

Unclassified**English - Or. English**

22 November 2019

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Cancels & replaces the same document of 30 October 2019****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by South Africa**

4 December 2019

This document reproduces a written contribution from South Africa submitted for Item 4 of the 130th OECD Working Party 3 meeting on 2-3 December 2019.
More documents related to this discussion can be found at
www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

Please contact Ms Despina PACHNOU if you have any questions about this document
[Despina.Pachnou@oecd.org, +(33-1) 45 24 95 25]

JT03455172

South Africa

Background

1. This paper sets out the Competition Commission of South Africa's ("the Commission") response to the call by the Organisation of Economic Cooperation and Development ("OECD") for written submissions to inform the roundtable discussion on access to the case file and protection of confidential information to be held in December 2019.
2. The OECD will look at, amongst others, the different types of rules and modes of access to the file in competition proceedings, the type of information that is considered confidential and the different approaches to protecting confidential information. This topic is part of the Competition Committee's long-term theme on *Transparency and Procedural Fairness*. The topic of access to information was briefly discussed in an earlier OECD roundtable on procedural fairness, but now requires a detailed discussion in light of its importance and developments in various jurisdictions.

1. Introduction

3. The South African Competition law as well as public law regulate the access to information held by public bodies. In general, such legislation set out a framework that seeks to provide a balance between the access to information and the privacy or protection of confidential information. The right of regulated access to information is enshrined in the South African Constitution and it is given effect in the Promotion of Access to Information Act (PAIA),¹ which is the overarching framework for access to information from a public body, including the Commission. PAIA is domesticated in Rule 15 of the South African Competition Commission,² which gives a member of the public the right to access the Commission's record in certain circumstances. This framework essentially governs the general right of access to information, including the Commission's case file, as a public body.
4. We elaborate below on the Commission's experience on the scope of the right of access to the Commission's case file and the stage at which parties can access information.
5. Unlike in the EU, where the EU Commission is tasked with both the investigation and adjudication functions, the South African model provides for a separation between these two functions. The Competition Commission (Commission) is charged with the investigation of restrictive practices, abuse of dominant position and the evaluation and approval of mergers, whilst the Competition Tribunal (Tribunal) is responsible for the adjudication of these matters. The Commission is therefore a party before the Tribunal in complaint litigation or contested mergers. Accordingly, a respondent or merging parties may want to exercise their right to a fair hearing by accessing the relevant information on which the Commission has based its decision to either prosecute a matter or block a merger.

¹ Act no. 2 of 2000

² Rules for the Conduct of Proceedings in the Competition Commission

6. In response to the OECD’s invitation to make a written contribution to the “*Roundtable on access to the case file and protection of confidential information*”, the Commission submits this paper which presents the Commission’s experience on access to its record and protection of confidential information. The paper will cover the following:

- The legal framework (2);
- Public right of access to information (3);
- Respondent’s right of access to information (4);
- Access to documents in merger proceedings (5); and
- Protection of confidential information (6).

2. The Legal framework

7. The right of access to information is enshrined in section 32 of the South African Constitution.³ This right is given effect in the Promotion of Access to Information Act (“PAIA”)⁴ and Rule 15 of the *Rules for the Conduct of Proceedings in the Competition Commission* (“Commission Rules”), in the context of competition law proceedings in South Africa.

8. PAIA was enacted to give effect to the constitutional right of access to information and is the overarching framework for accessing information held by public and private bodies for the exercise and protection of any rights. In the South African competition law context, PAIA has been domesticated in Commission Rule 15. Commission Rule 15 gives a member of the public the right to access the Commission’s record, including restricted information upon the payment of a fee.

3. Public right of access to information

9. The general right of access to information is governed by PAIA. PAIA provides for a very comprehensive regime for access to information. In its preamble, PAIA recognises that one of its aim is to remove “...*the secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations.*” PAIA applies to the Commission as it is a public body. Anybody can use PAIA to request access to information from a public body, and the procedure for accessing information through PAIA is fairly simple, where the requester is merely required to complete a form with its name and the record/records requested.⁵

10. PAIA, however, contains certain exclusions. For example, in respect of access to the record of a public body, such as the Commission, PAIA stipulates that the public body may refuse to grant access to the record (i) if the information was supplied in confidence by a third party, (ii) the disclosure of such information could prejudice the submission of similar information in the future; and (iii) it is in the public interest that similar information

³ The Constitution of the Republic of South Africa Act 108 of 1996.

⁴ Act no. 2 of 2000

⁵ Section 18 of PAIA

continue to be supplied.⁶ PAIA also stipulates that a public body must refuse access to its record if the record is privileged from production in legal proceedings.⁷ PAIA does also not apply to records requested for criminal or civil proceedings after commencement of the proceedings.⁸

11. In the context of the South African competition law, the general right of access to information is regulated under Commission Rule 15, which is a domestication of PAIA. Rule 15 stipulates that any person may access the Commission's record. However, if the record contains restricted information, such restricted information may only be disclosed as provided for in that Rule or by an order of the Tribunal or the Competition Appeal Court.⁹

12. The term "record" is not specifically defined in the Act. However, the Commission's record consists of information or documents that have been generated or received by the Commission in a particular matter.

13. For example, the Commission's record in merger proceedings will typically include the merger filing, correspondence between the Commission and the merging parties, correspondence with market players (including the merging parties' competitors, customers, third parties, etc.), correspondence with employees' representatives and other relevant stakeholders, investigators' notes of interviews or consultations with third parties.

14. The Commission's record in complaint proceedings would include the complaint (as submitted by the third party complainant or initiated by the Commission), evidence obtained from the complainant, leniency application and underlying documents (in a case of a cartel), information from and correspondence with the complainant, the leniency applicant (in a cartel case), the respondents, and other market players, transcripts of interviews or interrogations, etc.

15. No formalities, other than a prescribed fee, are required by Rule 15 to request information from the Commission. For example, a journalist may simply email the Commission and request a document.

3.1. Public right to information at investigation stage

16. A member of the public, including a respondent that is the subject of an investigation, may use PAIA or Rule 15 to have access to the Commission's record during the investigation. However, the request is subject to the restrictions contained in PAIA and Rule 15, respectively. Commission Rule 14 identifies certain information that is classified as "restricted" and cannot be accessed under Rule 15.

17. A document may be restricted because (i) of the nature of its contents (e.g. an internal communication of the Commission) or (ii) because of its status at a particular time

⁶ Section 37(1)(b) of PAIA.

⁷ Section 40 of PAIA.

⁸ Section 7 of PAIA.

⁹ Commission Rule 15(1)(b)(ii)

(e.g. a document received during an investigation is restricted information, until the Commission refers or non-refers the case, after that time it ceases to be restricted).¹⁰

18. Commission Rule 14 lists five classes of *restricted information*, namely:

1. confidential information within the meaning of the Competition Act 89 of 1998, as amended (“the Act”);¹¹
2. the identity of an informant who has requested to keep his/her identity anonymous;¹²
3. information that the Commission received during the course of its investigation/assessment of a complaint, merger or exemption, but prior to the Commission referring the case to the Tribunal or non-referring the case, or before the Commission has decided on the merger;¹³
4. internal documents or any other documents generated by the Commission;¹⁴ and
5. any document to which a public body would be required or entitled to restrict access in terms of the Promotion of Access to Information Act, no. 2 of 2000.¹⁵

19. In terms of Rule 15(2) the Commission may release restricted information for the purposes of inclusion in a consent order, an agreement by the complainant to an award of damages. In terms of Rule 15(3) there are various grounds on which the Commission may release restricted information. A party can access restricted information if it relies on any one of the following grounds:

1. that it is the person who provided the information to the Commission,¹⁶
2. that it is the firm to whom the restricted information belongs,¹⁷
3. that it requires the information for the purposes of the proper administration or enforcement of the Act or administration of justice,¹⁸
4. that it is a Tribunal Member,¹⁹.

¹⁰ Netcare Hospital Group (Pty) Ltd and Community Hospital Group (Pty) Ltd (Case No: 68/LM/Aug06)

¹¹ Rule 14(1)(a)

¹² Rule 14(1)(b)

¹³ Rule 14(1)(c)

¹⁴ Rule 14(1)(d)

¹⁵ Rule 14(1)(e)

¹⁶ Rule 15(3)(a)

¹⁷ Rule 15(3)(b)

¹⁸ Rule 15(3)(c) read with section 69(2)(a) and (b)

¹⁹ Rule 15(3)(a)

5. If the information concerns a merger then the Minister can access the restricted information. The Minister of Finance is entitled to access the restricted information if it concerns a merger which requires consent in terms of the Banks Act;²⁰ and
 6. those who obtain the consent of the owner of the information.
20. Access to documents is limited during investigations but a party that submitted information during a lengthy investigation may request its own information to understand what it has already submitted. This may occur where the party has legitimately destroyed records over time.

3.2. Public right to information at litigation stage

21. As mentioned above, PAIA does not apply if information is sought during the litigation stage.²¹ In other words, a person may not use PAIA to have access to information if it is for the purpose of civil or criminal litigation.
22. Prior to 25 January 2019, Commission Rule 15 applied regardless of the stage of the proceedings. In other words, under the former Rule 15, a litigant could request access to information using Commission Rule 15 for purposes of civil or criminal proceedings.
23. Rule 15 has, however, been recently amended²² to align with the provisions of PAIA that excludes the operation of PAIA in instances where the information is requested for purposes of civil or criminal proceedings.²³ The amendment now distinguishes between access to information by respondents in litigation cases and access by members of the public. Essentially, once litigation has commenced, Rule 15 is inapplicable and information has to be sought in terms of litigation rules. In other words, one cannot make a request in terms of Rule 15 to access the record. One can only access the record by using the litigation rules.
24. The absence of a similar exclusion in the former Rule 15 resulted in considerable litigation, where respondents in litigated cases sought to access the Commission's information as members of the public.
25. Annexure 1, attached to this paper, summarises a few seminal cases in which the old Rule 15 was interpreted.

4. Respondent's right of access

4.1. Respondent's right of access at investigation stage

26. Where the Commission exercises its coercive legal powers during the investigation, the respondent is entitled to know the legal basis for the exercise. For example, if the Commission obtains a search warrant to search the premises of a potential infringer of the Competition Act, the raided firm will be entitled to request a copy of both the search warrant and the application for the search warrant. The raided firm will then be in a position

²⁰ Section 37 and 54 of the Banks Act

²¹ Section 7 of PAIA (cite above)

²² Now the Minister of Trade and Industry.

²³ Section 7(1) of PAIA

to decide whether it wishes to challenge the warrant. The same applies in the case of summons issued by the Commission for a party to appear before the Commission for questioning or to produce documents. The summoned person will be entitled to know the basis for issuing the summons.

27. Nevertheless, during the investigation stage a respondent is not entitled to have access to the Commission's record, as such is restricted until the Commission prosecutes the matter before the Tribunal.²⁴

28. In terms of the Constitution, the exercise of public power is subject to a review. This includes powers exercised by the Commission. On this basis, any applicant in a review proceeding is entitled to access the Commission's case file. This is in terms of the rules of the South African courts in review proceedings. That is also applicable to respondents who review the basis of the Commission's exercise of its coercive powers.

29. There have been cases where parties have sought access to documents that the Commission relied upon to initiate a complaint.²⁵

30. For example, in *Mondi*,²⁶ Mondi sought access to the documents upon which the Commission relied to initiate its complaint against Mondi and SAPPI Southern Africa Limited (SAPPI), i.e. the record that formed the basis of the Commission's decision to initiate. This was following a review application filed by Mondi in terms of Rule 53 of the Uniform Rules seeking to, amongst others, review and set aside the Commission's decision to initiate.²⁷

31. The High Court was concerned that exposure of the Commission's deliberation process to public view would discourage future deliberations.²⁸ The High Court, however, recognised that Mondi was entitled to challenge the Commission's decision to initiate the complaint, based on the principle of rationality and legality.²⁹ The Court found that in order to challenge such decision, Mondi was entitled to require the information that formed the basis of the Commission's decision.

4.2. Respondent's right of access at litigation stage

32. At the litigation stage, access to documents is governed by the Tribunal's Rules, together with the High Court rules.³⁰

²⁴ Commission Rule 14(1)(c)

²⁵ See *Mondi*

²⁶ *Mondi Ltd and other vs the Competition Commission and other* (High Court decision – Case no. 47050/13) – High Court decision of 12 November 2014

²⁷ *Mondi* para 1 and 5

²⁸ *Mondi* para 51

²⁹ *Mondi* para 52

³⁰ In terms of Rule 55 of the Tribunal Rules (Rules for the Conduct of Proceedings in the Competition Tribunal), the Tribunal may have regard to the High Court Rules where its own Rules are silent on a particular aspect.

33. At the pleading stage, the respondent is entitled to the disclosure of documents relied upon or referred to in the Commission's pleadings.³¹ As discussed above, the old Commission Rule 15 was interpreted to give the respondents access to the Commission's case file even before close of pleadings.

34. At the litigation stage, respondents have also often requested access to the leniency documents. For example, in *ArcelorMittal*,³² the respondents requested access to the leniency application.³³

35. The Commission opposed the request on the grounds that the leniency application was protected by litigation privilege and was also restricted in terms of Commission Rule 14(1)(e).³⁴

36. The South African Supreme Court of Appeal found that the leniency documents were privileged. However, it ordered the disclosure of the documents on the grounds that the Commission had waived its privilege by mentioning the leniency application in its referral affidavit.

37. As mentioned above, a party is also entitled to the Commission's case file in review proceedings.³⁵ For example, in *Computicket*,³⁶ Computicket requested access to the report(s) and recommendation(s) that served before the Competition Commissioner and/or the Executive Committee of the Commission and on which they based their decision to refer the complaints to the Tribunal.³⁷ This was in order to review and set aside the Commission's referral of an abuse of dominance complaint against it.³⁸

38. The Competition Appeal Court (CAC) found that it was important to appreciate that the documents were sought in the context of a review application.³⁹ The CAC held that Computicket was entitled to the production of the "record" in order to be in a position to validly and effectively exercise its rights to review the Commission's decision. The CAC confirmed that in the context of review proceedings, this is "*whatever was before*" the Commission, i.e. the decision makers when they determined that a prohibited practice has taken place.⁴⁰ However, the disclosure of such information will be subject to any legitimate claims in terms of Commission Rule 14 and confirmation by the Commission that such information is restricted⁴¹ or privileged.

³¹ Rule 35(12) of the Uniform Rules of Court

³² Competition Commission v ArcelorMittal South Africa Ltd and Others – 2013 (5) SA 538 (SCA)

³³ ArcelorMittal.

³⁴ Commission Rule 14(1)(e).

³⁵ Rule 53 of the Uniform Rules of Court

³⁶ Computicket (Pty) Ltd v The Competition Commission of SA (CAC case no. 118/CAC/Apr12) – CAC decision of 29 October 2012

³⁷ Computicket (CAC) para 1

³⁸ Computicket (CAC) para 2

³⁹ Computicket (CAC) para 21

⁴⁰ Computicket (CAC) para 22

⁴¹ Computicket (CAC) para 26

39. The challenge for the Commission at this stage is that respondents may gain access to the Commission's record before they are required to answer to the allegations against them. The Commission's concern is that respondents use this information before pleading to tailor their case to exacerbate any challenges facing the Commission, instead of openly and fully explaining their case.

4.3. Respondent's right after the close of pleadings

40. After close of pleadings, the respondent is entitled to discovery of documents relevant to the case. At that stage, the respondent will also be entitled to written witness statements, which the Commission will rely on at the trial, except privileged documents.

41. At litigation stage, where a respondent is requesting discovery, the Commission cannot rely on Rule 14 in terms of a recent decision in *Continental tyres*,⁴² but has to rely on the discovery rules to protect privileged information.

42. The Tribunal has confirmed that "*legal representatives and economic advisors to a respondent in a matter must have access to confidential documents in order for justice to be achieved.*"⁴³ Based on this principle, it is common practice that confidential documents are exchanged between parties' legal and economic advisors together with confidentiality undertakings.⁴⁴ This enables the legal and economic experts to prepare for the hearing with all available information, including confidential documents. Such a process is colloquially called sharing confidential information on a "counsel-to-counsel" basis although it extends beyond legal advisors to include economic advisors as well.

5. Merger proceedings

43. The process of accessing documents in merger proceedings seems to be less controversial, as merging parties seek to have their transaction assessed and decided upon as quickly as possible.

44. During the investigation of the merger, Rule 15 applies, subject to the restrictions of Rule 14.

45. After recommending its decision to the Tribunal, in the case of a large merger, the Commission must file its record with the Tribunal. The merging parties will then be entitled to the non-confidential version of the Commission's record.

46. In the case of an intermediate merger, and a reconsideration by the merging parties, Rule 15 read together with Rule 14 applies, in that the merging parties will also be entitled to the non-confidential version of the record.

47. In merger proceedings, the controversy around access to the Commission's record is mainly in relation to access to confidential information submitted by third parties during

⁴² *Continental Tyres South Africa (Pty) Ltd and Goodyear South Africa (Pty) Ltd v the Competition Commission and others* (case no. 157/CAC/Nov2017)

⁴³ *Allens Meshco (Pty) Ltd and others / Cape Gate (Pty) Ltd and another* (CR093Jan07/CNF094Jul15;CNF095Jul15) para 49.

⁴⁴ *Allens Meshco (Pty) Ltd and others / Cape Gate (Pty) Ltd and another* (CR093Jan07/CNF094Jul15;CNF095Jul15) para 34.

the investigation. The merging parties may only have access to the confidential record if the owners of the relevant confidential information have waived confidentiality.

48. However, since the *Unilever*⁴⁵ decision (discussed below), it has now become a practice to provide the merging parties' legal representatives with access to the confidential record. This is subject to the consent of the relevant owner of the confidential information, and also subject to such representatives signing a confidentiality undertaking that they will not divulge any of the confidential information to their client or any other party. This process can only be followed if the Tribunal has issued a directive in the particular matter to pursue this route.

49. In practise, the Commission prepares an indexed record of its investigation and provides a confidential version to the Tribunal to consider. Where required, such a confidential bundle is presented to the legal and economic advisors of merging parties that seek to impugn the Commission's findings.

6. Protection of confidential information.

6.1. Legal framework

50. The protection of confidential information is governed under sections 44 and 45 of the Competition Act.

51. When submitting information to the Commission, a person may identify and claim the relevant information as confidential.⁴⁶ Confidential information is defined in the Competition Act as *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.*⁴⁷

52. The Commission is bound by a claim of confidentiality, but may at any time during its proceedings refer the claim to the Competition Tribunal (Tribunal) to determine whether or not the information claimed to be confidential is confidential information, as defined in the Competition Act.⁴⁸

53. A person who seeks access to confidential information may apply to the Tribunal for the disclosure of the confidential information.⁴⁹ The Tribunal will then determine whether or not the information is confidential information, as defined in the Competition Act. If the Tribunal finds that the information is confidential information, the Tribunal will make an appropriate order for access.

54. The Commission may take into account confidential information when making any decision.⁵⁰ However, it is an offence to disclose any confidential information concerning

⁴⁵ The Competition Commission of South Africa v Unilever PLC and others (Case no. 13/CAC/Jan02)

⁴⁶ Section 44 of the Competition Act

⁴⁷ Section 1((1)(v))

⁴⁸ Section 44 of the Competition Act

⁴⁹ Section 45 of the Competition Act

⁵⁰ Section 45A of the Competition Act

the affairs of any person or a firm, unless the information is disclosed for, *inter alia*, the purpose of the proper administration or enforcement of the Competition Act.⁵¹

55. The provisions on confidential information in the Competition Act⁵² have recently been amended in the Competition Amendment Act, no. 18 of 2018 (the Competition Amendment Act, 2018).⁵³ The proposed amendments provide that any Minister may access a firm's confidential information where the Minister uses it for purposes of the Act.⁵⁴ The amendments require the Commission, the Tribunal and the Minister to treat as confidential any information claimed to be confidential, until a final determination has been made on the confidential nature of such information. The amendments allow the Commission to determine whether the information claimed to be confidential is "*confidential information*", as defined in the Act, and make an appropriate determination concerning access to that information. In terms of the proposed amendments, an "appropriate determination" includes the disclosure of confidential information to legal and economic advisors subject to confidentiality undertakings.⁵⁵ So what is changing is that the Commission will be empowered to make a determination whether or not information is confidential and also to determine access to confidential information. Before the Commission makes any determination on whether or not the claimed information is confidential, the Commission must give to the proprietor of the confidential information and a party seeking access notice of its intention to make such a determination. The claimant will then be allowed to make the necessary representations. A person aggrieved (whether the claimant, the merging parties or the respondent) by the Commission's determination may approach the Tribunal to confirm or substitute the Commission's determination.

56. The amendments also provide that where determination has been made by the competition authorities for access to confidential information, it may include disclosure of the confidential information to the legal representatives and economic advisors of the person seeking access, subject to the provision of appropriate confidentiality undertakings.

57. Although the amendments have been passed into law, they have not yet come into effect. The Minister will also have to issue rules for the access to confidential information under the new amended provisions, once they have come into operation.

6.2. Protection of confidential information in practice

58. In *Unilever*, the competition authorities discussed the issue of access to confidential information by the merging parties in a contested merger.⁵⁶ In that case, the legal representatives of the merging parties requested access to confidential information to enable them to consider whether to challenge the confidentiality claim.⁵⁷ The Commission

⁵¹ Section 69 of the Competition Act

⁵² Section 44 and 45 of the Competition Act

⁵³ Under sections 27 and 28 of the Competition Amendment Act no. 18 of 2018

⁵⁴ Section 45(3).

⁵⁵ Section 44(9).

⁵⁶ *The Competition Commission of South Africa v Unilever PLC and others* (Case no. 13/CAC/Jan02)

⁵⁷ in terms of section 45 of the Competition Act

refused to make the information available on the grounds that the information was considered to be confidential. The Competition Appeal Court (CAC) ordered the Commission to give the merging parties' legal advisors access to the full record of the merger investigation, including information claimed as confidential, subject to the legal advisors providing the Commission with confidentiality undertakings prior to being granted access. The CAC restricted access by the merging parties' the legal advisors to inspection of the documents at the Commission's offices. The legal advisors were also ordered not to reproduce the record they had inspected. In reaching this decision, the CAC had to balance two rights, namely the right to a fair hearing by accessing the relevant information and the right to privacy by protecting information provided to the Commission.⁵⁸

59. Since the *Unilever* decision, the practice in relation to access to confidential information is to give the parties' legal representatives access to the confidential record. This is, however, subject to a Tribunal's directive directing the Commission to do so. The provision of the confidential record to the parties' legal representatives is also subject to the consent of the owner of the confidential information, and also subject to the legal representatives submitting a duly signed confidentiality undertaking. The undertaking must confirm, amongst others, that the legal representatives will not divulge any of the confidential information to their client or any other party. In practice, however, it is virtually impossible for competition authorities to monitor compliance with the confidential undertakings provided by legal representatives, because communication between legal representatives and their clients is protected by privilege. This system therefore depends on the professional ethics of legal representatives.

60. The respondents or the merging parties themselves are only given access to the redacted version of the Commission's decision and the redacted version of the Commission's record, if required.

61. There have, however, been cases where the owner of the relevant confidential information will not consent to its confidential information being disclosed even to the merging parties' or respondents' legal representatives. In these instances, the merging parties or the concerned respondent may apply to the Tribunal for an appropriate order. The Tribunal, in issuing a directive or order in this instance, always tries to be practical and would generally not force third parties to disclose their confidential information against their will. In such circumstances, the Commission will, unfortunately, not be able to rely on the confidential information.

62. A party may request that a specific session that will discuss confidential information in a hearing be conducted *in camera*. This is in order to ensure that the confidential information is only heard by the Tribunal, the Commission and the legal representatives of the parties to the matter.

⁵⁸ Ibid

ANNEXURE: Access to the Commission's record under the old Commission Rule 15 – Summary of important cases

63. Rule 15 was interpreted by the South African Supreme Court of Appeal (SCA) in *ArcelorMittal*.⁵⁹ The SCA found that it would be absurd to allow a member of the public to have access to the Commission's record, whilst refusing a litigant access to the same record.⁶⁰ As a result, the SCA found that ArcelorMittal (AMSA), being one of the litigant, was entitled to the Commission record subject to any claims of privilege or any restriction under Commission rule 14.⁶¹

64. The SCA found that the Commission could not prevent access to the record generally, but that it had to identify specific documents or categories of documents to which it may wish to restrict access.⁶² The SCA, however, recognised that the Commission may be obliged to restrict information relating to the investigation if it is in the public interest and if the Commission reasonably believes that disclosure would prejudice the future supply of such information.⁶³

65. However, the SCA did not clarify the stage at which a respondent could get access to the Commission's record, namely whether a respondent is entitled to have access to the Commission's record before or after close of pleadings.⁶⁴

Legal developments following ArcelorMittal interpretation of Rule 15

66. Following the SCA's judgment in *ArcelorMittal*, the Commission received an avalanche of requests for access to the Commission's record in various cases during the pleading stage, but before the filing of the respondents' answering affidavits. The respondents in complaint proceedings used the SCA's judgment in *ArcelorMittal* to circumvent the normal discovery process, which ordinarily happens after the close of pleadings. In some cases, the respondents refused to file their answering affidavits before receiving the Commission's record. This resulted in protracted interlocutory applications for access to the Commission's record resulting in a negative impact on the length of the litigation process.

67. Prominent examples of the impact of the old Rule 15 in delaying cases being heard on the merits are *Group Five Ltd v The Competition Commission*⁶⁵ (Group 5); *The Standard Bank of South Africa Ltd v the Competition Commission* (Standard Bank);⁶⁶ *Waco Africa*

⁵⁹ *Competition Commission v ArcelorMittal South Africa Ltd and Others* – 2013(5) SA 538 (SCA)

⁶⁰ *ArcelorMittal* para 46

⁶¹ *Ibid*

⁶² *ArcelorMittal* para 50

⁶³ *Ibid*

⁶⁴ *Group 5 (Tribunal)* para 18

⁶⁵ *Group Five Ltd v The Competition Commission* (CR229Mar15/DSC124Sep15) – Tribunal decision of 18 January 2016; *Group Five Ltd v The Competition Commission* (139/CAC/Feb16) – CAC decision of 23 June 2016

⁶⁶ *The Standard Bank of South Africa Ltd vs the Competition Commission* (160/CAC/Nov17)

(Pty) Ltd and others v Competition Commission;⁶⁷ and *Continental Tyres South Africa (Pty) Ltd and Goodyear South Africa (Pty) Ltd v the Competition Commission and others*.⁶⁸

Group 5

68. In Group 5 the question was at what stage of a complaint proceeding may a respondent require the Commission to discover its investigative record?

69. Following a hearing in Group 5, the Tribunal held that access to the Commission's record had to be given within a reasonable time. The Tribunal found that it could align the general right of access to the Commission's record with the discovery rights afforded in the Tribunal Rules. The Tribunal also considered that a reasonable time to provide the record amounts to the time for production of discovered documents in terms of the Tribunal Rules, namely after the close of pleading. This meant that a litigant who had requested access to the Commission's record would only obtain such record during the discovery process. In addition, the Tribunal noted that the right contemplated in Commission Rule 15 did not aim to facilitate a defence by the respondent. The Tribunal accordingly found that Group 5's request for access to the Commission's record before filing its answering affidavit was premature, and dismissed Group 5's application for access to the Commission's record before close of pleadings.

70. Group 5, however, appealed the Tribunal's decision to the Competition Appeal Court (CAC). On appeal, the CAC engaged with the interpretation of Rule 15(1) and confirmed the SCA's decision in *ArcelorMittal* that "any person" in Rule 15 included a litigant. The CAC thus found that Group 5, as a litigant, was entitled to access the Commission's record save for any documents that were restricted in terms of Rule 14(1). The CAC accepted the Tribunal's finding that access to the Commission's record needed to be given within a reasonable time. The CAC, however, criticised the Tribunal for finding that a reasonable time was affected by the position of the respondent as a litigant. The CAC remarked that the determination of a reasonable period within which the Commission must give access is not affected by the status or identity of the requester.

71. The CAC found that a litigant's entitlement to discovery is distinct from a general right of access such as the right envisaged under Rule 15(1).

Standard Bank

72. In *Standard Bank* the Commission referred a matter to the Tribunal against various banks alleging that they had engaged in collusive conduct with regard to trading in foreign currency (the Forex case). Instead of filing an answering affidavit, Standard Bank amongst others, applied to the Tribunal for access to the Commission's record in terms of Rule 15. The Tribunal dismissed Standard Bank's application that the record should be produced within 5 days and directed the Commission to provide Standard Bank with the record at the same time as it produces discovery in the Forex case. Standard Bank appealed the Tribunal's decision to the CAC. In allowing Standard Bank access to the Commission's record under Rule 15, the CAC reiterated the remarks it had made in the *Group 5* matter. The CAC noted that there might be legitimate cause for amending Rule 15, but as it

⁶⁷ *Waco Africa (Pty) Ltd and others v Competition Commission* (CR27Feb18/STR301-EXC300-DSC078/Mar-May18)

⁶⁸ *Continental Tyres South Africa (Pty) Ltd and Goodyear South Africa (Pty) Ltd v the Competition Commission and others* (case no. 157/CAC/Nov2017)

currently stands, Rule 15 does not provide for the restrictions contained in section 7 of PAIA.⁶⁹ Restrictions similar to those contained in section 7 of PAIA would essentially say that a person cannot use Rule 15(1) to access the Commission's record, if the record is requested for litigation purpose and if the litigation process has already started.

Waco

73. Following the CAC's ruling in *Standard Bank*, in the *Waco* case,⁷⁰ the Tribunal ruled that in light of the jurisprudence around request for access to the Commission's record in terms of Rule 15, it had no choice but to order the Commission make the record available to the respondents in a case involving the rigging of a tender for scaffolding issued by Eskom (the national electricity supplier) amounting to R4.5 billion.

74. The Commission appealed both the CAC's decisions in *Standard Bank* and *Waco* to the Constitutional Court, and is currently awaiting judgement in both cases.

Tyre case

75. Another important case dealing with access to the Commission's record in terms of Rule 15 is the Tyre case.⁷¹ In this case, Goodyear and Continental sought access to the transcripts of interrogations conducted by the Commission during its investigation against Tyre manufacturers, correspondence between the Commission and Parsons (the complainant) and correspondence between the Commission and Bridgestone (the leniency applicant). Goodyear's and Continental's appeals were brought following the Tribunal's dismissal of their applications for access to the above documents. The Tribunal found that these documents were privileged and/or restricted. Goodyear and Continental subsequently appealed the Tribunal's decision to the CAC.

76. In upholding both appeals and dismissing the Tribunal's decision, the CAC held that the Commission failed to adduce evidence to make out a case for the privilege. The CAC found that the Commission had failed in its claim that it is entitled to resist disclosure on the basis of an assertion of privilege. The CAC also found that Rule 15 read with Rule 14 is not applicable when a litigant seeks discovery of documents. Accordingly the Commission could not rely on Rule 14 to resist production of the transcripts by claiming that these documents were privileged and/or restricted. The matter is currently on appeal to the Constitutional Court.

⁶⁹ Paragraph 33 CAC decision in *Standard Bank*

⁷⁰ *Waco Africa (Pty) Ltd and others v Competition Commission* (CR27Feb18/STR301-EXC300-DSC078/Mar-May18)

⁷¹ *Continental Tyres South Africa (Pty) Ltd and Goodyear South Africa (Pty) Ltd v the Competition Commission and others* (case no. 157/CAC/Nov2017)