



COMPETITION COMMISSION'S DRAFT GUIDELINES ON THE EXCHANGE OF INFORMATION BETWEEN COMPETITORS

SUBMISSION BASED ON ROUNDTABLE DISCUSSION HELD ON 13 SEPTEMBER 2017

Centre for Competition, Regulation and Economic Development

University of Johannesburg

10 October 2017

On 3 July 2017, the Competition Commission of South Africa released the Draft Guidelines on the Exchange of Information between Competitors for public comment (available [here](#)). In response to the request for public comment, the Centre for Competition, Regulation and Economic Development (CCRED) at the University of Johannesburg hosted a public platform on 13 September 2017 to debate the draft guidelines.

Presentations were made as follows, along with comments and contributions from those attending:

- Professor Massimo Motta (former Chief Competition Economist at the European Commission's Directorate General for Competition) provided reflections from the EU experience (slides attached)
- Professor Liberty Mncube (Chief Economist of the Competition Commission South Africa) provided an overview of the draft Guidelines
- Professor Simon Roberts (Executive Director of CCRED) initiated the discussion with several questions.

Based on the main contributions and discussion, key issues have been drawn together along main themes.

Greater clarity

Several participants raised the issue of whether the draft Guidelines could go further in providing clarity, narrowing the grey area of uncertainty by providing safe-harbours on one side (where information exchange is unlikely to be problematic) and indicating presumptions on the other (where information exchange is likely to be anti-competitive). It was suggested that firms may not be in a better position than they were prior the introduction of these guidelines with regard to certainty.

In the absence of precedent setting cases this is difficult (as noted by Prof Mncube) and the Guidelines maybe only able to set out how the Commission will approach cases, to provide transparency in this regard. If the document was to provide 'Guidance' rather than being Guidelines (as suggested by Prof Motta) then it would perhaps be possible for the Commission to go further in providing clarification to firms on its thinking. This could include being clearer on the problematic nature of close-to-current (such as monthly) data in concentrated markets, while lagged data and/or data over longer periods is not likely to raise issues.

Safe-harbours could be established for exchanges between firms who collectively constitute a very small proportion of the market, especially where the information is lagged. This could assist in providing comfort for co-operative type arrangements between firms which seek to collectively improve their competitiveness.

Information exchange and possible contraventions of 4(1)(a) and 4(1)(b)?

The Guidelines suggest that information exchange will generally be examined under 4(1)(a) as a rule of reason analysis, unless it is part of coordination and monitoring of an agreement or if it relates to discussions among competitors about future prices which may contravene 4(1)(b). However, given that the Act provides for an agreement *or* a concerted practice being a 4(1)(b) contravention and it is provided that there may be *indirect* fixing of prices and other terms, is it not possible for information exchange in itself may be a contravention of 4(1)(b)? Case law from other jurisdictions such as the EU (albeit with different legal provisions) and economic reasoning suggests that information exchange can constitute coordinated conduct, and not just part of enforcing and agreement. In the EU there is a presumption that certain exchanges of information could amount to a concerted practice *even* if there is no direct effect demonstrated on market outcomes (along the lines of a *per se* contravention, by object).

Information exchange between whom?

Information exchange that potentially falls foul of the Act generally refers to exchanges between competitors, however, this needs to include information exchange between *potential* competitors, where the information exchange may be supporting market division arrangements by which firms do *not* enter each other's markets.

Information exchange between parties in 'hub and spoke' type arrangements may also constitute coordinated arrangements even while the information is not exchanged between competitors themselves (for instance, information exchange through common suppliers).

Commercial sensitivity of information?

Questions were raised about the focus on 'commercially sensitive' information in terms of how useful this is as a category. This would likely cover benchmarking initiatives where local firms look to improve efficiencies and production capabilities by sharing information on costs and productivity, with positive effects for the economy, and which would not likely facilitate price fixing or market division. Concerns about collusion would be even less where these local firms face intense import competition.

On the other hand, private announcements between firms of pricing and/or supply volumes, and public announcements without commitment value (that is, announcements of intentions regarding prices and discounts), are likely to be highly problematic even while it is not clear that they are commercially sensitive.

Further comments from CCRED

- To address concerns that the interpretation of 'commercially sensitive information' may be too broad, the Commission might consider providing more guidance from international precedent as to what is commercially sensitive and anti-competitive. For instance, the ECJ in the *Dole Food* case suggested that exchanges of information between competitors affecting the "timing, extent and details" of market conduct is anti-competitive, by object.
- While the Guidelines highlight that information exchange can be instrumental in performing two crucial tasks associated with collusion: *coordination and monitoring*,

the role of information exchange in possibly facilitating *reaching* an agreement should also be noted, as well as information exchange arrangements possibly amounting to a concerted practice as such.

- Given the South African experience, it may be useful to emphasise that the exchange of disaggregated, recent and individualised information between rivals can be particularly problematic in markets that were previously cartelised.
- The Guidelines could provide references in the Annexure to other key cases involving information exchange, such as *Dole Foods*, *T-Mobile*, Danish concrete producers, Cement producers (*Cimbel*) internationally and South African cases such as the bitumen, steel, fertilizer and cement cartel cases.