

# RECONCILING DISCLOSURE OF CONFIDENTIAL INFORMATION AND ENFORCEMENT OF COMPETITION LAW

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9<sup>th</sup> October 2019

# CONFIDENTIAL INFORMATION AND COMPETITION LAW

## STRUCTURE OF PRESENTATION

- GENERAL PRINCIPLES
- HOW DO AUTHORITIES OBTAIN INFORMATION?
- PARTICULAR ISSUES
  - SELF-INCRIMINATION
  - LEGAL PROFESSIONAL PRIVILEGE
  - COMPLAINANTS' ANONYMITY
  - ACCESS TO THE FILE
  - DISCLOSURE OF LENIENCY STATEMENTS
  - DISCLOSURE OF SETTLEMENT SUBMISSIONS
  - REDACTED DECISIONS
  - CONFIDENTIALITY RINGS

# CONFIDENTIAL INFORMATION AND COMPETITION LAW

## GENERAL PRINCIPLES

- THE MISSION OF THE COMPETITION COMMISSION IS ‘TO ENHANCE MARKET COMPETITION’
- IN PARTICULAR THE COMMISSION MUST INVESTIGATE WHETHER ANY AGREEMENTS OR MONOPOLY SITUATIONS ARE HARMFUL TO COMPETITION AND WHETHER ANY MERGER WOULD SUBSTANTIALLY LESSEN COMPETITION
- THE COMMISSION HAS VARIOUS POWERS TO END ANTI-COMPETITIVE BEHAVIOUR
- EFFECTIVE ENFORCEMENT IS ESSENTIAL FOR THE ACHIEVEMENT OF THE CC’S MISSION

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## GENERAL PRINCIPLES

- ENTERPRISES MUST COMPLY WITH THE LAW
- BUT THEIR 'RIGHTS OF DEFENCE' MUST BE COMPLIED WITH
- THE MAURITIAN ACT IS EXPLICIT AS TO CERTAIN RIGHTS, FOR EXAMPLE LEGAL PROFESSIONAL PRIVILEGE (SECTION 54), THE RIGHT TO A HEARING (SECTION 56)
- OTHER ISSUES ARE NOT ADDRESSED SPECIFICALLY IN THE LEGISLATION: PRESUMABLY THERE IS A ROLE FOR THE COURTS HERE

# CONFIDENTIAL INFORMATION AND COMPETITION LAW

## HOW DO COMPETITION AUTHORITIES OBTAIN INFORMATION?

- COMPETITION AUTHORITIES HAVE THEIR OWN ‘INTELLIGENCE UNITS’
  - IN THE UK THE COMPETITION MARKETS AND AUTHORITY HAS A MERGERS INTELLIGENCE UNIT
  - ALSO A CARTELS INTELLIGENCE UNIT
- COMPETITION AUTHORITIES RECEIVE COMPLAINTS, EG FROM COMPETITORS, CUSTOMERS
- CONSUMER BODIES MAY REFER MATTERS (CITIZENS ADVICE, BEUC)

# CONFIDENTIAL INFORMATION AND COMPETITION LAW

## HOW DO COMPETITION AUTHORITIES OBTAIN INFORMATION?

- ENTERPRISES THEMSELVES MAY ‘SELF REPORT’ TO COMPETITION AUTHORITIES
  - MERGER NOTIFICATIONS
  - REQUESTS FOR GUIDANCE
- COMPETITION AUTHORITIES MAY CONDUCT DAWN RAIDS OR REQUEST INFORMATION
- ENTERPRISES MAY SEEK LENIENCY
- ENTERPRISES MAY PROVIDE INFORMATION AS PART OF SETTLEMENT DISCUSSIONS

# CONFIDENTIAL INFORMATION AND COMPETITION LAW

## HOW DO COMPETITION AUTHORITIES OBTAIN INFORMATION?

- ◉ GOVERNMENT DEPARTMENTS MAY PROVIDE INFORMATION
- ◉ INFORMATION MAY ALSO BE PROVIDED BY OTHER COMPETITION AUTHORITIES
- ◉ STAKEHOLDERS GENERALLY WILL BE INVITED TO/MAY PROVIDE INFORMATION DURING INVESTIGATIONS
- ◉ COMPETITION AUTHORITIES MAY END UP WITH A LARGE AMOUNT OF INFORMATION!



# CONFIDENTIAL INFORMATION AND COMPETITION LAW

## SELF-INCRIMINATION

- EU AND UK LAW RECOGNISE PRIVILEGE AGAINST THE PROVISION OF SELF-INCRIMINATING INFORMATION
  - THIS DOES NOT ENTITLE ENTERPRISES TO WITHHOLD SELF-INCRIMINATING DOCUMENTS
- DISTINGUISH PROTECTIONS THAT ARE AFFORDED TO NATURAL PERSONS IN CRIMINAL PROCEEDINGS FROM THE POSITION OF WELL-RESOURCED AND LEGALLY-ADVISED LEGAL PERSONS INVOLVED IN COMPETITION PROCEEDINGS



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## LEGAL PROFESSIONAL PRIVILEGE

- ◉ EU LAW AFFORDS LPP TO CORRESPONDENCE BETWEEN EXTERNAL, EU, LAWYERS IN CONTEMPLATION OF AN ACTUAL INFRINGEMENT PROCEEDING
- ◉ UK LAW ALSO RECOGNISES IN-HOUSE PRIVILEGE
- ◉ NB BREXIT!
- ◉ SECTION 54 MAURITIAN COMPETITION ACT - HOW MUCH IS COVERED?
- ◉ NB THE PHENOMENON OF ‘MOCK DAWN RAIDS’: IN CONTEMPLATION?

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## COMPLAINANTS' ANONYMITY

- ◉ CAN A COMPLAINANT COMPLAIN TO THE CC, BUT INSIST ON ANONYMITY?
- ◉ IN EU LAW THE EVIDENCE OF AN ANONYMOUS COMPLAINANT DOES HAVE PROBATIVE VALUE, BUT CANNOT BE EVIDENCE IN ITSELF OF AN INFRINGEMENT WITHOUT CORROBORATING EVIDENCE: *SALZGITTER V COMMISSION*
- ◉ IN MAURITIAN LAW SEE SECTION 52 OF THE ACT

# CONFIDENTIAL INFORMATION AND COMPETITION LAW

## ACCESS TO THE FILE

- ONE OF THE RIGHTS OF THE DEFENCE IS ACCESS TO THE FILE
- IN THE EU THERE IS A COMMISSION *NOTICE ON ACCESS TO THE FILE*
- THERE IS A RIGHT TO BE SHOWN EXCULPATORY DOCUMENTS
- THERE IS NO RIGHT TO BE SHOWN INTERNAL COMMISSION PAPERS
- SEE BELOW ON LENIENCY STATEMENTS AND SETTLEMENT SUBMISSIONS

# CONFIDENTIAL INFORMATION AND COMPETITION LAW

## DISCLOSURE OF LENIENCY STATEMENTS

- NEARLY ALL MAJOR CARTEL CASES IN THE EU ARE DISCOVERED AS A RESULT OF ENTERPRISES SEEKING LENIENCY (INCLUDING IMMUNITY)
- THE SYSTEM DEPENDS ON LENIENCY APPLICANTS!
- NEARLY ALL MAJOR CARTEL CASES IN THE EU LEAD TO FOLLOW-ON ACTIONS FOR DAMAGES
- IT IS IMPORTANT THAT A LENIENCY APPLICANT IS NOT PUT IN A WORSE POSITION THAN OTHER CARTEL MEMBERS WHEN IT COMES TO DAMAGES CLAIMS

# CONFIDENTIAL INFORMATION AND COMPETITION LAW

## DISCLOSURE OF LENIENCY STATEMENTS

- IF SO LENIENCY APPLICANTS WOULD BE DISINCENTIVISED FROM BLOWING THE WHISTLE
- AS A RESULT LENIENCY APPLICANTS IN THE EU CAN MAKE AN ORAL STATEMENT AND THIS WILL NOT BE DISCLOSED IN DAMAGES PROCEEDINGS
- HOWEVER THERE WILL STILL BE A DECISION ESTABLISHING AN INFRINGEMENT OF COMPETITION LAW, AND THAT WILL BE PUBLISHED, SUBJECT TO REDACTION (SEE BELOW)

# CONFIDENTIAL INFORMATION AND COMPETITION LAW

## DISCLOSURE OF SETTLEMENT SUBMISSIONS

- MANY CARTEL CASES ARE NOW SETTLED:  
ADMISSION OF GUILT IN RETURN FOR A REDUCED FINE
- ENTERPRISES MUST MAKE A ‘SETTLEMENT SUBMISSION’ WHICH MAY CONTAIN IMPORTANT INFORMATION ABOUT THE CARTEL
- THE OTHER MEMBERS OF THE CARTEL ARE ENTITLED TO SEE AN ENTERPRISE’S SETTLEMENT SUBMISSION AS PART OF ACCESS TO THE FILE
- BUT THEY MUST NOT DISCLOSE IT TO ANYONE ELSE

# CONFIDENTIAL INFORMATION AND COMPETITION LAW

## REDACTED DECISIONS

- ◉ WHEN DECISIONS ARE PUBLISHED THE EUROPEAN COMMISSION/CMA WILL EXCLUDE CONFIDENTIAL INFORMATION
- ◉ THIS CAN TAKE A CONSIDERABLE AMOUNT OF TIME TO ESTABLISH, BETWEEN THE AUTHORITY AND THE LAWYERS
- ◉ THERE ARE MANY DISPUTES; THESE SOMETIMES GO TO THE COURT FOR DECISION
- ◉ A BALANCE HAS TO BE STRUCK
- ◉ SEE SECTION 70 OF THE MAURITIAN ACT



# CONFIDENTIAL INFORMATION AND COMPETITION LAW

## CONFIDENTIALITY RINGS

- ◉ NOTE THE FREQUENT USE IN LITIGATION IN THE UK OF CONFIDENTIALTY RINGS
- ◉ FOR EXAMPLE IN APPEALS AGAINST FINDINGS OF INFRINGEMENT
- ◉ AND IN APPEALS AGAINST MERGER PROHIBITIONS
- ◉ AND IN DAMAGES CLAIMS
- ◉ BREACH OF THE TERMS OF THE RING WOULD BE A CONTEMPT OF COURT

# CONFIDENTIAL INFORMATION AND COMPETITION LAW

THANK YOU FOR YOUR ATTENTION!