Draft Guidelines on the Exchange of Competitively Sensitive Information under the Competition Act

Explanatory note

On 14 July 2017 the Competition Commission published draft *Guidelines on the Exchange of Information between Competitors under the Competition Act*, inviting public comment. The guidelines were intentionally broad and attempted to deal with as many forms of information exchange as possible.

The Commission received extensive comments from various interested parties. The main concerns raised by stakeholders related to the following:

- The definition of "Commercially Sensitive Information";
- The lack of safe harbours;
- The need for more guidance on what information competitors may safely share;
- Industry specific concerns; and
- Public announcements.

There have been various internal iterations of the guidelines over time as the Commission tried to address the concerns raised by stakeholders. The Commission finally resolved to provide narrower, more focussed guidance to industry associations in particular because it is most often industry associations that contact the Commission seeking guidance on the issue.

The Commission retained a broad approach covering all markets and as a result the amended draft guidelines, like the previous draft, do not set out safe harbours. Any safe harbours would be dependent on the features of a particular market and can be more meaningfully determined on a case-by-case basis. The amended draft however does seek to provide more clarity on the type of exchanges of competitively sensitive information that is likely to fall foul of the Competition Act and *Commercially Sensitive Information* was replaced with *Competitively Sensitive Information*. The revised draft

guidelines only apply to the exchange of Competitively Sensitive Information between competitors. The revised guidelines no longer specifically deal with price signalling or public announcements, joint ventures, cross-directorship or cross-shareholding, customer requests for quotations, market studies and benchmarking since these topics are complex and better dealt with on a case-by-case basis.

Given that a long period of time has passed since the draft guidelines were initially published the Commission resolved to publish the amended draft *Guidelines on the Exchange of Competitively Sensitive Information under the Competition Act* for a further round of public comment.

Written comments are invited by the Commission from any interested person.

The *Draft Guidelines on the Exchange of Competitively Sensitive Information under the Competition Act* are attached hereto and can also be downloaded from www.compcom.co.za/guidelines/

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The closing date for the submission of comments is **4 November 2022**.

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Guidelines on the Exchange of Competitively Sensitive Information between Competitors under the Competition Act No.89 of 1998 (as amended)

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Draft

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1. PREFACE

1.1. These Guidelines have been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended) ("the Act") which, *inter alia*, empowers and authorises the Competition Commission ("Commission") to prepare and issue guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act. These Guidelines are not binding on the Commission, the Competition Tribunal, or the Competition Appeal Court in the exercise of their respective discretions and of their interpretation of the Act.

1.2. The Commission identified a need to provide guidance to industry associations and both public and private stakeholders on the sharing of information between competitors. From time-to-time industry associations and other stakeholders request advisory opinions from the Commission on setting up information exchange systems and it is apparent that there is some uncertainty on what constitutes permissible and impermissible information exchange within the framework of the provisions of section 4 of the Act. In the circumstances there is clearly a need for the Commission to provide guidance to relevant stakeholders on the type of information exchange that may potentially be harmful to competition and the type that may enhance efficiencies.

1.3. The Guidelines present the general approach that the Commission will follow in determining whether information exchange between firms that are competitors amounts to a contravention of section 4 of the Act. The principles set out herein are not intended to be applied mechanically, as information exchange cases are evaluated on a case-by-case basis, depending on, amongst other things, the nature of the information sought to be exchanged, the purpose for which the information is being exchanged and the market characteristics and dynamics. The Commission may from time to time amend the Guidelines where necessary.

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2. DEFINITIONS

Unless the context indicates otherwise, the following terms are applicable to these Guidelines-

2.1. **"The Act"** means the Competition Act No. 89 of 1998, as amended;

2.2. **"Agreement"** when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable;

2.3. **"Aggregated information"** means information where the recognition or identification of an individual firm's information is not possible;

2.4. **"Anti-competitive"** means an action and/or conduct by a firm that has adverse effects on local/regional/national/international competition (i.e., any relevant product or geographic market);

2.5. **"Competitively sensitive information"** means information that is important to rivalry between competing firms and likely to have an appreciable impact on one or more of the parameters of competition (for example price, output, product quality, product variety or innovation). Competitively sensitive information could include prices, customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies, research and development programmes and their results;

2.6. **"The Commission"** means the Competition Commission, a juristic person established in terms of section 19 of the Act empowered to investigate, control, and evaluate competition matters in South Africa in accordance with the Act;

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2.7. **"Competitors"** mean firms that are in the same line of business[1] in a particular market. This may include firms that actually compete with one another or have the potential to enter the relevant market and compete against one another. Competitors need not be in the same geographical market;

2.8. **"Concentration"** as used in reference to markets, refers to the number and relative size distribution of firms. The fewer competitors in a market, the more concentrated the market structure**;**

2.9. **"Concerted practice"** means cooperative or coordinated conduct between firms, achieved through direct or indirect contact, which replaces their independent action, but which does not amount to an agreement;

2.10. **"Disaggregated information"** means information that has been broken down into smaller units of information;

2.11. **"Efficiencies"** means a reduction in costs incurred by firms, reduction in search costs incurred by consumers, or other changes that result in fewer resources being used to produce and transact;

2.12. **"Firm"** includes a person (juristic or natural), partnership or a trust. This may include a combination of firms that form part of a single economic entity, a division and/or a business unit of a firm;

2.13. **"Guidelines"** mean these guidelines which have been prepared and issued in terms of section 79(1) of the Act;

2.14. "**Historical**" refers to Competitively Sensitive Information that relates to past activities that does not provide a meaningful indication of future intended pricing or other competitively significant factors. Whether information is historical is determined on a case-by-case basis.

[1] *The Competition Commission of SA, Anglo American Medical Scheme & others v United South African Pharmacies & others* Case No:04/CR/Jan02

2.15. **"Individualised"** refers to information from which a specific firm's information can be identified;

2.16. **"Pro-competitive gains"** refer to increases in the total surplus or value realised by firms and consumers arising from trade due to an action and/or conduct by a firm;

2.17. **"Trade association"** means an association established by firms that operate in a specific industry to promote the collective interests of its membership;

2.18. **"Trading condition"** means any condition which affects a transaction including, but not limited to, credit terms, delivery charges, delivery schedules, minimum quantities, and interest charges; and

2.19. **"Tribunal"** means the Competition Tribunal, a juristic person established in terms of section 26 of the Act empowered to adjudicate competition matters in accordance with the Act.

3. INTRODUCTION

3.1. These Guidelines concern the exchange of competitively sensitive information between competitors. These Guidelines do not concern the exchange of information which is not competitively sensitive information. These Guidelines deal mainly with exchanges of competitively sensitive information between competitors directly or through a third party such as a trade association, an accounting firm, or a private company that collects firms' information, processes it, and disseminates it among firms.

3.2. The Commission acknowledges that the sharing of information, which is competitively sensitive but historical and aggregated, among competitors, in appropriate circumstances, could have benefits for competition, including, but not limited to: improvement of investment decisions; improvement of product positioning; provision of organisational learning;

facilitation of entering an industry; benchmarking best practices; and general trends of market demand. Information exchanges which may benefit competitors without harming competition are, for example, exchanges on good governance practices and health and safety measures as well as nationally aggregated and historical information.

3.3. However, the exchange of competitively sensitive information could also be anti-competitive by increasing the likelihood of, establishing, or facilitating collusion or coordination among competitors. Furthermore, information exchange may also allow firms to achieve collusive or coordinated outcomes without concluding explicit agreements to co-operate.

3.4. The exchange of competitively sensitive information can be instrumental in performing two crucial tasks associated with collusion: coordination and monitoring. To avoid competition, firms will have to replace their competition with coordination by, for instance, setting prices at a level above what would otherwise be sustainable in a competitive market, or by agreeing to restricting output, or by sharing markets through an allocation of sales, territories, products, customers, or tenders. Having agreed to a particular price or market-sharing arrangement, firms will monitor for compliance to ensure that the participating firms are setting the collusive price and have sales consistent with the agreed-upon market allocation.

3.5. In some instances, the exchange of competitively sensitive information can result in foreclosure of new entrants by depriving them of access to the exchanged information and enabling the incumbent firms to observe and take steps to prevent or limit their entry into the market. This type of foreclosure is only possible if the information concerned is very important for competitive rivalry. The extent of the effect of the exchange of competitively sensitive information between competitors on competition within the relevant market will depend on the facts of each case. The strategic usefulness of the competitively sensitive information also depends on its aggregation and age, as well as market context and frequency of exchange.

3.6. These Guidelines describe those information exchanges that most often occur within the context of industry associations and that are likely to be subject to investigation and to form the subject of a prosecution by the Commission, because they facilitate or amount to collusion and may enable firms to achieve collusive or coordinated outcomes without the need to conclude explicit agreements to co-operate.

3.7. These Guidelines are general and are not market, sector, or industry specific.

4. OBJECTIVES

4.1. The primary objective of these Guidelines is to provide some measure of transparency regarding the types of information exchanges between competitors which the Commission considers likely to result in a contravention of section 4 of the Act and those types of information exchanges which are not covered by this provision.

4.2. These Guidelines are intended to assist firms, industry associations and other stakeholders to make informed decisions about the competition law consequences of the exchange of competitively sensitive information between competitors.

4.3. The principles outlined in these Guidelines are based on the Commission's experience through its investigations as well as guidance from other jurisdictions in relation to information exchange between competitors.

5. LEGAL FRAMEWORK

5.1. The legal framework for assessing the exchange of information between competitors and between competitors through a third party such as a trade association, is found in section 4(1) of the Act. Section 4(1) of the Act states as follows:

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"4. Restrictive horizontal practices prohibited

(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

(a) It has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological efficiency or other pro-competitive gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering."

5.2. Section 4(1)(a) of the Act prohibits the exchange of information between competitors that has the effect of substantially preventing or lessening competition, unless a party to the information exchange can prove efficiency benefits that arise from the information exchanged. Such efficiency benefits will also have to be shown to outweigh the anti-competitive effect resulting from the information exchange.

5.3. Section 4(1)(b) of the Act prohibits outright information exchange that involves:

5.3.1. the direct or indirect fixing of a purchase or selling price or any other trading condition;

5.3.2. the dividing of markets by allocating customers, suppliers, territories, or specific types of goods or services; and

5.3.3. collusive tendering.

5.4. The main difference between section 4(1)(a) and section 4(1)(b) is the option given to parties in terms of section 4(1)(a) to put up an efficiency

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justification in defence of allegations of anti-competitive exchange of information.

5.5. Section 4(1)(b) provides for an outright prohibition when information exchange results in the conduct listed under section 4(1)(b) and there is no opportunity for raising efficiency, pro-competitive or technological gains as a defence to the alleged anti-competitive conduct.

5.6. Both section 4(1)(a) and section 4(1)(b) require that an agreement between, or concerted practice by firms, or a decision by an association of firms, be established as part of the contravention.

5.7. There are number of factors used to determine the harm caused by the exchange of competitively sensitive information which is set out below.

6. THE HARM CAUSED BY INFORMATION EXCHANGE

6.1. Anti-competitive conduct causes harm to competition within the market and to consumers through, for example, increased prices, exclusion of competitors, and raising barriers to entry.

6.2. The harmful effects of information exchange between competitors depends, *inter alia,* on the nature and characteristics of the information exchanged. As per the definition of competitively sensitive information, the nature of the information exchanged relates to the rivalry between competing firms. Generally, information related to prices and quantities is most important for competitive rivalry between firms, followed by information about costs and demand. However, if, for example, firms compete on research and development, it is the technology information that may be the most important for competitive rivalry.

6.3. General factors taken into account in evaluating the harm caused by exchange of competitively sensitive information are the market characteristics, the availability of the information exchange, the

indispensability of the competitively sensitive information given the purpose of the exchange, and whether the competitively sensitive information is historical or relates to current or future activities.

6.3.1. **Market characteristics**

6.3.1.1. The particular features of a market wherein competitors operate is an important consideration when evaluating information exchange between competitors. The relevant features of a market which may be taken into consideration include but are not limited to the following: whether products are homogenous; the level of concentration; the transparency of information in the market; the symmetry and stability of the market shares of the competing firms; barriers to entry and the history of collusion within the market.

6.3.1.2. Generally, the higher the concentration and the lesser the degree of product differentiation in a specific market, the more likely it is that competitively sensitive information exchanged between competitors may facilitate coordinated outcomes in the market and the higher the risk of an infringement of the Act. The exchange of competitively sensitive information by competitors in an oligopolistic market (a market dominated by a small number of suppliers) has a high risk of infringing the Act.

6.3.1.3. The assessment of the market characteristics will be done on a case-by-case basis. It is important to note that the exchange of competitively sensitive information may facilitate a collusive outcome even in circumstances where one or more of the features indicated above are not present or considered to be relevant.

6.3.1.4. Future price intentions, communication of current prices, exchange of disaggregated and recent past competitively sensitive information will, for example, be considered by the

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Commission as evidence of a likely contravention of the Act independent of the market features.

6.3.2. **Exchanging competitively sensitive information on non-historical current and future conduct**

6.3.2.1. As a general rule, a firm that provides competitively sensitive information to competitors about the future, such as its intentions regarding future conduct, or what it anticipates or expects regarding competitors' future conduct, is anti-competitive, because it could constitute or facilitate a collusive understanding among firms. Any exchange among competitors about their future prices is likely to be regarded by the Commission as giving rise to an anti-competitive price-fixing agreement or concerted practice in contravention of section 4(1)(b) of the Act.

6.3.2.2. Any exchange of competitively sensitive current or very recent information between competitors is likely to be regarded by the Commission as anti-competitive because it could constitute or facilitate a collusive understanding among firms as well as serve to monitor compliance with a collusive agreement. Any discussion among competitors about their current prices and/or trading terms is likely to be regarded by the Commission as giving rise to an anti-competitive price-fixing agreement in contravention of section 4(1)(b) of the Act.

6.3.2.3. The exchange of competitively sensitive past information between competitors can be anti-competitive because it allows colluding firms to monitor for compliance and thereby sustain a collusive arrangement or where such competitively sensitive information provides a meaningful indication of future intended pricing or other competitively significant factors.

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6.3.2.4. The level of aggregation is critical to an evaluation of the sharing of past competitively sensitive information with regard to its potential for supporting anti-competitive behaviour. The more disaggregated the competitively sensitive information is with regard to firms, customers, geographic areas, products, and time, the more useful the information is for monitoring of a collusive arrangement, and thus the more likely it is to be anti-competitive. Competitively sensitive information that allows identification of the firm or the customer or a narrow product-geographic area will raise competition concerns.

6.3.2.5. The frequency of price re-negotiations in the relevant market will determine whether competitively sensitive information is considered not to be useful for supporting collusion or “historical”. If the information is several times older than the average length of contracts in the relevant market, it could be considered to be historical.

6.3.2.6. It is generally accepted that the higher the frequency of information exchange, the more likely the increased market transparency will enable firms to effectively monitor each other’s behaviour, resulting in a dampening of competition in the relevant market. When long-term contracts are concluded, punishment could be possible even where exchanges are infrequent, as long as the exchanges are detailed.

6.3.3. **Availability and mechanism**

6.3.3.1. Competitively sensitive information shared among competitors to the exclusion of the general public may be considered by the Commission as evidence of a likely contravention of the Act, since it enables participating firms to achieve coordinated outcomes to the detriment of consumers in that market. This does not mean that the sharing of competitively sensitive information among

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competitors which is made public may not fall foul of the Act. The exclusion of the general public increases the likelihood of harm to competition and consumers.

6.3.3.2. Aggregated historical competitively sensitive information that is to be disseminated among industry players must be reasonably accessible to all the industry players simultaneously, whether or not they form part of a particular industry association. Such information could for example be made available to non-members of an association upon payment of a reasonable fee.

6.3.3.3. Sharing of competitively sensitive information that will be available exclusively to competitors or some competitors in a market, will raise competition concerns even though that information may be known to some customers or could be established by means of independent actions that require cost or effort, such as going to the business premises of the competitor.

6.3.3.4. In assessing the exchange of competitively sensitive information between competitors, the Commission will identify and consider the mechanism used – whether the exchange of information was carried out in terms of direct exchange between the competing firms themselves, or in terms of indirect exchange through the participation of a trade association or another entity acting on their behalf. The Commission is more likely to view direct communication of competitively sensitive information between competitors as evidence of a contravention of section 4 since depending on the facts, the involvement of an independent third party in the collection and dissemination of the information could act as a risk mitigating factor to prevent the disclosure of disaggregated non- historical information to competitors.

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6.3.4. **Indispensability**

6.3.4.1. To the extent that a real need to share competitively sensitive information to achieve efficiency gains that will be beneficial to society is identified and a mechanism of exchange is created to achieve the objective, the type of information, the aggregation, age, and confidentiality thereof, as well as the frequency of the exchange must carry the lowest risks to competition and must be indispensable for creating any efficiency gains resulting from the exchange that may be claimed by firms.

6.3.4.2. The exchange of information must be limited to the information that is relevant and necessary for the attainment of the claimed efficiency gains or objective.

7. INDUSTRY ASSOCIATIONS AND GOVERNMENT POLICY MAKERS

7.1. In this section we discuss information exchanged through industry associations and exchanges required by government policy makers. It should, however, be noted that the forms of information exchange dealt with in these Guidelines are not exhaustive but are the most common ways in which information can be exchanged between competitors.

7.1.1. **Industry Associations**

7.1.1.1. Industry associations are bodies that are created by some or all the participants in a particular industry or sector to promote the interests of that industry or sector. The decisions of associations are specifically covered in section 4(1) of the Act as decisions of associations of firms. The promotion of the interests of a particular industry or sector is not prohibited by the Act. The exchange of information that is not competitively sensitive, such as information relating to health and safety matters could, for example, be beneficial to workers in an industry or sector.

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7.1.1.2. However, decisions by industry associations can also constitute or facilitate anti-competitive practices. These associations also provide platforms for information sharing among competitors. Industry associations must take steps to ensure that information sharing between members of the association does not prevent or lessen competition.

7.1.1.3. Most industry associations are not truly independent of their members since representatives of the members often form the decision-making bodies of the association. Therefore, the collection of disaggregated competitively sensitive information from members, to be collated by associations before distribution to their members, is problematic. The Commission strongly advises that industry associations should appoint independent parties to collect and to collate the information.

7.1.1.4. Generally, if information is historical and aggregated nationally it will not be problematic, depending on the characteristics of the market. Disaggregation which would allow competitors to derive information by district, by customers, by individual firm or sub-product category, is usually highly problematic and will be considered by the Commission as evidence of a likely contravention of section 4 of the Act.

7.1.2. **Government policymakers or regulators**

7.1.2.1. Government policymakers usually require information, which may include competitively sensitive information, from market participants in order to formulate policy. Government regulators require information to allow them to regulate industries. It is perfectly legitimate from a competition perspective, for policymakers and regulators to collect and process information from market participants and for firms to provide the relevant information.

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7.1.2.2. However, competition concerns arise when industry participants themselves collect and process the information.[2] The Commission therefore recommends that policymakers and regulators themselves collect and process the information or appoint an independent party to collect and process the information. In addition, once the information has been collected and processed, steps need to be taken to ensure that the disaggregated competitively sensitive information remains confidential and is not provided to competing firms. Market participants must only be entitled to view the aggregated information.

7.1.3. **General guidance**

7.1.3.1. The Commission provides the following general guidance to firms who are competitors participating in industry associations and engaging with policy makers or regulators who require the submission of competitively sensitive information:

7.1.3.1.1. The purpose or object for the information exchange must be clearly identified and stated by the industry association or policy makers or regulators.

7.1.3.1.2. All information shared among competitors must be limited to what is relevant and necessary to achieve the object of the initiative or purpose for which the information is being collected and must carry the lowest risk.

7.1.3.1.3. The Commission strongly advises that industry associations should appoint independent parties to collect and to collate the information.

[2] See *The UK Agricultural Tractor Registration Exchange* case

7.1.3.1.4. Government policymakers may obtain disaggregated competitively sensitive information directly from firms without harming competition as long as government itself collates the information or appoints an independent party to collate the information. In addition, once the information has been collated, adequate steps need to be taken to ensure that the disaggregated information remains confidential and to ensure that it is not provided to competing firms. Market participants may only view the information if it is historical and in an aggregated format.

7.1.3.1.5. All competitively sensitive information shared among competitors must be aggregated at least nationally, must be historical and it should not be possible for competitors to identify firm specific information. For example, if only two firms participated in the exchange each firm would be able to identify the other's information. This may also be possible where the exchange involves more firms, but the market is highly concentrated.

7.1.3.1.6. Firms must not share and discuss individualised competitively sensitive information with competitors. They can, however, discuss aggregated market trends, e.g., the historical aggregated national annual industry demand or supplier information, which do not identify individual company information.

7.1.3.1.7. Competitors may not discuss individualised information on capacity, production volumes and sales figures. However, competitors can discuss aggregated total annual national capacity, production volumes and sales figures which are historical and that are prepared

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by an independent third party. The aggregated figures should not identify individual company information and should be prepared in such a way that it is not possible to extrapolate individual company information.

7.1.3.1.8. In this context customer information, marketing strategies, budgets, as well as business and investment plans, cannot be discussed by competitors either in an individualised or aggregated format.

8. CONCLUSION

8.1. These Guidelines present the general approach that the Commission will follow in assessing the exchange of competitively sensitive information. These Guidelines are not exhaustive and will not affect the discretion of the Commission and/or the Tribunal and courts to consider the exchange of information issues on a case-by-case basis, taking into account the market circumstances and the nature of the information exchanged.

8.2. Should market participants be uncertain as to whether the exchange of information may potentially contravene the Act, such market participants should approach the Commission for further guidance.

9. EFFECTIVE DATE AND AMENDMENTS

These Guidelines become effective on the date indicated in the Government Gazette and may be amended by the Commission from time to time.

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