



competitioncommission
south africa

Grocery Retail Sector Market Inquiry

Guidelines for Participation

15 July 2016

INTRODUCTION TO THE GUIDELINES

1. The Competition Commission (“the Commission”) publishes these guidelines in terms of Chapter 4A of the Competition Act 89 of 1998 (“the Act”) which allows the Commission to conduct a “*formal inquiry in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm*”. These guidelines must be read in conjunction with Terms of Reference and the Statement of Issues.

2. The Commission will conduct a market inquiry to understand the general state of competition in the grocery retail sector (“the Inquiry”). The Commission initiated the Inquiry because:
 - 2.1 it has reason to believe that there are features or a combination of features in the grocery retail sector that may prevent, distort or restrict competition within the sector; and
 - 2.2 to achieve the purposes of the Act.

3. These guidelines contain the rules of participation that will apply to all stakeholders who wish to participate in the proceedings of the Inquiry. The guidelines seek to provide for a fair opportunity and a transparent process for all stakeholders to effectively participate in the Inquiry. The guidelines outline who may participate in the Inquiry and how they may submit information; the treatment of confidential information; the administrative activities of the Inquiry; and the powers available to the Commission, the Chairperson and the Panel, among other issues.

4. These guidelines are issued by the Commission after consultation with the Panel. The guidelines will be published for comment and input by interested and affected stakeholders on the Commission's website (www.compcom.co.za). After consideration of the comments received, the final guidelines will be published on the Commission's website and will become effective on the date of publication.
5. The guidelines may be reviewed from time to time. Any amendments to the guidelines will be notified to the public, and the latest version will always be that appearing on the Commission's website.

APPLICATION OF THE GUIDELINES

6. These guidelines only apply to the present Inquiry and not to other market inquiries that may be conducted by the Commission under Chapter 4A of the Act. These guidelines must be read in conjunction with the Act and its Rules as well as the Terms of Reference for the Inquiry, none of which are superseded by these guidelines.
7. Deviations from the guidelines will be at the discretion of the Chairperson who will be guided by the principles of fairness and justice and the need to facilitate the proper conduct of the Inquiry. An explanation for the deviation will be provided.
8. These guidelines do not bind the Competition Tribunal ("the Tribunal") and the Competition Appeal Court ("the CAC").

CONDUCT OF THE INQUIRY

9. In terms of section 43B of the Act, the Commission may conduct the Inquiry in any manner, subject to the provisions set out in the Act. The Commission as a public body and creature of statute may only exercise its powers within the confines of the Act. Furthermore, the Inquiry must be conducted fairly and, as far as possible, openly in accordance with the Constitution and administrative law principles.

10. For the purposes of this Inquiry, the methods that will be used for gathering information include, but will not necessarily be limited to, the following:
 - 10.1. Receipt of **Written Submissions** on the issues identified in the Terms of Reference and Statement of Issues;
 - 10.2. **Targeted Information Requests** to specific stakeholders;
 - 10.3. **Questionnaires and Surveys** to identified stakeholders or the general public;
 - 10.4. **Research Studies** including research papers, case law, case studies, and literature reviews drawn from a variety of domestic and comparative international sources;
 - 10.5. **Data Reviews** examining data or information gathered during the Inquiry;
 - 10.6. **Direct Consultations** including meetings, and in-depth interviews;
 - 10.7. **Public Consultations** including workshops and seminars;
 - 10.8. **Focus Group Discussions** with the relevant stakeholders;
 - 10.9. **Site Visits** by arrangement with the relevant stakeholders; and
 - 10.10. **Formal Public Hearings** taking into account written submissions by participants in order to provide information to the Panel on the issues to be addressed during the public hearings.

11. The submissions may be hand written or typed. Anyone who is unable to write or type may approach the Inquiry Technical Team for assistance in doing so. All relevant Forms and documents referenced herein are available on the Commission's website. Anyone who does not have access to, or has difficulty in completing any of the Forms or documents referenced herein may approach the Inquiry Technical Team for assistance in doing so. The relevant contact details for the Inquiry Technical Team are set out in paragraph 21 below.

12. Consistent with the Panel's commitment to transparency and openness, during the course of the Inquiry the Panel will, subject to any legal restrictions on disclosure that may apply, aim to make public the relevant information that it has received and may publish preliminary observations it has made, and which it considers appropriate to disclose at any stage in order to facilitate public participation and constructive comment.

13. Section 43B (3)(a) - (e) of the Act regulates confidentiality, the powers of the Commission in the conduct of the Inquiry as well as offences for non-compliance that apply to the Inquiry. In the conduct of the Inquiry, section 49A of the Act empowers the Commissioner to issue summons and interrogate, and to compel the production of books, documents and other objects which have a bearing on the Inquiry. However, section 43B(3)(b) excludes the power to enter and search premises in the conduct of the Inquiry.

ACTIVITIES AND ESTIMATED DURATION

14. The Inquiry will be conducted in accordance with the following phases:
 - 14.1. Information Gathering;
 - 14.2. Analysis of information;
 - 14.3. Provisional findings; and
 - 14.4. Final report.

15. These phases are set out in more detail in the Inquiry administrative timelines which will be published on the Commission's website and which may be amended from time to time.

16. The Commission may, by notice in the Government Gazette, amend the time within which the Inquiry is expected to be completed.

PARTICIPATION IN THE INQUIRY

17. Anyone may participate in the Inquiry either in person or through a representative. This includes the following:
 - 17.1. **Members of the public** - Any member of the public, individual or group that has an interest in the Inquiry or is affected by the subject matter of the Inquiry.
 - 17.2. **Firms** - Any owner or designated representative of a business that has an interest in or is affected by the subject matter of the Inquiry;

- 17.3. **Organised groups** - Business organisations, labour unions, civil society based organisations, industry bodies or any other bodies or institutions that have an interest in or are affected by the subject matter of the Inquiry; and
- 17.4. **Government** – State departments, agencies, state owned companies and any other organ of state or statutory body that has an interest in the Inquiry or is affected by the subject matter of the Inquiry.

METHODS OF PARTICIPATION

18. Apart from attending any public consultation that may be organised by the Panel, anyone wishing to participate in the Inquiry must do so by making a written submission in response to the Statement of Issues as read with the Terms of Reference.
19. The Panel invites all participants to make submissions on the issues identified in the Statement of Issues which must be read with the Terms of Reference. Members of the public are encouraged to make their submissions to the Commission in groups – such as social groups, church groups, ward councils, stokvels etc.
20. Anyone wishing to make an oral presentation in addition to their written submission will be required to register in due course as set out below.
21. **Written Submissions**
- 21.1. Participants wishing to make written submissions must make full submissions at the outset. It should not be assumed that those who withhold information and argument

at the outset will be afforded an opportunity to provide it later, as and when they choose.

21.2. Anyone making a written submission is expected to provide the following information in Form “GRI1” or a form substantially similar:

- (i) Particulars of the participant;
- (ii) Contact details;
- (iii) Summary of the issues addressed;
- (iv) Where the participant is making any claim to confidentiality, a Form “CC7” must be properly completed, identifying the confidential information precisely and setting out specifically the grounds for the claim; and the participant must clearly state where he or she wishes his or her identity to be protected.

21.3. Anyone making a submission should ensure that the submission is legible, succinct and to the point. Submissions may be made in any of the official languages.

21.4. The submissions may be hand-written or typed and must be sent to the Panel by email, post or hand delivered to the following addresses:

Attention: Ms Louise Du Plessis

Head of the Inquiry Technical Team

Market Inquiry into the Grocery Retail Sector

Postal Address:

The Competition Commission,

Private Bag x23,

Lynwood Ridge,

Pretoria

0040

Physical Address for hand deliveries:

THE DTI CAMPUS

Block C, Mulayo Building

77 Meintjies Street

Sunnyside,

Pretoria,

0002

Email: Retail@compcom.co.za

Contact Number: 012 394 3200 or 012 394 3320

- 21.5. Submissions that are hand delivered to the above address must be delivered between the hours of 08:30 and 15:30 on weekdays.
- 21.6. All submissions longer than ten (10) pages should contain an executive summary that will outline the main points and important aspects of the submissions. This executive summary should be as short as possible.
- 21.7. Where possible, participants in the Inquiry are requested to provide an electronic version of their submission.

21.8. All submissions should be provided in language that is accessible to readers, avoiding the use of obscure jargon and, in as far as reasonably possible, without technical terms. If necessary, participants making submissions should provide in their executive summary an abridged account describing the contents of the technical information submitted. Where submissions contain technical data, this should be presented in a format that is easily understandable to all readers and in accordance with the Guideline for Submissions on Data and Technical Analysis available on the Commission's website.

21.9. Anyone wishing to have his or her identity protected must indicate so in the Form "GRI1" and should attach a motivation for the request.

21.10. All submissions should be properly indexed and paginated, and should also be securely bound where they contain more than ten (10) pages.

21.11. The Commission will acknowledge receipt of the submissions upon receipt.

22. **Public Hearings**

22.1. The Chairperson of the Panel and two (2) panel members will preside over public hearings.

22.2. Hearings will be conducted formally in public through an open process. Where appropriate, the Chairperson may allow some flexibility in the process in order to achieve the desired purpose and to avoid any infringements of the rights of any participant in the hearing, and to ensure that the hearings are conducted expeditiously and in accordance with the rules of natural justice.

- 22.3. The Panel enjoys inquisitorial powers to examine and interrogate the information that is placed before it.
- 22.4. The public hearings will take place at different venues across South Africa to accommodate, as far as possible, the different stakeholders to this Inquiry.
- 22.5. Participants wishing to make oral presentations at the public hearings must express their interest to the Inquiry by the date set out in the administrative timelines published from time to time on the Commission's website, by completing a Form "GRI2". Such parties should estimate the time required for the oral presentation as well as the issues they wish to address at the hearing. The time allocated will remain at the discretion of the Chairperson.
- 22.6. Because the time available for public hearings will be limited, it is not possible to guarantee that everyone registering to make an oral presentation will be able to do so. The Panel will in the exercise of its discretion determine which participants may participate in public hearings in support of their written submissions. One of the factors that will be taken into consideration in the exercise of this discretion is the extent to which oral presentation will help to clarify or resolve any issues raised by written submissions.
- 22.7. A hearing notice detailing the date, venue and the intended participants in the public hearing will be published on the Commission's website within a reasonable period prior to the hearing, and the relevant participants will also receive such notice.

22.8. There is no charge for making a written submission or for attendance or participation at the public hearings.

22.9. The public hearings will be conducted mainly in English. However, to cater for the other official languages, an interpretation service will be made available if a prior request has been made for such service in the registration in Form “GRI2”.

22.10. All proceedings will be recorded in audio format. These recordings will be the property of the Commission, subject to the provisions of the Act.

22.11. The proceedings may also be transcribed and the transcripts will be the property of the Commission, subject to the provisions of the Act.

22.12. The Panel may make available the audio files and running transcript of the proceedings subject to the requirements of confidentiality and verification.

22.13. In order to effectively manage the proceedings, ensure fairness to all, any party or media representative who wishes to film the proceedings must request permission from the Chairperson to do so at least three (3) business days prior to the commencement of the proceedings. The Chairperson has the discretion to grant or deny such a request, which permission shall not be unreasonably withheld.

23. **Administrative arrangements for Public Hearings**

23.1. A written submission is a pre-requisite for making an oral presentation at the public hearings. Any party who wishes to participate in this Inquiry but cannot read or write may request assistance from the Inquiry Technical Team on how to participate.

- 23.2. In order to assist the Panel to facilitate and manage the proceedings and determine the choice of venue, parties will be required to register to participate in the public hearings. Parties who fail to register by submitting Form “GRI2” prior to the closing date for registration may be permitted to make an oral presentation, subject to time availability and at the Chairperson’s discretion; provided that such a party complies with other pre-hearing requirements set out in these guidelines.
- 23.3. Electronic copies of the visual presentations and copies of such material to be introduced at a hearing must be submitted at least fourteen (14) days prior to the hearing, unless the Chairperson has agreed to relax this requirement in any particular case.
- 23.4. Each party making an oral presentation will only be permitted to do so once, and at one designated public hearing venue, unless the Panel, in its discretion, determines that a party needs to be allowed a further opportunity to respond to certain matters immediately or later at another time or venue.
- 23.5. In general only one representative of a group or entity, either personally or through a legal representative, will be permitted to make oral submissions at the public hearings, other than witnesses the parties may wish to call in support of their submissions.

24. **Conduct of Public Hearings**

24.1. The Chairperson may, upon request, direct that a matter be heard:

- (i) in private or in camera on aspects pertaining to confidential information; or
 - (ii) that oral submissions be made at the hearing by telephone or video conference,
- if it is in the interests of fairness and expediency to do so.

24.2. The Chairperson may exclude members of the public, specific persons, or categories of persons, from attending the proceedings:

- (i) if the information to be presented is confidential information;
- (ii) if the proper conduct of the hearing requires it;
- (iii) for any other reason that would be justifiable in proceedings of the Tribunal and the CAC or in terms of the Act.

24.3. At a hearing the Chairperson may:

- (i) require any person to answer questions under oath or affirmation;
- (ii) accept oral submissions from any participant;
- (iii) accept any other information that is submitted by a participant, and
- (iv) perform any other act contemplated by relevant sections in the Act.

24.4. Confidential information presented during the hearing may not be published.

24.5. The Panel may conduct joint hearings in terms of which any number of persons may be combined as participants in the same proceedings if their respective submissions or responses seem to the Panel to involve substantially the same question of law or facts.

- 24.6. The allocated time will be guided by the simplicity or complexity of the subject matter and the number of witnesses that will give evidence. The Chairperson will also afford sufficient time as he deems appropriate for questions and answers from other Panel members.
- 24.7. The Panel may appoint an Evidence Leader to assist the Panel with the examination of information on issues at the public hearings.
- 24.8. The Chairperson may allow participants, upon request, to call their own witnesses to deal with issues. Where reasonably possible, advance notice will be given by the Panel, or the appointed Evidence Leader, of the names of witnesses to be called and the summary of their expected testimony. Participants wishing to call witnesses of their own should provide similar advance notice as well as a summary of the expected testimony to the Chairperson or the appointed Evidence Leader in sufficient time before the relevant hearing to enable the Panel to prepare. When a witness intends to refer to a document or audio-visual presentation in the course of his or her testimony, that fact, as well as the content of the document or presentation, or the means of readily identifying it among previous submissions to the Inquiry, must be included in the advance notice.
- 24.9. At any hearing, the Chairperson may call upon the Evidence Leader, if appointed, to question witnesses, and afford a similar opportunity to members of the Panel. The Chairperson may also allow participants to question witnesses, directly or through the chair as the Chairperson considers appropriate in the circumstances, in order to allow for proper ventilation of information on contested issues. Leave to question a witness, where the need to do so could reasonably be determined in advance of the

hearing, must be sought on sufficient and reasonable notice to the Panel, stating the reasons for the request.

24.10. The Panel will make available a program of the day's proceedings for the public hearings, indicating the intended order of oral presentations for the day and their allocated timeframes. Except in circumstances beyond the Panel's control, this will be done within a reasonable time period prior to the day of the public hearing in question.

24.11. If, in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the Chairperson –

- (i) may give directions on how to proceed; and
- (ii) for that purpose, if a question arises as to the practice or procedure to be followed in cases not provided for by these Guidelines, the Chairperson will determine the procedure to be followed and, in doing so, may have regard to the Tribunal or the CAC Rules for comparative guidance.

25. **Pre-Hearing Conferences**

25.1. The Panel may decide, at its own discretion, to conduct pre-hearing conferences with participants, in order to:

- (i) establish procedures for protecting confidential information, including the terms under which participants may have access to that information;
- (ii) establish who will represent the participants at the hearings and the language in which each witness will testify;

- (iii) determine the procedure to be followed at the hearing, and its expected duration;
- (iv) establish a date, time and schedule for the hearing;
- (v) give directions in respect of technical or formal amendments to correct errors in any documents filed by participants;
- (vi) identify issues in dispute and those that are common cause as between particular participants;
- (vii) clarify and simplify the issues;
- (viii) obtain admissions or confirmations of particular facts, documents or issues by particular participants;
- (ix) determine when documents will be produced or delivered, whether formally or informally, if applicable; and
- (x) otherwise assist in expediting the Inquiry proceedings.

25.2 After concluding a pre-hearing conference, the Panel will issue minutes recording any agreements arising from matters considered at the pre-hearing conference.

25.3 Members of the Panel may request that a further pre-hearing conference take place, if they deem it necessary to clarify any further issues prior to the proceedings. The provisions of these guidelines on pre-hearings shall similarly apply to a further pre-hearing conference.

26. **Summons**

26.1. The Commission may use its powers in terms of section 49A of the Act to summons persons, which includes individuals and organisations, to appear before the Panel

and to produce any relevant book, document or other object specified in the summons.

26.2. Individuals and organisations summonsed may allow their legal representatives to make representations on their behalf.

26.3. A representative acting on behalf of any individual and organisation in any proceedings must notify the Panel in advance of the following particulars:

- (i) the representative's name;
- (ii) their designation or formal authority;
- (iii) their postal address and physical address of employment or business; and
- (iv) if a fax number, email address and telephone number are available, those particulars.

HANDLING OF INFORMATION AND DATA

27. Voluntary Disclosure

It is the Commission's aspiration to solicit information from parties voluntarily, through written submissions, questionnaires, requests for information, testimony and other such means.

28. Testimony During Hearings

28.1. Every person giving oral testimony in the public hearings will either be sworn in or required to make an affirmation.

- 28.2. Every person testifying should answer any question fully and to the best of that person's ability.
- 28.3. Provisions of the Act, such as sections 49A(2), 49A(3), 72, 73(2)(d) and (f) are applicable to information given by a witness during the Inquiry proceedings. These and other relevant sections of the Act are set out in full in Annexure A.

29. **Confidential Information & Information Disclosure**

- 29.1 Information management during the Inquiry is guided and bound by procedures related to confidentiality in sections 44, 45 and 45A of the Act and Rules 14 and 15 of the Commission Rules to the extent applicable.
- 29.2. Parties have the right to claim confidentiality over information submitted to the Inquiry. Any confidentiality claim must be supported by a written statement in the prescribed form "CC7". The parties must identify the confidential information and provide a full explanation to the Panel as to why the information is considered confidential. It is important in this regard to bear the following in mind:
- (i) Trade, business or industrial information that belongs to a firm, that has a particular economic value and is not generally available to or known by others is entitled to protection as confidential information in accordance with the Act.
 - (ii) A claim of confidentiality is binding on the Panel and the Commission during the conduct of the Inquiry, subject to Section 44 of the Act. If the Panel is of the view that the information is not truly confidential as defined in the Act, it may, at any time, refer the claim to the Tribunal to determine whether or not the information is confidential.

(iii) The Panel may request a party to submit two versions of their submissions: one confidential version for the Panel and the Commission only, and a non-confidential version which omits any confidential information, which may be disclosed to the public.

29.3. Access to confidential information or documents submitted to the Inquiry shall be in accordance with the provisions stipulated in section 45 of the Act and Commission Rules 14 and 15.

29.4. Where information is subject to a claim of confidentiality, the Panel may, with the written consent of the owner of such information, allow specified third parties such as external legal representatives and independent economic experts appointed by stakeholders to view and assess the confidential information subject to confidentiality undertakings by the parties concerned.

29.5. Any party who seeks access to information that is subject to a confidentiality claim may apply in the prescribed manner and form to the Tribunal, as stipulated in section 45 of the Act. Equally, the party with confidentiality claims may appeal an unfavourable ruling on the Tribunal in the CAC.

29.6. The Commission may use confidential information in making decisions in a manner that does not prejudice a party's claim to confidentiality as provided for in Section 45A of the Act.

CONCLUSION OF THE INQUIRY

30. The Panel will submit a report to the Commission. The Panel will produce a confidential and non-confidential final report with the findings of the Inquiry. The non-confidential report will indicate where confidential information has been removed.
31. Prior to the final report, a provisional report will be published for comment. Stakeholders will be required to engage meaningfully with the provisional report. The Panel will review the comments, and if necessary request further interviews, information or data before finalising the report.
32. In accordance with section 43C of the Act, the Inquiry may produce any number of recommendations, including but not limited to the following:
- (i) Publication of information to help consumers and small businesses;
 - (ii) Encouragement of firms to take voluntary action;
 - (iii) Promotion of a customer or industry code of practice;
 - (iv) Recommendations to Government or other regulators on new or amended policy, legislation or regulations; or
 - (v) Initiation of further investigations in terms of section 49B of the Act or of immediate enforcement actions in terms of section 50 of the Act against a particular firm or firms.
33. In terms of section 43B(6) of the Act, the Commission must issue a report in accordance with section 43(C) of the Act within the time frame stipulated in the Terms of Reference, unless amended in terms of section 43B(5) of the Act. Based on the information obtained during the Inquiry, and after considering the Panel's report, Commission may decide not to take any further action as contemplated by section 43C(3)(e) of the Act.

34. The latest version of the guidelines will always be that appearing on the website of the Commission and changes thereto will become effective on the date that they are published on the website.