COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM148Dec21 / CNF 119 Nov 23

In the matter between:

VODACOM PROPRIETARY LIMITED	First Applicant
BUSINESS VENTURE INVESTMENTS NO 2213 PROPRIETARY LIMITED	Second Applicant
and	
FROGFOOT NETWORKS PROPRIETARY LIMITED	First Respondent
THE COMPETITION COMMISSION OF SOUTH AFRICA	Second Respondent

Case No: LM148Dec21 / CNF120 Nov 23

In the matter between:

VODACOM PROPRIETARY LIMITED	First Applicant
BUSINESS VENTURE INVESTMENTS NO 2213 PROPRIETARY LIMITED	Second Applicant
and	
VOX TELECOMMUNICATIONS PROPRIETARY LIMITED	First Respondent
THE COMPETITION COMMISSION OF SOUTH AFRICA	Second Respondent

In re the large merger between:

VODACOM PROPRIETARY LIMITED Primary Acquiring Firm

And

BUSINESS VENTURE INVESTMENTS NO 2213 PROPRIETARY LIMITED Primary Target Firm

Panel:	Mr A Wessels (Presiding Member)
	Ms A Kessery (Tribunal Member)
	Prof T Vilakazi (Tribunal Member)
Heard on:	31 January 2024
Orders Issued on:	5 February 2024
Reasons Issued on:	29 February 2024

REASONS FOR DECISION

Introduction

1. This matter relates to two separate applications[1] brought by Vodacom Proprietary Limited ("Vodacom") and Business Venture Investments No 2213 Proprietary Limited (collectively referred to as "the applicants" or "the merging parties") for access to all information provided by Frogfoot Networks Proprietary Limited ("Frogfoot") and Vox Telecommunications Proprietary Limited ("Vox") respectively (collectively referred to as "the respondents") to the Competition Commission ("Commission")[2] during its investigation of the proposed large merger between the applicants, and which information the respondents claim to be confidential.

2. We note that this matter does not concern a challenge to the respondents' confidentiality claims. It concerns disputes between the parties over the manner of access to the

[1] We deal with both applications in these reasons as they relate to the same issue, i.e., the manner of access to the information of Frogfoot and Vox respectively, claimed as confidential.

[2] The Commission did not participate in the proceedings and attended the hearing as an observer.

respondents' information provided to the Commission, which are assumed for purposes of these reasons to be confidential information.

3. The respondents have tendered access to the applicants' external legal representatives and independent economic experts[3] to view all their information/documents/data (as explained in more detail below) without the applicants taking possession of the information i.e., they may view the information but not receive hard and/or soft/electronic copies of the information in terms of tender. The applicants contend that, in the context of this merger case, this is not practical from an administrative perspective and not meaningful access since they require hard and/or soft/electronic copies of the information.

4. Having heard the parties, and after receiving draft orders from the parties, we issued our orders on 5 February 2024.

5. We set out our reasons for our decisions below.

Our orders

6. The applicants during the hearing indicated that their immediate issue is access to the information contained in, referred to, or relied upon in the Commission's merger report.[4] They provided the Tribunal with draft orders in respect of each application and the respondents commented on those draft orders.

7. In our orders of 5 February 2024, we distinguish between two categories of information (i) Frogfoot/Vox information contained in, referred to, or relied upon in the Commission's merger report; and (ii) all other information submitted by Frogfoot/Vox to the Commission during its investigation which does not fall in the category in (i) above.

(i) Information contained in, referred to, or relied upon in the Commission's merger report

8. In relation to the information contained in, referred to, or relied upon in the Commission's merger report that is claimed as confidential by Frogfoot and Vox respectively, we ordered that the respondents must provide the merger parties' external legal representatives and independent economic experts (collectively referred to as "independent advisors") who have signed confidentiality undertakings, with access to all such information; and to permit the

[3] Subject to appropriate confidentiality undertakings.
[4] Transcript pages 21 and 70.

Commission to provide such independent advisors with access to unredacted copies of all paragraphs in its merger report containing such information.

9. In regard to Vox, our above order contains one exception relating to Vox's information contained in paragraph 376 and the letter dated 21 March 2022 referred to in footnote 443 of paragraph 376 of the Commission's merger report.[5]

10. "Access" for purposes of our order means the provision of copies of Frogfoot's/Vox's data and documents, and of the relevant paragraphs of the Commission's referral, to the independent advisors for use at their own offices and at the Tribunal. Copies of any Excel documents must be provided in open-file electronic format.

(ii) Other information

11. In terms of all other information claimed as confidential by Frogfoot and Vox respectively which does not fall in the abovementioned category of information, we ordered that the respondents give access to the applicants in accordance with the following access regime:

11.1. Subject to the provision of confidentiality undertakings, Frogfoot/Vox will make available for inspection to the merger parties' independent advisors, all such information. This information shall be:

(i) in unredacted form, with the merger parties' independent advisors having unrestricted rights of inspection and the right to take notes;

(ii) available for inspection for a sufficient period of time to enable the merger parties' independent advisors to engage meaningfully with the information and to determine its relevance to the merger proceedings;

(iii) available in hard copy or in soft copy, as required by the merger parties' independent advisors; and

(iv) made available by Frogfoot for inspection in Johannesburg, Stellenbosch and London.

11.2. Following the exercise by the merger parties' independent advisors of the unrestricted inspection rights referred to above, such advisors shall identify the information (if any) to which they require access (as defined above) and state why access is required.

[5] See paragraphs 2 and 3 of the Tribunal's order in relation to Vox.

11.3. Frogfoot/Vox undertakes to consider any such request in good faith and shall indicate within five business days upon receipt of any such request whether or not it is willing to provide the merger parties' independent advisors with access to the information in question.

11.4. Insofar as Frogfoot/Vox is willing to provide the merger parties' independent advisors with access to all or any of the information in question, they shall immediately permit the Commission to provide such advisors with access to the relevant information.

11.5. Insofar as Frogfoot/Vox is not willing to provide the merger parties' independent advisors with access to all or any of the information in question, Frogfoot shall provide the reasons for its refusal within five business days upon receipt of any such request for access from the merger parties.

11.6. The merger parties shall be entitled to approach the Tribunal on an urgent basis in order to seek such access.

12. We do not deal with the second category (referred to above as "other information") in any further detail in these reasons. The parties essentially accepted the principle that insofar as the second category of information is concerned, the applicants' independent advisors shall view the information, and identify the information to which they require access (as defined above) and state why access is required. The respondents will then undertake to consider any such request in good faith and indicate upon receipt of any such request whether or not it is willing to provide the merger parties' independent advisors with access to the information in question. Insofar as the respondents are not willing to provide the applicants' independent advisors with access to all or any of the information in question, the Tribunal in addition, ordered the respondents to provide the reasons for their refusal.

13. The rest of these reasons deal with the issue of the manner of access in respect of confidential information of Frogfoot/Vox contained in, referred to, or relied upon in the Commission's merger report.

Background

14. During its merger investigation the Commission requested information from various market participants, including the respondents. Relevant to our reasons is that the Commission in its

referral report in which it recommends that the proposed large merger be prohibited, refers to and relies on submissions/data received from Frogfoot and Vox respectively.

15. The respondents are part of the same group of companies, although they are represented by separate legal advisors of the same firm. Vox is an Internet Service Provider and Frogfoot operates a fibre business. Both respondents claim blanket confidentiality over all information provided to the Commission during its investigation of the proposed merger. As indicated above, the confidentiality claims themselves are not the disputed issue between the parties and confidentiality is assumed for the purposes of our reasons. We however note that it is not our practice to accept blanket confidentiality claims from any parties.

16. As regards the nature of the information that Frogfoot and Vox provided to the Commission, the merging parties confirm that this information includes "*costs, prices, market shares, etc*";[6] that the information is "*extensive*" and that it concerns "*volumes, revenues and pricing in the retail FTTH business and volume and revenue data for FTTB*."[7] The merging parties label the information as "*detailed information*" that relates to a "*wide range*" of issues including "*pricing, sales, distribution, and other market information*."[8] They also say that the information is "*data heavy*" and contains "*large sets of data and detailed market, financial and geographic information*."[9]

Applicants' submissions

17. The applicants identify three categories of documents that they require access to (i) redacted sections of the Commission's referral report containing information of Vox and Frogfoot respectively; (ii) Frogfoot data and documents; and (iii) Vox data and documents.

18. They submit that they seek an order of the Tribunal permitting "meaningful" access to the above documents and data for their independent advisors. Meaningful access in the circumstances, they submit, must involve their independent advisors being provided copies of the relevant documents and data to perform their analysis, prepare for the hearing and deal with this information at the hearing. They point out that they must prepare factual witness statements and expert reports in terms of the further conduct of proceedings. Their lawyers and economists they argue would need to assimilate data, compare it to other data and have

[6] Merging parties' Heads of Argument, paragraph 44.3.
[7] Merging parties' Heads of Argument, paragraph 45.2.
[8] Merging parties' Heads of Argument, paragraph 45.2.
[9] Merging parties' Heads of Argument, paragraph 50.

it available for leading and cross-examining witnesses. They also submit that in preparing for the hearing, the exercises to be undertaken by their economists would include the aggregation of data, comparisons with other data, separate calculations, and checking of the Commission's calculations.

19. They further submit that fairness dictates that in the absence of exceptional circumstances (which would preclude the provision of copies of particular (extremely sensitive) documents), the ordinary access position should prevail, and copies of documents and data should be provided. They note that copies of the relevant documents are available to the Commission's lawyers and economists (who will in terms of the Commission's referral report in due course argue that the proposed transaction should be prohibited). To permit fairness in preparation and presentation of the matter, they argue that it is necessary for the merger parties' independent advisors to get copies of documents containing this information.

20. In relation to the restricted access regime proposed by the respondents, they submit that providing only a right to view information on a screen in a third-party representative office is unworkable and would deprive the merger parties of a proper opportunity to know, understand and meet the case against them. Their legal representatives and economists require access to the information in a manner that will allow them to analyse the data and Excel documents and for this purpose it is essential that electronic copies of the relevant documents be provided. From a practical perspective they submit that the information is data intensive and spans volumes, and the merging parties' independent advisors cannot visit Frogfoot's/Vox's representatives every time they need to consider the data and to then perform calculations using that data, without it being immediately available.

21. The merging parties further argue that once it is accepted that their lawyers and economists can go and inspect the information at the Commission's or another office and take notes, the "*cat would be out of the bag"* and that there is no suggestion in this case that the independent advisors are going to breach their confidentiality undertakings.[10]

[10] Transcript *inter alia* pages 78 and 79.

Respondents' submissions

22. As indicated above, Vox[11] and Frogfoot[12] have both tendered access to their information in terms of a restricted access regime as follows: the merging parties' independent advisors may inspect all the information in issue (such inspection to be of hard copies or in the form of electronic access). Such inspection has been tendered in Johannesburg, Stellenbosch and London for as long as the merging parties' advisors require to consider and interrogate the information. If the merging parties' advisors identify specific data that they wish to take possession of and control over, Frogfoot and Vox undertake to engage the merging parties in good faith to reach a mutually agreeable access mechanism.

23. We note that the respondents initially proposed that the applicants' independent advisors would only be able to view the information and would not be allowed to take any notes. During the hearing the respondents indicated that the applicants' independent advisors could take notes when viewing the information.[13]

24. Frogfoot and Vox argue that they are concerned about giving up possession of and control over their most guarded, competitively sensitive information particularly where the merging parties are their direct competitors. Therefore, Frogfoot and Vox wish to retain possession of and control over their confidential information.

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[11] Vox explains its tender as follows in its answering affidavit: Subject to the signature of non-disclosure agreements, Vox would provide the merger parties' external advisors with copies of all of Vox's submissions to the Commission. These documents may contain some limited redactions, either because the information in issue is particularly sensitive or because it could not lawfully be disclosed by Vox. In addition, the merger parties' external advisors were invited to attend at Primerio's offices to inspect Vox's complete unredacted submissions. In other words, the merger parties' external advisors were offered complete unrestricted access rights to inspect all of Vox's documents. Moreover, it was proposed that once the advisors had exercised those unrestricted inspection rights, they could determine whether Vox's information was relevant to the merger, whereafter Vox undertook to engage in good faith to agree on a mechanism to enable further access.

[12] The respondents submit that the tender on offer by Frogfoot was in all material respects the same as that of Vox. The tender was as follows: copies of all the submission made to the Commission would be provided to the merging parties' advisors. Insofar as those copies contained certain limited redactions, the advisors would be permitted to attend at Primerio's offices to exercise full inspection rights in respect of all the data, fully unredacted. Third, if the advisors, having exercised those inspection rights, considered it necessary to take possession of and control over the documents, such a mechanism could be agreed.

[13] Transcript page 86.

25. They point out that the Commission's investigation concluded that the proposed merger will likely result in a substantial prevention or lessening of competition because the merged entity would have the ability and incentive to engage in foreclosure in relation to certain identified markets. They allege that given the Commission's findings, the merged entity would have the ability and incentive to foreclose against them and therefore the manner of access should be restricted.[14]

26. They further contend that the manner of access tendered by them is appropriate and strikes an appropriate balance between the parties' competing rights, i.e., their rights to protect their confidential information and the merging parties' fair trial/hearing rights. They allege that there is nothing inherently prejudicial about the merging parties' independent advisors reviewing data (whether in hard or soft copy) at Primerio's offices and that it would not be a particularly onerous or time-consuming task. Thus, if the merging parties' fair trial/hearing rights are adequately protected under the access regime proposed then there is no basis to go further and to grant the merging parties possession of and control over Frogfoot's/Vox's data.

27. As regards the applicable law, they submit that the Competition Act 89 of 1998, as amended ("the Act") specifically contemplates the Tribunal having wide powers as regards the manner of access to third-party information and that the access regime on offer by Frogfoot and Vox mirrors that ordered by the Competition Appeal Court ("CAC") in *Competition Commission v Unilever PLC and Others ("Unilever*").[15] They also rely on the Tribunal's decision in *Allens Meshco.*[16]

Regulatory Framework

28. The Act recognises the rights of persons to claim any aspect of the information provided to the Commission or the Tribunal as confidential information. In terms of section 44(1) of the Act a person when submitting information to the Commission or Tribunal may identify information that the person claims to be confidential information. Section 1(1) of the Act defines confidential information 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".*

[14] *Inter alia* transcript page 28.
[15] (13/CAC/Jan02) [2002] ZACAC 1.
[16] Allens Meshco (Pty) Ltd / Cape Gate (Pty) Ltd Case CR/093/Jan07 / CNF95Jul15 ("*Allens Meshco*").

29. Section 45(1) of the Act states:

> *"(1) A person who seeks access to information that is subject to a claim that it is confidential information may apply to the Competition Tribunal in the prescribed manner and form, and the Competition Tribunal may –*
>
> > *(a) determine whether or not the information is confidential information; and*
> > *(b) if it finds that the information is confidential, make any appropriate order concerning access to that confidential information." (our emphasis)*

30. Section 44(9) of the Act states:

> *"(9) Unless the Competition Commission, Competition Tribunal or Competition Appeal Court holds' otherwise, an appropriate determination concerning access to confidential information includes the disclosure of the information to the legal representatives and economic advisors of the person seeking access —*
>
> > *(a) in a manner determined by the circumstances; and*
> > *(b) subject to the provision of appropriate confidentiality undertakings."* (our emphasis)

31. Further of relevance is that the Tribunal must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice.[17]

Our Assessment

32. As indicated above, our reasons specifically deal with the manner of access to the information contained in, referred to, or relied upon in the Commission's merger report – limited to the applicants' independent advisors and subject to appropriate signed confidentiality undertakings by them.

33. As is evident from the above provisions of the Act, the Tribunal has the power to make any appropriate determination concerning access to confidential information. Section 45(1) provides for the following considerations when a person seeks access to information.[18]
    33.1. First, a person who seeks access to information may challenge whether the information satisfies the definition of confidential information under the Act. If the

[17] Section 52(2)(a) of the Act.
[18] Also see Nutri-Flo CC v Sasol Limited [2004] 1 CPLR 248 (CT) paragraph 28 ("*Nutri-Flo*").

Tribunal finds that the information is not confidential, then there is no reason to deny access. As already explained, this is not the issue that we are dealing with in this matter.

33.2. Second, if the information is confidential (or assumed confidential as in these reasons), a person can seek access to the confidential information subject to any appropriate order by the Tribunal.

34. The Tribunal's practice regarding access to confidential information in merger and other proceedings has since *Unilever* (explained below) evolved over time and the well-established principle in Tribunal proceedings is that the legal representatives and economic advisors should be given access to confidential information subject to appropriate confidentiality undertakings. It would render the hearing "*profoundly unfair*" if the legal representatives and economic advisors of the party seeking access to the information were denied access similar to that enjoyed by the Commission and its advisors.[19] This principle has been concretised in the recent amendments to the Act as reflected in section 44(9).

35. Section 44(9) means that an appropriate regime regarding access to information over which confidentiality is asserted includes disclosing the information to the legal representatives and economic advisors of the person seeking access subject to appropriate confidentiality undertakings, unless the competition authorities have made a different determination. Notably, the default position is disclosure.[20]

36. It is clear from section 44(9) that the appropriate manner of access in any particular case is fact-specific and context-specific since it is determined by the circumstances. In other words, the facts of each case determine which manner of access or access conditions are appropriate.

37. The general principle is that the manner of access or access conditions are determined through a process of balancing or weighing the right to a fair process/hearing and the right to protect confidential information.[21] This requires an assessment of the circumstances in each case when deciding the appropriate manner of access to the documents/data claimed as confidential. There will ordinarily be a tension between the requestor's right to a fair process

[19] See *Unilever* judgement of the CAC.
[20] The approach of the Constitutional Court is similar. The general principles are that a court will ordinarily grant a full right of inspection and copying unless, in the exercise of its discretion, imposing appropriate limits is warranted. See, e.g., Independent Newspapers (Pty) Ltd v Minister for Intelligence Services in re Masetlha v President of the Republic of South Africa and Another 2008 (5) SA 31 (CC) paragraph 27.
[21] *Nutri-Flo,* paragraph 89.

and the information owner's interest in confidentiality. In each case, consideration needs to be given to the relevant facts supporting the competing interests, which includes factors such as the Tribunal's interest in ensuring a fair and expeditious hearing;[22] the information owner's interest in ensuring the confidentiality of the information is protected; the requestor's interests in obtaining meaningful access to the documents to be able to prepare for and present its case and deal with the submissions/allegations of other parties in an efficient and effective manner. The tension between these competing interests will be resolved in the interests of justice.

38. The principle of access to third-party information in competition matters was initially established in *Unilever* in the CAC where a dispute arose because section 45 of the Act is silent on what disclosure is required for the purposes of a confidentiality challenge in terms of that section. As a result, the CAC was confronted by two challenges. In the first place it was required to find a right to some disclosure to enable respondents to exercise their rights meaningfully in terms of section 45. The CAC held that this right is to be found in a reading of the purpose of section 45 which remains congruent with the constitution and the common law principle of a fair hearing. Secondly, it was confronted with an exercise in the balancing of rights. It explained that on the one hand, parties provide information to the Commission on the basis that such information will remain confidential and would certainly not find its way into the hands of respondents, and on the other hand the Act envisages a deliberative process of determining whether information is confidential as defined.

39. The CAC in *Unilever* allowed for all the information claimed as confidential to be made available to the legal representatives, subject to them providing confidentiality undertakings because "… *were respondents' legal representatives to be denied all access to the impugned information, it would render a hearing under section 45 profoundly unfair; the applicant would come before the tribunal in a veil of ignorance which would be incurable*."[23]

40. As indicated above, the manner of access must be determined on the facts of each case. Notably, the facts in these applications differ from the facts in *Unilever* because the issues at hand are not related to access for the purpose of challenging confidentiality, since confidentiality is assumed in this instance. The context of the *Unilever* decision as explained by the CAC was that the respondents' legal representatives applied to the Tribunal for an order directing the Commission to make available to them the information in its possession including that relied on in its report so that the legal representatives could consider whether

[22] Section 52(2) of the Act.
[23] See *Unilever* judgement of the CAC.

the confidentiality claims made in respect of such information were valid. In that context, the CAC provided access to the Commission's entire record but restricted the manner of access as follows: (i) it limited the access to inspection solely by the legal representatives of the respondents at the offices of the Commission; and (ii) the legal representatives not reproducing the record which they have inspected.

41. Likewise, in *Allens Meshco*, where this Tribunal ordered restricted access, the set of facts were unique and differ from the facts in these applications. It was a cartel matter where the information in respect of which access was sought, during the hearing, by the Allens Meshco Group[24] involved access to another respondent's (Cape Gate's)[25] information in support of its pleaded contention that the cartel was ineffective, which Cape Gate argued meant that the penalty to be levied against it should be reduced.[26] (Cape Gate admitted to being involved in the cartel conduct and therefore did not contest the merits.)[27]

42. The Tribunal's decision in *Nutri-Flo* confirms that each access regime must be tailored to suit the circumstances.[28] In *Nutri-Flo* this Tribunal held that when embarking on a complex balancing exercise in terms of a section 45(1) application, it may exercise its discretion differently on a case-by-case basis. The example was given that the rights to procedural fairness of an intervenor in a merger proceeding, seeking access to the merging parties' business plans, might be less compelling than an applicant or a respondent's rights to unrestricted access to its opponent's affidavits in a prohibited practice case.[29]

43. *Nutri-Flo* furthermore provides guidance on the requirements placed on applicants in access matters and states that in general in section 45 applications, regardless of the type of proceeding, applicants requiring access should allege why (i) the information is relevant; (ii) the information is of probative value; and (iii) the applicant will be prejudiced by not having access, or access in a form that is not being allowed by the claimant.[30] Once an applicant has established these elements, the onus is then on the claimant to demonstrate that it is not appropriate for the confidential information to be released in the form proposed by the applicant because it will suffer harm.[31] In the latter case, in our view where the party asserting confidentiality seeks to impose restrictions on disclosure that may impinge on the fair hearing

[24] The second to eleventh respondents in the main matter.
[25] The first respondent in the main matter.
[26] It thus included information on the appropriate quantum of any penalty.
[27] *Allens Meshco*, paragraphs 13, 29, 30 and 54.
[28] *Nutri-Flo*, *inter alia* paragraph 68.
[29] *Nutri-Flo*, paragraph 66.
[30] *Nutri-Flo*, paragraph 87.
[31] *Nutri-Flo*, paragraph 88.

rights of another party, it should explain why the restrictive regime sought to be applied is appropriate in the circumstances.

44. Firstly, we note that access as contemplated here is already restricted in that it is limited to the merging parties' independent advisors and subject to appropriate confidentiality undertakings as provided for in section 44(9) of the Act. The provision and application of these undertakings is well-understood and applied by advisors who practice competition law and economics and appear in the Tribunal. In the absence of any evidence that suggests a likely breach of these undertakings, the parties and the Tribunal must operate on the assumption that these undertakings will not be breached.

45. Access provided to ringfenced external/independent advisors does not impel the information into the public domain nor may it be used for a purpose outside of the Tribunal hearing. Documents that are handed over under claims of confidentiality may only be used "*for the purpose of the action in which they are disclosed".*[32] The independent advisors who obtain access to the Vox and Frogfoot documents/data for purposes of these merger proceedings will be prevented from using them in any other context. Furthermore, section 69 of the Act makes it an offence to disclose any confidential information that is obtained as a result of participating in any proceedings in terms of the Act.

46. In the balancing exercise that we must perform, the competitive value or sensitivity of the documents/data may be relevant to the terms on which access would be given. We acknowledge that in some circumstances, if adequately motivated, documents/data which contain information of a highly competitively sensitive nature would be produced under more restricted access terms. This necessarily presupposes that a factual basis be established to enable the Tribunal to do an assessment of the competitive value or sensitive nature of the documents/data justifying the level of protection contended for. In *Nutri-Flo*, this Tribunal noted:[33]

> "102. *Although we have accepted that all information claimed is confidential, this just means that it is not contested that they meet the statutory test on the evidence before us thus far. We do not know, unless the claimant properly enlightens us, whether we are dealing with information whose disclosure may cause blushes or ruin. Indeed none of the*

[32] *Siyakhuphuka Investments Holdings (Pty) Ltd v Ports Regulator of South Africa Transnet SOC* [2018] ZAKZDHC 19 (21 May 2018) paragraph 30, citing with approval the English decision of *Riddick v Thomas Boards Mills* [1977] 3 All ER 667 at 687.
[33] *Nutri-Flo*, paragraphs 102 to 104.

information is on the face of it obviously confidential. Discounts are not inherently confidential and are often transparent. So too are market shares, margins, capital costs and production capacities.

103. … arguments are speculative, argued at a level of generality and lack a foundation in the circumstances of the applicants in relation to it. They have not in our view demonstrated that there is a sufficient degree of harm to them by the limited disclosure to the applicants. As we stated earlier, against the competing interest of fairness in a prohibited practice case, the threshold of harm is set high and … has not demonstrated a likelihood of harm that crosses it.

104. In our view if one is to err, less danger is apparent by erring on the side of fairness even at the expense of diluting the right to privacy…".

47. In relation to relevance, the respondents did not seriously dispute that the Frogfoot/Vox information included, reflected or referred to in the Commission report would be relevant. The merging parties asserted that the information referred to in the Commission's report and relied on by it would clearly be relevant and that suffices for the relevance argument.[34] The respondents did not provide any substantiated dispute as to why that information would not be relevant. We concur with the applicants on this score and find that the information reflected or referred to in the Commission report will have probative value.

48. In our view it would be manifestly unfair for the merging parties' independent advisors to not have meaningful access to the information contained in, referred to, or relied upon in the Commission's merger report in order for them to properly represent the merging parties' case, lead and cross-examine witnesses, and advise the Tribunal. The applicants in our view have made out a sufficient case that they will be prejudiced by not having meaningful access to that information. We accept that it would be difficult for the merging parties' independent advisors, specifically external economist to meaningfully engage with "*data heavy*" information by simply viewing it on screen and taking notes. They require meaningful access to prepare their own economic assessments and to respond to the analysis of the economists of the Commission (and potentially of intervenors). We note that the merger hearing before the Tribunal is set down for May 2024 and a timetable has been set which requires factual witness statements and expert reports to be prepared in good time before the hearing.

49. The respondents' suggested restricted manner of access is largely because of their anxiety that information would be disclosed rather than any apprehension grounded on fact that would justify not providing the independent advisors with access to confidential information subject

[34] Transcript pages 76 and 85.

to signed confidentiality undertakings. Furthermore, they failed to adequately explain why the normal confidentiality protections would not suffice to protect the information from disclosure. This weighs against them when we exercise our discretionary powers to impose appropriate conditions for the manner of access to the information contained in, referred to, or relied upon in the Commission's merger report.

50. Whilst the respondents claimed that a more restricted manner of access was warranted in relation to their information contained in, referred to, or relied upon in the Commission's merger report, they did not provide any analysis nor adequate specific facts to support their proposed restricted manner of access, other than in relation to Vox's arguments regarding the abovementioned one paragraph referred to the Commission's referral report that required a stricter approach, in terms of which we gave Vox the benefit of the doubt in our order. We ordered:

"*In respect of the information contained in paragraph 376 and the letter dated 21 March 2022, Vox must furnish a version redacting the information that it considers highly competitively sensitive information and which it alleges must be subject to limited access as set out in paragraph 4 below. Access must be provided to the redacted version of paragraph 376 of the Commission's merger report and the letter dated 21 March 2022*."[35]

51. Other than making blanket claims, Frogfoot did not identify and explain to the Tribunal which of its information claimed as confidential would be so sensitive that it could not be provided in terms of the established practice as to the manner of access.[36] It made blanket claims that all its information must be treated in terms of the very restricted regime of access it contended for. These assertions however are not based on any factual premise.

52. In light of the above, we find that the respondents failed to adequately demonstrate in relation to the information contained in, referred to, or relied upon in the Commission's merger report, why the normal access regime of giving access to the independent advisors including copies of the documents/data, subject to appropriate confidentiality undertakings, is insufficient to guard against the risk of harm to them, balanced against the applicants' rights to a fair merger hearing in circumstances where the Commission is recommending that the proposed merger be prohibited.

[35] See paragraph 3 of the Tribunal's order in relation to Vox.
[36] Frogfoot Answering Affidavit paragraphs 15 and 35.

Costs

53. As is evident from the above, the disputes between the parties are in relation to the manner of access rather than access itself and neither party's position has been frivolous nor vexatious. In our discretion each party should bear its own costs.

Conclusion

54. For all the above reasons, we granted access as per our orders dated 5 February 2024.

Mr A Wessels

29 February 2024
Date

Adv Anisa Kessery and Prof Thando Vilakazi concurring.

Tribunal case managers:	Theodora Michaletos and Sinethemba Mbeki
For the First and Second Applicants:	Adv Jerome Wilson SC assisted by Adv Duncan Turner, Adv Phumlani Ngcongo, and Adv Lerato Zikalala instructed by Andries Le Grange of Cliffe Dekker Hofmeyr Inc and Janine Simpson of DLA Piper
For the Respondents:	Adv Shannon Quinn instructed by Michael-James Currie and John Oxenham of Primerio International
For the Commission:	Candice Slump, Mpumi Tshabalala, Omphemetse Kgaladi and Tshegofatso Koma