



Guidelines

CC 7 - GENERAL PROVISIONS

November 2009

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1. Introduction

- 1.1. The Competition Commission is an independent public body, established to enforce the Competition Act 2007¹. The Act defines four areas of restrictive practice, which the Competition Commission may investigate and – if it believes that a restrictive practice is occurring – take action to remedy. In cases of collusive agreements, it is also empowered to levy fines on enterprises involved. The Act sets out the Competition Commission's powers of investigation and some key principles of transparency², natural justice and fairness³ to which it must have regard.

Guidelines

- 1.2. Section 38 of the Act requires that the Competition Commission "within a period of 6 months of its establishment, publish –
- (a) guidelines on the economic and legal analysis which shall be used for the determination of cases under this Act;
 - (b) guidelines on the principles which shall be used for the determination of penalties or remedies imposed under the Act, and on the manner in which turnover is to be calculated for the purposes of section 59;
 - (c) procedural rules specifying the procedures which the Competition Commission shall follow when carrying out its functions under the Act.
- 1.3. The Competition Commission has published five documents together constituting its guidelines on economic and legal analysis (item (a) in the list above), in addition to one guidelines document on penalties and remedies and one set of procedural rules. The complete list of guidelines and procedural rules is as follows:
- CC 1 – Procedural Rules
 - CC 2 – Market definition and the calculation of market shares
 - CC 3 – Collusive agreements
 - CC 4 – Monopoly situations and non-collusive agreements
 - CC 5 – Mergers
 - CC 6 – Remedies and Penalties
 - CC 7 – Guidelines general provisions

¹ https://www.competitioncommission.mu/04-Competition-Act-2007_Amended_050213.pdf

² In the requirement to published reasoned decisions, Section 18 of the Act.

³ Section 38.

- 1.4. All of these documents are available on the Competition Commission web site, at www.competitioncommission.mu.
- 1.5. Guidelines on economic and legal analysis are intended to provide information on how the Competition Commission will make its assessment of restrictive practices. The purpose is to enable enterprises to assess their practices to ensure compliance with the Act and to assist persons concerned that they might be affected by restrictive practices to decide whether to complain to the Competition Commission. They also provide a framework for parties and the Competition Commission to discuss evidence and other submissions, during the course of an investigation.
- 1.6. The Guidelines do not constitute fixed rules. The Competition Commission expects to follow the analytical framework they set out. If parties to its investigations believe that the Competition Commission's analysis or provisional conclusions are not consistent with the guidelines, they should make submissions to that effect. On rare occasions, the facts of a specific case might require the Competition Commission to depart from its guidelines, because circumstances arise that were not envisioned when the Guidelines were drafted. In those circumstances, the Competition Commission would expect to explain clearly its reasons for doing so, in its published decision (and perhaps to modify the guidelines, to take account of such situations).
- 1.7. The guidelines are based on the Competition Commission's own assessment of established principles of competition law and economics, drawn from other jurisdictions, as applicable under the Competition Act 2007⁴. In general, the Competition Commission welcomes submissions to its investigations based upon established principles of competition law and economics. Parties are welcome to refer to guidelines and case law from other authorities when doing so. However, parties should be aware that the Competition Commission will not regard any such evidence as a 'precedent' in a legal sense. Furthermore, parties should take note that Mauritian competition law is unique and, while it conforms to general best practice principles, is in some ways very different from competition laws in force elsewhere⁵.
- 1.8. Note that Competition Commission 6, the guidelines on Remedies and Penalties required by the Act, contains both analytical and procedural guidance.
- 1.9. As the Act provides, the Competition Commission may, from time to time, review and publish the revised versions of, its guidelines and procedural rules. The Competition Commission expects to do so infrequently, and to carry out a wide-ranging public review when it does so. It will not modify guidelines piecemeal or do so without public notification.

⁴ No one set of guidelines or other documents was used in this assessment. The Competition Commission found the guidelines of the UK competition authorities, the Competition Commission of Singapore and the European Commission (including guidance on enforcement criteria) to be particularly useful sources of material.

⁵ In particular, the Mauritian Competition Act is relatively unusual in the way it treats abuse of monopoly power, treating it as a problem to be remedied rather than an offence to be punished. Much of the specific discussion as to whether certain sorts of behaviour constitute an offence, under Article 82 of the European treaty, or the monopoly provisions of US antitrust law, is therefore not particularly relevant. *CC 4: Monopoly Situations and Non-Collusive Agreements*, discusses this issue in more detail.

- 1.10. Guidelines and procedural rules only describe the Competition Commission's approach when investigating restrictive practices, as described in Part IV of the Act. The monitoring and research functions of the Executive Director, described in Section 30 of the Act, are not necessarily covered by these documents. However, economic analysis carried out under that Section can normally be expected to be consistent with the principles in these guidelines.

Guidelines in this document

- 1.11. The General Provisions guidelines contain material applicable to all of the Competition Commission's investigations of restrictive practices. Section 2 sets out the Competition Commission's objectives under the Act – broadly speaking, how it expects to assess the effects of the behaviour it is investigating. Section 3 describes the Competition Commission's approach to exemptions from the Act as provided in schedules to the Act. Sections 4 and 5 provide more detail on the Competition Commission's approach to one of those exemptions: for agreements relating to Intellectual Property Rights. Section 6 sets out the circumstances in which the Competition Commission may disclose certain information, including confidential information, in proceedings under the Act as well as the procedures relating thereto. **[Amended 18 October 2018]**
- 1.12. These guidelines are not a substitute for the Act, the regulations or rules. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the Competition Commission. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

2. The Competition Commission's objectives under the Competition Act

2.1 The Competition Commission aims to protect and enhance competition in Mauritius by applying the Competition Act 2007. In doing so, it will frequently have to assess conduct against criteria set by the Act. In this section, the Competition Commission therefore sets out its approach to such matters, under the provisions of the Act.

Background

2.2 The Competition Act 2007 does not provide a single over-arching objective for the Competition Commission, but provides for slightly different matters to be taken into consideration in different circumstances. There are three broad areas of the Act that deal with this topic⁶:

(a) In general, collusive agreements under Sub-part I of Part III of the Act are simply prohibited without any reference to adverse effects, although for a horizontal agreement to be considered collusive under Section 41, it must 'significantly restrict, prevent or distort competition.'

(b) Restrictive practices under sub-parts II and III of Part III of the Act refer to 'competition' being prevented, restricted or distorted, while under mergers the Competition Commission is required to assess whether the merger is likely to result in a 'significant lessening of competition.'

(c) Section 46, on monopoly situations, refers several times to 'consumers' and (in subsection (3) (d) requires the Competition Commission to take into account "where such actions or behaviour that have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumers."

(d) When considering remedies under Sections 60 and 61, the Competition Commission is empowered to remedy adverse effects on competition and also remedy, mitigate or prevent any resulting detrimental effects on users and consumers,

2.3 This chapter sets out how the Competition Commission will make decisions taking account of these differing objectives.

⁶ In addition, when considering remedies under Section 50, the Competition Commission can take into account whether off-setting benefits of the restrictive practice exist, 'and the benefits have been or are likely to be shared by consumers and business in general.'. The Competition Commission's approach to considering these benefits is set out in detail in CC 6: *Penalties and Remedies*.

Prohibition of collusive agreements

- 2.4 The simplest decision-making rule is provided for collusive agreements under Sub Part I of Part III of the Act. All of the restrictive practices defined under Sections 41, 42 and 43 (including agreements to fix prices, share markets, limit output, rig bids or for resale price maintenance) are prohibited and void. It is not open to enterprises engaged in these practices to argue that they have no adverse effects, nor do the 'off-setting benefits' provisions of the Act apply to such agreements to allow any argument that they have beneficial effects.
- 2.5 To find a horizontal agreement to be collusive under Section 41, the Competition Commission must believe that its object or effect is to 'significantly prevent, restrict or distort competition'. As noted in *CC 3: Guidelines on Collusive Agreements*, the Competition Commission would normally regard clear price-fixing, market-sharing or agreements⁷ to restrict supply as inherently likely to have such effects. Sections 42 and 43 contain no such provisions: bid-rigging and minimum price resale price maintenance are simply prohibited under the Act.

Assessing effects on competition

- 2.6 Restrictive practices other than collusive agreements are assessed for their effects on competition⁸. The Competition Commission regards 'competition' in this sense as describing very broadly the process of rivalry between enterprises, so that those enterprises which best meet their customers' requirements prosper, while those which do not lose sales and may even fail. Vigorous competition can be expected to result in lower prices and greater choice than would be expected when competition is weak. It can also result in better quality products and services, or a wider variety of products and services better suited to the differing requirements of different customers.
- 2.7 By providing rewards for efficient enterprises and penalizing the least efficient, rivalry between enterprises is also likely to enhance the efficiency of production and productivity over time. Such rivalry also promotes longer term productivity growth and economic development.
- 2.8 It is this process of rivalry that the Competition Commission is empowered to protect under the Act. It may take account of other matters as possible *indicators* of a failure of competition, but only as possible indicators. For example, high prices, or increased prices, might indicate a competition problem, but they might be driven by a range of other causes. Similarly, behaviour such as aggressive price-cutting that damages rival businesses is normally the result of vigorous competition, rather than evidence of anticompetitive behaviour.

⁷ Where 'agreement' has a broader interpretation than an explicit or written agreement – see CC 3 for details.

⁸ Under Section 50 of the Act.

Adverse and detrimental effects of failures of competition

2.9 Section 46, relating to monopoly situations states that the Competition Commission will have regard to whether a monopolist's actions:

"have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumers. "

2.10 This clause relates only to adverse effects arising from the monopolist's actions. It does not imply that the Competition Commission should consider arguments that the monopolist's behaviour *benefits*, for example, the competitiveness of the economy of Mauritius. This issue is addressed when considering 'off-setting benefits', when determining remedies.

2.11 Under sections 60 and 61, the Competition Commission may also take action to remedy, prevent or mitigate detrimental effects on consumers and users.

2.12 Where it is necessary to consider such adverse and detrimental effects, the Competition Commission will generally seek to protect and promote the consumer interest by fostering greater competition. The economy of Mauritius is also likely to function better to the extent that it meets the needs of its consumers. The Competition Commission will not in general intervene to provide consumers with a better product offering or price than might reasonably be expected to arise in a competitive market.

2.13 The Competition Commission can intervene only when there is a competition problem, and only to promote the interests of affected consumers and users. The Competition Commission does not have the power to intervene solely on grounds of 'fairness' between different consumers, or between consumers and suppliers. There is no provision in the Act for the Competition Commission to favour some groups of consumers or some sections of society over others.

International aspects

2.14 The Competition Commission is concerned with competition in markets in Mauritius, and competition to supply those markets. Restrictive practices relating to exports will not in general be regarded as a concern⁹.

2.15 The Act draws no distinction between Mauritian-owned and foreign-owned enterprises, and the Competition Commission too will make no such distinction. A restrictive practice that prevents foreign entry into an industry will be regarded no differently from one which prevents entry by a Mauritian competitor. A merger between a foreign enterprise and a Mauritian enterprise will be assessed no differently from a merger between two Mauritian enterprises.

⁹ However, sales to foreign tourists, although they could be regarded as 'invisible exports' will be considered as markets for goods and services in Mauritius.

3. Applying the Competition Act in regulated sectors

- 3.1 All sectors of the economy are subject to legal constraints, to regulation or otherwise affected by Government policy to some extent. However, some sectors, such as utilities or financial products, are subject to sector-specific regulation, normally with a dedicated regulatory body to enforce that regulation. Moreover, in Mauritius there are several State-owned bodies, notably the State Trading Corporation, that operate as businesses but act in pursuit of Government policy objectives rather than private profit.
- 3.2 Different countries have adopted different solutions to the difficulties raised by extending competition law to regulated sectors. In Mauritius, as in many other countries, the Competition Act fully applies to those sectors and the Competition Commission has the duty and power to enforce it in those sectors¹⁰.
- 3.3 However, regulation can in some ways affect the way the Competition Commission will go about enforcing the law. The Competition Commission has the power to carry out investigations only with regard to the restrictive practices defined in the Act, as carried out by 'enterprises'. This includes State-owned enterprises, or the State itself when the State is engaged in business activity. However, the Competition Commission has no powers over *policy* which might restrict, prevent or distort competition. 'Policy' here should be taken to include the use of regulatory powers by regulatory bodies, as well as Government policy itself. The Competition Act does not in any sense over-ride other legislation or policy decisions and the Competition Commission has no powers to strike down or over-rule policy or regulatory decisions. A regulator's decisions cannot be in breach of the Competition Act in the way that the behaviour of an enterprise might be¹¹.
- 3.4 The Competition Commission can conduct inquiries into policy matters, and can make recommendations to Government or other State bodies about the effects of policy on competition. It would make such findings public with its reasons, in a similar format to its decisions on restrictive practices. But it has only an advisory role. This is quite appropriate. As an expert body on competition matters, the Competition Commission is well-placed to identify policies that restrict, prevent or distort competition, and the costs of such restrictions. However, it is not competent to decide how to weigh these competition considerations against other effects of the policy – such as social or environmental objectives.
- 3.5 When an enterprise under investigation is taking actions that distort competition to comply with Government (or a regulator's) policy requirements, the Competition Commission will

¹⁰ The Minister has the power to exempt sectors from the provisions of the Competition Act, an issue discussed in the next chapter. At the time of publication of these Guidelines, only petroleum and LPG were exempted.

¹¹ Except, obviously, when the regulator is buying and selling. For example, its practices in procurement could be covered by the restrictive practices provisions of the Act.

consider whether it is the policy itself that is causing any distortions to competition. If so, it might make recommendations but would not normally take action against the enterprise itself¹².

- 3.6 This should not be taken to imply that all actions taken by regulated enterprises that are consistent with regulators' directions or other policy decisions are exempt. The Competition Commission will normally want to consider whether the enterprise could have complied with those decisions in a manner that does not distort competition, or that results in less distortion. If there were more competitive alternatives, the Competition Commission could find the behaviour to constitute a restrictive practice and could impose remedies or (for intentional or negligent breaches of the collusive agreements provisions) fines. Enterprises should therefore seek to comply with price controls or other mandatory policies in a manner which minimizes distortions to competition. Similarly, enterprises merging to meet regulatory objectives should consider whether there are any alternatives which meet the same objectives without harming competition.
- 3.7 Enterprises should ensure that any regulatory directions are made explicit, rather than seeking to carry out what they believe to be a regulator's wishes without specific direction to do so.
- 3.8 The Competition Commission would be particularly concerned about collusive agreements concluded supposedly on the basis of compliance with regulatory policy. These are the most serious breaches of the Competition Act and it is not obvious why regulated enterprises should ever need to breach them. Enterprises subject to price controls from regulators should of course comply with that requirement, but they should not make agreements about prices with potential competitors or require retailers to sell only above a minimum price floor¹³. Enterprises should each individually comply with price controls.
- 3.9 The role of sector regulators also has implications for *how* the Competition Commission will carry out competition investigations in regulated sectors. A sector regulator is an unbiased source of expertise on what are usually complex technical and economic issues at stake in regulated sectors. Regulators also have a legitimate interest in being well-informed about the Competition Commission's activities in the sectors they regulate. In the interests of efficiency, both the Competition Commission and sector regulators should try to avoid duplicating one another's work or acting at cross-purposes. For all these reasons, the Competition Commission will wish to work closely with sector regulators. As required by the Competition Act, it therefore agrees Memoranda of Understanding (MOUs) with sector regulators and publishes them on its web site. These MOUs differ slightly in each sector, but all have the core objective on ensuring good communication between the Competition Commission and sector regulators and defining procedures for the exchange of views. MOUs cannot over-ride legislation, so each Party to the MOU reserves its rights to act as prescribed by its enabling legislation but commits to discussions with the other party when planning to take action that affects the other.

¹² Procedurally, the Competition Commission could either find that no restrictive practice has occurred, or find a restrictive practice but impose no remedy, because the regulatory objectives constitute an offsetting benefit (see *CC 6: Remedies and Penalties* for discussion of this concept).

¹³ See *CC 4: Collusive Agreements*.

4. Exemptions under the Schedule to the Act

- 4.1 A Schedule to the Act lists (A) agreements or practices and (B) products which are excluded from the Act. Section 74 of the Act provides that The Minister may, by regulations, amend the Schedule.
- 4.2 As of November 2009, three classes of agreement or practice were exempted under Part A, namely:
1. Any practice of employers or any agreement by which employers are parties insofar as it relates to the remuneration, terms or conditions or employment of employees.
 2. Any agreement insofar as it contains provisions relating to the use, license or assignment of rights under or existing by virtue of laws relating to copyright, industrial design, patents, trademarks or service marks.
 3. Any practice or agreement approved or required under an international agreement to which Mauritius is a party.
- 4.3 As of November 2009, two products were exempted under Part B, namely:
1. Petroleum products
 2. Liquid petroleum gas

Applicability of the exemptions

- 4.4 The Competition Commission regards these exclusions as applying to the restrictive practices listed in Part III of the Act. In case of uncertainty about whether an agreement, practice or product falls within the exempted list or not, the Competition Commission may carry out an investigation under Part IV, using the powers specified in the Act, but will set out in its final report why it believes the matter is not excluded, if it takes action.
- 4.5 The Competition Commission will interpret exclusions as narrowly as possible within the scope of the Act. In particular, it will not regard broad areas of activity that include some of the excluded matters as being outside its scope. For example, some economic activities might involve the incidental sale of petroleum products.
- 4.6 This may be particularly relevant to agreements that have the object or effect of fixing prices (or in other ways breaching the prohibitions of Sections 41 to 43 of the Act). An agreement between employers which are also competing enterprises, which has the object or effect of fixing prices, would only be regarded by the Competition Commission as exempt insofar as the agreement related to employees' terms and conditions. Aspects

of the agreement that breach Sections 41-43 would be null and void and fines may be levied.

- 4.7 Similarly, provisions of agreements relating to intellectual property are exempt, but this does not imply that any agreement relating in part to intellectual property rights is exempt in its entirety. More generally, the whole spectrum of the Competition Commission's work is likely to be affected by intellectual property rights, and the treatment of this issue is therefore addressed fully in the next chapter.

5. Intellectual property rights

- 5.1. Intellectual property rights (IPRs), like competition law, are an essential element in a successful market economy. The two both involve the interface between law and economics and can be closely inter-related. An intellectual property right is a legal instrument creating ownership for products where ownership rights would otherwise be harder to enforce than for physical products: such as copyright, patents and trademarks/brands. IPRs affect competition and the work of the Competition Commission across the range of its activities, especially in its investigation of monopoly situations.

IPRs and the Competition Act

- 5.2. For the most part, the Competition Commission will treat these assets no differently from any physical assets that might be involved in cases it is considering. Thus, for example, the purchase by one enterprise of intellectual property rights from another will be treated as a merger. Similarly, when considering remedies involving the divestment of assets, the Competition Commission may require IPRs, or at least access to intellectual property, to be divested as part of the package, for example, to make the divested entity viable. The Competition Commission will respect intellectual property rights as it does property rights more generally. The Competition Commission would not in normal circumstances require the owner of a physical asset to allow his competitors to use that asset; Similarly, it would not in normal circumstances force an owner of an IPR to give access to rivals.
- 5.3. An IPR such as a patent, copyright or trademark is essentially a legally-protected monopoly. This may seem to be at odds with competition policy, but it need not be. A legal monopoly provided by IPR on a specific product does imply that the owner has a monopoly position within the meaning of the Competition Act. A monopoly position can be held only in relation to a market. In most cases, multiple brands compete in a wider product market and the legal 'monopoly' over the brand does not imply that the holder is in a monopoly situation in that wider market. Thus, to assess whether the owner of an IPR is in a monopoly situation, the CC would follow the same procedures as it would in an assessment of any other business.
- 5.4. However, there are occasions when actions that might be considered anticompetitive are specifically exempt from competition law when they concern IPRs. Schedule 2 to the Act specifically excludes from the Act:

Any agreement insofar as it contains provisions relating to the use, licence or assignment of rights under or existing by virtue of laws relating to copyright, industrial design, patents, trade marks or service marks.

- 5.5. In addition, Section 50(4), which defines off-setting benefits that the Competition Commission will consider when deciding on remedies, may well be relevant when considering cases in which IPRs are significant. For example, trademarks may allow investment in product safety or quality that would not occur were products anonymous, and patents and copyright obviously contribute to development of new goods and services, or technological progress. Because this covers a broader range of topics than the specific

exception created under Schedule 2, these Guidelines here set out more generally the Competition Commission's approach to assessing competition in markets involving IPR.

- 5.6. In line with international best practice, the Competition Commission takes the attitude that exploitation of IPRs by the holder to maximize the value of that intellectual property, will not be regarded as a restrictive practice. Thus, for example, an inventor with a patent is free to price it at whatever level he chooses, to assign exclusive rights, to prevent resale at prices below a specified price and so on.
- 5.7. However, also in line with international best practice the Competition Commission does not interpret the IPR exemption to imply that any anticompetitive action or agreement is permitted if it involves IPR. In particular, holders of IPR may not be permitted to 'leverage' the legitimate monopoly power they enjoy from their IPR to restrict, distort or prevent competition in other markets. For example, the holder of an IPR for an imported food product will not be prevented from raising the price of that product by the Competition Commission enforcing the Competition Act. However, such an importer might be considered to be abusing a monopoly situation if he threatens not to supply that product to force his customers to take other products from his line, or to agree to exclude the products of his competitors. 'Bundling' of IPR protected products with other products, whether formally through a restrictive agreement or for example through a retailer exclusively selling some brand and also thereby capturing customers for his non-branded products, could be an abuse of monopoly.
- 5.8. Horizontal agreements exempted under Schedule 2 might include such matters as sharing of intellectual property, for example to co-operate in the development and marketing of new products. It should not be assumed that any agreement that involves IPRs in some regard is exempt from the Act under Schedule 2. It is only exempt insofar as it relates to IPRs, and other provisions involving restrictive practices may be fully subject to the Act. For example, agreements on sharing IPRs might also create a channel of communication through which prices more generally are fixed, which would be a breach of Section 41 of the Act. Following investigation, the Competition Commission might (in addition to other penalties and remedies) require agreements to be renegotiated in a manner that preserves the IPR-related element of the original agreement, but removes such effects.

Exclusive import arrangements

- 5.9. Many goods sold in Mauritius embody IPR held overseas. In some cases, this property right has been assigned to an importer, giving that importer similar rights within Mauritius as the original holder of the IPR would have.
- 5.10. As a general principle, the Competition Commission will not treat exclusive import rights any differently from the way it will treat 'original' holders of IPR. If it receives a complaint about behaviour by the holder of an exclusive import right, therefore, the Competition Commission will consider whether it would be concerned were the same complaint being made about a product of Mauritian origin. If not, the Competition Commission will not be concerned.

- 5.11. However, there may be a concern if IPRs held by the same entity extend across several products if those IPRs could reasonably be expected to be held by different enterprises (for example because the original holders of those rights are separate enterprises). The holder of an exclusive import right for two competing branding products may have *more* market power than the original owners of those brands.
- 5.12. The Competition Commission would regard the acquisition of exclusive rights to IPRs on products that can be expected to compete against one another as a horizontal merger and would assess whether any such acquisition is likely to result in a substantial lessening of competition. Similarly, the acquisition of rights that could reasonably be expected to be held by different owners to complementary products (such as different stages of production), may create concerns of a vertical nature, investigated as a vertical merger.
- 5.13. For existing holders of IPRs, the Competition Commission may find that such holdings represent an abusive monopoly if they create a stronger market position than would exist had all of the original owners of the IPRs themselves imported the products into Mauritius, and it may force divestment of IPRs to remedy that situation if it believes that the monopolist is restricting competition or otherwise exploiting that situation.

6. Disclosure of Information in proceedings under the Competition Act 2007

- 6.1. As a general rule, section 70 of the Act prohibits the disclosure of information, including confidential information, relating to any particular business or the affairs of an individual, which was obtained under or by virtue of any of the provisions of the Act (hereinafter 'specified information') to other persons. However, Section 70(1)(a) of the Act and Rule 30 of the Competition Commission Rules of Procedure 2009 (as amended) allow the it to disclose such information in limited circumstances. Such circumstances include *inter alia*, disclosure of specified information for the purpose of administration or enforcement of the Act and in particular, for the purpose of achieving due process and allowing parties under investigation to effectively exercise their rights of defense.
- 6.2. Where, either on its own initiative or upon request made by a main party, the Competition Commission decides that disclosure of specified information is necessary for the purpose for which the it is permitted to make the disclosure, it may, where appropriate, edit, redact, anonymise or aggregate confidential information, for example by providing ranges in relation to market share data, prior to and for the purpose of disclosing a non-confidential version of the information.
- 6.3. In certain circumstances and in particular, where data are of a quantitative nature or in the event of a voluminous amount of confidential information (e.g. internal strategy documents of competitors), it may not be possible to provide, in a timely manner, a meaningful non-confidential version. However, granting access to such data may nevertheless be necessary in particular, for the purpose of giving a party under investigation adequate information to prepare his defense or submissions either in the course of investigation proceedings (following the issuance of the Provisional Findings to the main party) or before the Commission.
- 6.4. In considering whether the disclosure is necessary, the Competition Commission will have regard to the need to protect the legitimate interests of confidentiality of the enterprises or persons from which it has obtained the information (the "Data Providers"), the function or purpose for which the information is required and the scope of the information requested. The Competition Commission will generally seek to inform the party claiming confidentiality or the party to whom the information relates of its intention to make and the form of its intended disclosure of confidential information. The Competition Commission will set a time period during which the Data Provider may submit any written comments/representations, which the Competition Commission endeavours to consider, as appropriate, and address in good faith, while seeking to balance opposing interests and the need to expedite the proceedings to the extent possible.
- 6.5. When the Competition Commission considers it appropriate to disclose confidential information and in view of protecting the legitimate interests of confidentiality of the Data Providers, it may, depending on the circumstances of the individual case, have recourse

to confidentiality rings and data or disclosure rooms¹⁴ for the purpose of the disclosure. By means of a Disclosure Room, specific quantitative and/or qualitative data are made accessible in a restricted manner to the extent strictly necessary and proportionate for the purpose of the disclosure. Disclosure Rooms are an exceptional tool and it is in the Competition Commission's discretion to decide whether a Disclosure Room is appropriate in a particular case.

Access to Disclosure Room(s)

- 6.6. Disclosure Rooms enable access to a specific category of confidential data or documents to a defined group (to be determined on a case-by-case basis but, generally, the relevant parties' external legal and/or economic advisers), where the Competition Commission considers that, for reasons of due process, disclosure is required, but due to the nature of the information, additional safeguards are appropriate. A Disclosure Room provides access on the Competition Commission premises, and in so doing has the advantage of providing additional protection.
- 6.7. Disclosure Rooms may, in particular, be considered in two situations, namely to allow parties' -
- a) External economic advisers to carry out their own analysis of the underlying data to confirm or challenge the Competition Commission's findings or conclusions, and
 - b) external legal advisers to carry out an assessment of a specific set of qualitative documents.
- 6.8. Access to a Disclosure Room is subject to compliance with the Disclosure Room Rules, and the submission of written Confidentiality/Non-Disclosure Commitments, tailored to the specificities of each case, which must be accepted by the main party requesting access and signed by its external Adviser(s) prior to getting access to the Disclosure Room. The Disclosure Room Rules *inter alia* provide that access to the Disclosure room is granted under strict confidentiality obligations, increased security measures and appropriate supervision. The Commitments address how persons accessing the Disclosure Room may use the information disclosed to them and the restrictions that apply to onwards disclosure and sanctions in case of noncompliance. The main party and its external advisers will also have to provide a Joint Indemnity letter. The said Joint Indemnity letter, submitted by the party and its external adviser(s), provides that the latter jointly undertake to indemnify the Executive Director, Commission and its staff, as the case may be, for any resulting damage and prejudice which may arise following any claim or any action by a data subject/data provider as a result of any breach of the Commitments pursuant to which such confidential information has been imparted or disclosed.
- 6.9. It will be a condition of access to a Disclosure Room that information reviewed by advisers is not shared with their client(s). It is for advisers to satisfy themselves of the

¹⁴ The terms 'Data Room' and 'Disclosure Room' are used interchangeably.

steps they are required to take under any relevant professional conduct rules to ensure that they are able to operate on this basis.

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