Commission v ArcelorMittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA) at para 28

²⁹ *ArcelorMittal, Competition Commission v ArcelorMittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA) at para 31. The respondents requested access to the leniency application, including the annexures and all supporting documents submitted by the leniency applicant. The court found that the document came into existence at the instance of the Commission for the purpose of prosecuting firms alleged to be part of a cartel. The leniency application was, in substance, the leniency applicant's witness statement in the contemplated litigation, and the document was therefore privileged in the hands of the Commission.

³⁰ *S v Govender* 1967 1 All SA 6 (N); 1967 2 SA 121 (N)

35. The person in whom the right vests may not be obliged to testify about the content of the privileged material. No adverse inference may be drawn against a party because he/she, or one of his/her witnesses, has exercised a privilege.³¹

36. If a third party (including a potential witness) overhears or obtains knowledge of privileged information, the privilege may be defeated.³²

3.4. Discovery

37. While the contents of privileged documents need not be disclosed, the existence thereof must be disclosed. Privileged documents are generally listed in a separate schedule to the discovery affidavit and are not provided to the other side and may not be relied upon in subsequent proceedings, unless a supplementary discovery affidavit is lodged, in which the document previously listed as privileged is fully disclosed.

3.5. Waivers of privilege

38. Only the client (or its agent) can waive legal professional privilege. An unintended waiver is also likely to require full disclosure of a document.³³ The waiver can be express, implied or imputed. It is implied if the person who claims the privilege discloses the contents of a document or relies upon it in its pleadings or during court proceedings.³⁴ It would also be implied if only part of the document is disclosed or relied upon. For a waiver to be implied the test is objective, meaning that it must be judged by its outward manifestations. Imputed waiver occurs when fairness requires the court to conclude that privilege was abandoned.³⁵

39. Should any party submit privileged documents to the Commission, its claim to privilege is waived. Where a party discloses part of a privileged statement, the elements of fairness and consistency require the whole of the statement to be disclosed, unless it deals with separate matters.³⁶ References to legally privileged communications in non-privileged correspondence/documentation may constitute a waiver of privilege of that document, if not properly redacted.³⁷

³¹ *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd* (1) 1955 1 All SA 28 (W); 1955 2 SA 1 (W) 10–11

³² *S v Mushimba* 1977 3 All SA 147 (A); 1977 2 SA 829 (A) 840

³³ *Msimang v Durban City Council* 1972 4 All SA 287 (D); 1972 4 SA 333 (D)

³⁴ In *Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others* (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA); 2013 (5) SA 538 (SCA) (31 May 2013) the court held that the Commission waived its privilege to a leniency application by referring to it in the referral affidavit.

³⁵ *S v Thandwa and Others* (538/06) [2007] ZASCA 34; [2007] SCA 34 (RSA) ; 2008 (1) SACR 613 (SCA) (28 March 2007) at paragraph 18

³⁶ *S v Nhlapo* 1988 3 All SA 30 (T); 1988 3 SA 481 (T)

³⁷ *Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others* (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA); 2013 (5) SA 538 (SCA) (31 May 2013)

40. While privilege may not be waived when privileged advice is disclosed to a third party under express conditions of strict confidentiality, waiver of privilege may be imputed or implied where no such express conditions are stipulated.

41. If privilege regarding certain documents, information, or communication was waived in another jurisdiction, the document will not be deemed privileged in South Africa, as the information will be in the public domain. When the Commission requests access to purportedly privileged information, that request is directed at obtaining access to the relevant information. The Commission would not consider the impact of such waiver on other jurisdictions, unless such concern was specifically raised by the party claiming privilege.

4. Legal Professional Privilege in Competition Law

42. Regulatory investigations and administrative procedures are not automatically considered to be adversarial from the outset. Documents created before adversarial proceedings are contemplated will not attract litigation privilege, although they may attract legal advice privilege, if the requirements for legal advice privilege are met.

43. Disclosures made by firms, pursuant to both compulsory and voluntary Commission requests for information, may be made subject to a contracted retention of confidentiality and privilege (if the requirements have been met) and will not result in waiver thereof in respect of third parties, unless otherwise directed by the Tribunal.

44. Communications in the context of competition compliance programmes or to prepare for internal competition audits will not qualify for legal privilege unless litigation is at that stage contemplated. It is thus important to properly record when exactly, during the course of the investigation, litigation was first contemplated. The involvement of in-house or external legal advisers will, further, be essential to warrant any claim of legal privilege. Access to due diligence reports prepared by merging parties in contemplation of a merger may be requested by the Commission. These reports are only covered by legal advice privilege when prepared by attorneys or counsel, but not when prepared by accountants or other professionals.

45. In competition law matters, third parties (usually economists) are often briefed. The manner in which this is done is important for the maintenance of privilege. In the case of legal advice privilege, where no litigation is contemplated, the economist must be briefed by the attorney or counsel (or legal adviser). Where litigation is contemplated the client may directly brief the economist or any other third party, without compromising privilege, if the purpose of the brief relates to pending or actual litigation.³⁸

46. During a dawn raid search the Commission can seize both hard copies and electronic data. Although there is no legal distinction required between inspectors who seize different categories of data or documents, in practice hard copies are seized by Commission staff, while electronic data is normally seized by independent, outsourced IT forensic experts. This happened because the Commission does not currently have capacity internally to seize electronic data, but the distinction has some implications for managing privilege claims. The Commission's powers of inspection are, however, subject to claims of privilege in respect of both hard copy documents and electronic information.

³⁸ See also *International Tobacco supra*

47. A person may refuse, during a dawn raid search, to permit the removal of an article or document on the ground that it contains privileged information (either legal advice privilege or litigation privilege).³⁹ If the Commission, during a raid, happens upon a privileged document, privilege is not waived and the Commission is not permitted to use the document in any investigation or proceedings.

48. Where a claim of privilege is made in respect of hard copy documents, these documents are placed in a separate evidence bag, which is placed in the safe custody of the Registrar of the Competition Tribunal. A list of the documents in respect of which privilege is claimed is supplied to the Commission, in order that it may consider the validity of the claim of privilege.

49. In practice, where the Commission chooses to challenge the claim of privilege, the parties generally agree to have a senior independent advocate consider the documents and determine whether or not they contain privileged information. To date all disputes regarding privilege have been resolved amicably in this manner. Should any one of the parties, however refuse to accept the advocate's finding regarding privilege, the issue may be referred to the Tribunal for determination, and Tribunal decisions are appealable to courts in the normal cause.⁴⁰

50. When electronic data is seized during dawn raids, the Commission targets computers, servers, mobile phones, laptops and other electronic storage devices. Care has to be taken to ensure that the warrant authorising the search and seizure also authorises the seizure of data on laptops or other devices not on the premises, or access will may not be granted thereto. Since servers are not necessarily located on the premises specified in the warrant, this possibility must be stated and the warrant must authorize that they may be seized wherever they are. In certain instances, where the court has declined to issue a warrant allowing the Commission to image an off-site server, authorisation has been given for the Commission to telephonically apply for permission to enter premises where such server are located, in order to seize the electronic data stored on the server.

51. Provision must also be made in the warrant for the Commission to be afforded access to cloud servers. However, it has to be noted that the Commission can still search any premises without a warrant, provided it meets the requirements of the law. The Commission has only conducted such a search once, and it seized both hardcopy and electronic documents. There was no legal challenge to this search.

52. The Commission is reliant on the cooperation of the firm subjected to the raid to provide the log in details to access the electronic information. In the raids undertaken to date by the Commission where electronic data has been seized, the parties have agreed that full access is granted to the Commission's contracted independent IT forensic experts, who clone or image the electronic devices and retain such data in their custody.

53. The independent IT forensic experts then search the data using key words provided by the Commission. The legal representatives of the firms that are subject of the investigation provide key words to enable the forensic experts to identify and extract privilege information from the information extracted using the Commission's key words.

54. The forensic experts prepare a list of the information identified as potentially privileged, which they make available to both the Commission and the raided firm. The

³⁹ In terms of Section 49(5) of the Act.

⁴⁰ See section 49(6) of the Act.

firm is afforded the opportunity to exercise a claim of privilege in respect of that information. Until the issue of privilege has been finally determined the forensic experts retain custody of the information and do not release such to the Commission.

55. Should the Commission wish to challenge the validity of the claim to privilege, this too is usually resolved amicably by way of determination by an independent senior advocate. To date no dispute regarding privilege attaching to electronic data has been referred to the Tribunal for determination.

56. The Tribunal can be approached immediately after the claim to privilege has been made and the issue is not stayed until review of the final decision in the main dispute between the parties.

57. Although the above is now standard practise, the Commission is currently reviewing the practise of outsourcing IT forensic expertise with the intention of creating internal capacity, for both security and financial reasons. This is expected to have an impact on the process of resolving privileged claims for electronic documents.

5. CROSS BORDER ARRANGEMENTS

58. The Commission is not a party to any agreements with any other competition authorities, in any form, that regulates the exchange of potentially privileged information. South Africa's agreements with other jurisdictions (in the form of MOUs only) currently refer only to an exchange of information and do not specifically refer to confidential or privileged documents.

59. The Commission has not yet encountered a situation where it has experienced difficulties in accessing documents due to different levels of confidentiality protection in another jurisdiction. No requests for access to such information have been made.

60. The Commission has not yet encountered a situation where it has been required to send potentially privileged information to other jurisdictions. It has accordingly not been necessary for the South African Competition Commission to determine whether or not such other jurisdiction offers a lower level of privilege protection than South Africa jurisdiction.

61. The Commission has never been required to send information lawfully collected in South Africa and deemed privileged in the receiving jurisdiction. It has accordingly never exercised any election to refuse or refrain from sending such information.