



WHAT HAPPENS TO CONFIDENTIAL INFORMATION EXCHANGED BETWEEN THE COMPETITION COMMISSION AND SECTOR REGULATORS AS THE NUMBER OF CO-OPERATION AGREEMENTS INCREASE?

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The protection of confidential information has always been a feather in the cap of the Competition Commission ("Commission"). The Competition Act No. 89 of 1998 ("Competition Act") distinctly provides that the Commission is bound by a claim of confidentiality by business and that the sharing or disclosing of such confidential information other than provided for in terms of the Competition Act, is an offence liable to a fine, imprisonment or to both a fine and imprisonment.

INTRODUCTION

A memorandum of agreement ("MOA") was entered into between the Commission and the Construction Industry Development Board ("the Construction Board") in July 2016. Published in Government Gazette 40140, the agreement allows for the exchange of information and the protection of confidential information, between the two entities in the interest of protecting competition within the construction industry. The question is however, how will confidential information be protected?

THE OBJECTIVES OF THE MEMORANDUM OF AGREEMENT

Amongst others, the objectives of the MOA are to establish a formal basis for co-operation when considering competition matters within the construction industry and managing areas of concurrent jurisdiction over prohibited practices such as contractors engaging in collusive practices, tenderers engaging in collusive practices with other tenderers and tenderers exchanging information regarding tenders with any other tenderer, prior to the closing time and date for tenders.

The Competition Act provides for concurrent jurisdiction over regulated entities in terms of competition matters. In this regard, the Competition Act mandates that the manner in which concurrent jurisdiction is exercised, must be managed in terms of negotiated agreements to co-ordinate and harmonise the actions of a specific regulatory authority and the Competition Commission. The aim of such agreements is to ensure the consistent application of the Competition Act.

The basis for a MOA is therefore to clarify how the concurrent jurisdiction will operate where competition concerns overlap with regulatory responsibilities.

The Commission has signed numerous MOAs with other regulatory authorities to date. Amongst others, these include the Council for Medical Schemes, the Independent Communications Authority of South Africa (ICASA), the National Gambling Board, the Postal Regulator and the National Electricity Regulator of South Africa (NERSA). It is notable that on paper the MOAs are all similar and straightforward, but it is respectfully submitted that these MOAs do not always appear to provide much guidance in practice. From a practical point of view, one issue that appears constantly, relates to the sharing of confidential information.

The Construction Board has, in terms of the relevant legislation, published a code of conduct for all construction related procurement which is applicable to all participants involved in the construction procurement process. This code provides that all parties involved in construction related procurement, whether with regard to public or private construction related procurement, should apply with all applicable legislation and associated regulations. The code also lists specific examples of conduct that conflict with the code including matters concerning collusive practices.

The MOA between the Commission and the Construction Board clearly provides for the exchange of information that may be necessary to give effect to the agreement between the two regulators. The agreement also states that any information shared between the Commission and the Construction Board pursuant to the MOA shall be used only for lawful supervisory and statutory purposes, and furthermore, that the Commission and the Construction Board may share confidential or restricted information subject to their respective statutory confidentiality requirements. The question is however, what statutory requirements are prescribed in terms of the Construction Industry Development Board Act No. 38 of 2000 ("Construction Board Act")?

It is notable that the Construction Board Act provides for secrecy in that staff and members of the Construction Board may not disclose information that may be considered confidential. Furthermore, that

any person who breaches this duty to hold confidential information in secrecy, will be subject to disciplinary action. However, such a person is not personally liable in respect of anything done or omitted in good faith in the exercise of the performance of a duty or in respect of anything that may result therefrom.

Having regard to this and the intention of the MOA, it is important to thoroughly consider what this sharing of confidential information between official bodies or regulators actually entails, with due regard to statutory confidentiality requirements. This is of utmost importance when one considers the confidence that many a business have when sharing such pivotal confidential information with the Commission.

It is clear that the test from a Competition Act perspective, when considering the duties of the regulator when dealing with confidential information, far exceeds the provisions in terms of the Construction Board Act. It is submitted that therein lies the cause of concern as the MOA makes provision for sharing of confidential information by the Commission with another regulator and such regulators governing legislation provides for a less onerous duty to protect confidentiality than provided for in terms of the Competition Act.

CONCLUSION

Whilst it is desirable and even favourable from a competition law perspective to enter into MOAs of this nature, there are a host of other permeating issues that ought to be carefully considered. We ought to strike a balance between the need to advance competition law and the sharing of information between regulators in respect of achieving this. This should be achieved without encroaching on the Commission's duties and obligations or businesses' trust and inherent right to the protection of confidential information, when the Commission shares confidential information based on an MOA entered into.

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