

COMPETITION

Information Exchange and Collusion: Revised (and Trimmed) Draft Guidelines

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On 23 September 2022 the Competition Commission of South Africa (Commission) published its revised draft "Guidelines on the Exchange of Competitively Sensitive Information between Competitors under the **Competition Act no 89 of 1998**"[1] (2022 Draft Guidelines).

These follow the first set of draft guidelines, published in 2017[2] (2017 Draft Guidelines) and the 2018 settlement confirmation in respect of the diesel information exchange complaint referral the Commission had brought against various oil companies in 2012[3] (*Diesel*).

We find ourselves in the midst of an "information revolution" and have to contend with an ever-increasing role played by information and data in business decisions. It is therefore not surprising that the Commission has received numerous questions from participants in various markets seeking guidance on what information may be exchanged safely without contravening the Competition Act no. 89 of 1998 ([Competition Act](#)).

Suspicious about information exchanges between competitors

These are thorny questions because as the 2022 Draft Guidelines recognise, despite competition authorities' propensity to be suspicious about information exchanges between competitors, it cannot be denied that the sharing of competitively sensitive information may also have benefits (to improve investment decisions and benchmark best practices, to name two examples) [4].

Judgment calls on where the benefit ends and the harm starts (or overlaps), is no mean feat and must often be based on speculative predictions. An unduly hawkish approach to policing information exchange may thus have the opposite effect to the ends the Competition Act seeks to achieve – a quandary facing virtually all governmental interventions in the economic affairs of citizens.

Historically, the Commission addressed information exchange questions of market participants on a case-by-case basis, generally following the principles set by the European Commission. Over time it recognised the need for policy clarification, which led to the Commission publishing and inviting public comment on the 2017 Draft Guidelines.

Five years later, after extensive comments on the 2017 Draft Regulations (including on the topic of public announcements and on the need to recognise "safe harbour" practices) and various internal iterations, the Commission published the 2022 Draft Guidelines.

Read more about [Taking the Collusion out of Collaboration between Competitors](#).

2017 Draft Guidelines

The **2017 Draft Guidelines** were more ambitious (and longer than) the 2022 Draft Guidelines, with the former addressing specific forms of information exchange[5]. These included public announcements or signalling, cross-directorship or cross-shareholding, joint ventures, customer requests for quotations, market studies as well as bench-marking. They are not repeated in the 2022 Draft Guidelines.

Although both drafts follow a similar approach to the general factors considered in information exchange assessments, the 2022 Draft Guidelines were narrowed to focus on providing guidance specifically to industry associations rather than to competing businesses.

In explaining this change of focus, the Commission advised that the approach was adopted because in its experience it is most often industry associations who seek guidance on information exchange issues.

The Commission further advised that the specific forms of information exchange addressed in the 2017 Draft Guidelines are complex and best dealt with on a case-by-case basis. For the same reason no "safe harbours" have been formulated[6].

This means that corporate compliance officers are left with less certainty than they had hoped for and will have to adopt a cautious approach until clearer principles emerge from the cases.

A notable and welcome addition to the 2022 Draft Guidelines is the expanded definition of "Competitively Sensitive Information"[7]. This renders the very concept that underlies these guidelines more informative.

2022 Draft Guidelines

Unfortunately, the **2022 Draft Guidelines** retain the conservative norms of aggregating information at a national level and on an annual basis[8]. This when the 2018 *Diesel* settlement permitted aggregation at a provincial level on a quarterly basis. As already pointed out, an overly hawkish bias against information exchange will deprive our economy the benefits that could have been reaped from pro-competitive exchanges of information.

Flowing from the previous point, it should be noted that information exchange should generally be assessed with the "rule of reason" test (i.e. section 4(1)(a) of the Competition Act), which involves a weighing of pro- and anti-competitive effects. In *Diesel*, however, the Commission in its complaint elected to characterise the information exchange as price fixing and market division, both of which are prohibited *per se* under section 4(1)(b) of the Competition Act.

The **2022 Draft Guidelines** similarly adopt the view that the mere exchange of future prices or of current prices and/or trading terms will likely be regarded by the Commission as price fixing. Of course, if there is evidence of pricing fixing, corroborated by parties' exchange of information, then section 4(1)(b) must be applied.

However, it will be a concern if the 2022 Draft Guidelines indicate a predilection to horseshoe pure information exchange complaints into section 4(1)(b) for prosecutorial convenience (at the expense of foregoing a competitive effects analysis).

Lastly, firms should be aware that information exchange can be just as problematic when dealing with potential competitors as with actual competitors[9]. This means that the 2022 Draft Guidelines may hit information exchange practices between firms that did not consider each other to be competitors.

As a result, all firms who provide or receive information to or from other firms should scrutinise the nature of their relationship and, if at risk of being treated as competitors, should seek specialist legal advice to ensure compliance with the Competition Act.

The Commission has invited the public to comment on or before 4 November 2022.

The [2022 Draft Guidelines](#) can be viewed online

Comments can be submitted to mayas@compcom.co.za, korkoia@compcom.co.za or luker@compcom.co.za.

The views expressed by the authors are their own and do not purport to reflect the views and opinions of Werksmans Inc.

Footnotes

[1] Guidelines on the Exchange of Competitively Sensitive Information between Competitors under the Competition Act No.89 of 1998 (as amended), as published in GN 2525 in GG 46959 of 23 September 2022.

[2] Guidelines on the Exchange of Information between Competitors under the Competition Act, as published in GN 684 in GG 40980 of 14 July 2017.

[3] Competition Tribunal case no. CR098Oct12/SA245Nov17.

[4] 2022 Guidelines, paragraph 3.2.

[5] Pages 14 – 24.

[6] Explanatory Note to the 2022 Draft Guidelines, as published in GN 2526 in GG 46959 of 23 September 2022.

[7] Paragraph 2.5.

[8] Paragraphs 7.1.3.1.5 and 7.1.3.1.7.

[9] Paragraph 2.7.



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