GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

ECONOMIC DEVELOPMENT DEPARTMENT

NO. 684 **14 JULY 2017**

competitioncommission
south africa

Draft Guidelines on the Exchange of Information between Competitors under the Competition Act

The Competition Commission hereby, in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended), which allows the Competition Commission to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction, issues these Draft Guidelines on the Exchange of Information between Competitors under the Competition Act, for public comment.

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

The Draft Guidelines on the Exchange of Information between Competitors under the Competition Act are attached hereto and can also be downloaded from www.compcom.co.za.

Email: MayaS@compcom.co.za or KorkoiA@compcom.co.za

Tel: 012 394 3054 or 012 394 3335

The Competition Commission South Africa

Private Bag X23

Lynwood Ridge, 0040

CLOSING DATE FOR SUBMISSION OF COMMENTS: 14 SEPTEMBER 2017.

File Plan Ref Number: **CM Project**

competitioncommission
south africa

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

03 July 2017

Draft

Persons Responsible:

Maya Swart

Korkoi Ayayee

1. PREFACE

These Guidelines have been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended) ("the Act") which allows the Competition Commission ("Commission") to prepare 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 Competition Commission, the Competition Tribunal or the Competition Appeal Court in the exercise of their respective discretion, of their interpretation of the Act.

The Commission identified a need to provide guidance to both public and private stakeholders, as well as industry associations, 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.

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.

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"** includes a contract, arrangement or understanding, whether or not legally enforceable;

2.3. **"Anti-competitive"** means an action and/or conduct by a firm that has adverse effects on local/regional/national competition;

2.4. **"The CAC"** means the Competition Appeal Court as established in terms of section 36 of the Act;

2.5. **"Commercially sensitive information"** means trade, business or industrial information which has a particular economic value to a firm and its business strategy and is generally not available or known by others;

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;

2.7. **"Competitors"** mean firms that are in the same line of business in a particular market. This may include firms that actually compete with one another or have the potential to compete against one another;

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

2.9. **"Disaggregated information"** refers to information that has been broken down into smaller units of information or data;

2.10. **"Efficiencies"** mean 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;

2.11. **"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;

2.12. **"Guidelines"** mean these guidelines which have been drafted in terms of the Act;

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

2.14. **"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;

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

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

2.17. **"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 only apply to the exchange of information between competitors. An exchange of information between competitors could, however, also occur through a third party such as a trade association, an accounting firm, or a private company that collects firms' data, processes it, and disseminates it among firms.

3.2. The Commission acknowledges that the sharing of information among competitors, in appropriate circumstances, could have benefits, including, but not limited to: improvement of investment decisions; improvement of product positioning; provision of organisational learning; facilitation of entering an industry; lower search costs; benchmarking best practices; and more precise knowledge of market demand. Information exchanges which may benefit competitors without harming competition are, for example, exchanges related to accounting methods, stock control or book-keeping practices, new forms of technology and research results. It is useful to bear in mind that the exchange of information can take place within different contexts.

3.3. However, information exchange could also be used to facilitate collusive behaviour among competitors, ultimately resulting in harm to consumer welfare. Information exchange between competitors make it easy for firms to align their behaviour without the need to enter into an explicit cartel agreement or necessarily being party to a concerted practice. In some instances, information exchange can result in foreclosure of new entrants by enabling the incumbent firms to coordinate on exclusionary actions against the new entrant. The effect of the information exchange between competitors on competition within the relevant market will depend on the facts of each case.

3.4. Information exchange can be instrumental in performing two crucial tasks associated with collusion: coordination and monitoring. To avoid competition, firms will coordinate on prices, setting them at a level above

what would otherwise be sustainable in a competitive market, or on a market-sharing arrangements, by agreeing to 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. Information exchange between competitors may sustain collusion by allowing firms to monitor and punish any deviations from collusive prices or output levels.

3.5. These Guidelines describe those information exchanges that are prohibited or will be subject to investigation because they facilitate firms coordinating on a collusive outcome, monitoring for compliance with that collusive outcome, and protecting that collusive outcome from entry.

3.6. These Guidelines are intended to assist firms, industry associations and other stakeholders to make informed decisions about the exchange of information between competitors which may be viewed as harmful to competition between parties in a horizontal relationship.

4. OBJECTIVES

4.1. The primary objective of these Guidelines is to provide some measure of transparency and objectivity in 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 type of information exchanges which are beneficial to competition.

4.2. The principles outlined in these Guidelines are based on the Commission's experience through its investigations as well as guidance from other jurisdictions[1] in relation to information exchange between competitors.

[1] Such as the European Union and the United States of America

5. LEGAL FRAMEWORK

5.1. From a competition law perspective, "information exchange" refers to the sharing of information that has a particular economic value to the firm such as, for example, information relating to prices, output, costs or its business strategy. As previously stated these Guidelines are limited to the exchange of information between firms that are competitors in a particular market.

5.2. The legal framework for assessing information exchange between competitors and information exchange 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:

"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."

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

the direct or indirect fixing of a purchase or selling price or any other trading condition; (ii) the dividing of markets by allocating customers, suppliers, territories, or specific types of goods or services and (iii) collusive tendering.

5.4. The main difference between section 4(1)(a) and section 4(1)(b) is the opportunity given to parties in terms of section 4(1)(a) to put up an efficiency justification in defence of allegations of anti-competitive exchange of information. On the other hand section 4(1)(b) provides for an outright prohibition when information exchange results in the conduct listed under section 4(1)(b)[2] and there is no opportunity for raising efficiency, pro-competitive or technological gains as a defence to the alleged anti-competitive conduct. Thus under section 4(1)(a), parties to the information exchange can advance efficiency gains whilst they cannot do the same under section 4(1)(b).

5.5. Generally there are two contexts within which competitors exchange information and these are:

5.5.1. Information exchange in circumstances where there is no cartel agreement is likely to be analysed in terms of section 4(1)(a); or

5.5.2. Information exchange which facilitates a cartel agreement between competitors is likely to be assessed in terms of section 4(1)(b).

5.6. In the first instance there could be harm to competition depending on the circumstances and facts of the case. The extent to which information exchange may dampen competition depends on, *inter alia*, the structure of the relevant market (such as, for example, the level of concentration of the market or the homogenous nature of the products in question), the level of disaggregation of the information that is the subject of the exchange (i.e. by geography, customer category, pack size or product specification), the

[2] Section 4(1)(b) of the Act prohibits information exchange that occurs through (i) the direct or indirect fixing of a purchase price, selling price and trading condition; (ii) the dividing of markets and (iii) collusive tendering.

frequency of exchanges and the age of the information at the time of the exchange, as will be discussed below.

5.7. In the second instance (information exchange in support of a cartel agreement) the information exchange will be viewed as part of the cartel conduct and the harm to competition is inherent in the conduct. Cartel conduct is accepted to be most egregious in nature and is a contravention of section 4(1)(b) of the Act.

6. ASSESING THE HARM CAUSED BY INFORMATION EXCHANGE

6.1. The harmful effects of information exchange between competitors depends, *inter alia,* on the nature and characteristics of the information exchanged, as well as the structure of the relevant markets within which the competitors compete. Certain characteristics of information and market structure may make it easier for competitors to collude to the detriment of competition between them. If a system of information exchange is contemplated, the specific characteristics of the information exchange system and the market will be considered in order to assess the likelihood of harm to competition.

6.2. Information exchange may involve past conduct (e.g. past sales), current conduct (e.g. prices at which a customer can currently transact), and future conduct (e.g. intentions regarding future prices). Information can be shared directly between firms, such as through bilateral communications and public announcements, and can be shared indirectly through a third party such as a trade association, an accounting firm, a private company that provides a subscription service to collect and disseminate information, as well as other intermediaries. An evaluation of an information exchange with regards to anti-competitive behaviour will consider the type of information that is shared, how it is shared, and the market conditions under which it is shared.

6.3. **Exchanging information on past conduct and outcomes**

6.3.1. Information on past conduct includes the prices at which transactions occurred, how much was sold by which firm and to which customer, and other information associated with the past decisions of firms and the outcomes that ensued. While the sharing of this information can serve the legitimate purposes mentioned in paragraph 3.2 above, the exchange among competitors of past prices, sales, and other variables can be anti-competitive because it allows colluding firms to monitor for compliance and thereby sustain a collusive arrangement.

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

6.3.3. 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.

6.3.4. The frequency of exchange of information is closely related to the age of that information and the presence of both of these factors could facilitate collusion. It is, however, possible that, depending on the structure of the market, a single exchange may constitute a sufficient basis for collusion between firms.

6.3.5. The frequency of price re-negotiations in the relevant market will determine whether data is considered not to be useful for supporting collusion or “historic”. If the data is several times older than the average

length of contracts in the relevant market, it could be considered as historical.

6.3.6. Therefore, depending on the facts of a particular case and the market structure, information which is delayed annually and aggregated nationally will generally not raise competition concerns

6.4. **Exchanging information on current conduct**

6.4.1. Current conduct refers to existing prices and other terms of trade at which customers can transact, and the prices and other terms of trade of recent transactions. Any discussion among competitors about their current prices is likely to be regarded as giving rise to an anti-competitive price-fixing agreement in contravention of section 4(1)(b) of the Act.

6.4.2. The exchange of the terms of trade of recent transactions among competitors can also facilitate coordination, as well as serve to monitor compliance with a collusive arrangement. For example, the use of a subscription service that provides real-time or close to real-time dissemination of prices among competitors can be a device by which to propose and coordinate on collusive prices. Such information exchange can serve anti-competitive goals.

6.4.3. Information sharing of the current terms of trade that is conducted in a manner that is exclusive to competitors will raise competition concerns even if such information is publicly available. For example, a firm contacting a competitor to learn of its price is conducive to coordination and thus will raise competition concerns, even though that price information may be known to some customers.

6.5. **Exchanging information on future conduct**

6.5.1. As a general rule, a firm expressing its intentions regarding future conduct, or what it anticipates or expects regarding competitors' future

conduct, is anti-competitive, because it facilitates reaching a collusive understanding among firms. Any discussion among competitors about their future prices is likely to be regarded as giving rise to an anti-competitive price-fixing agreement in contravention of section 4(1)(b) of the Act.

6.5.2. A firm that shares information with competitors on its future prices, quantities and other elements of a business plan, is generally anti-competitive. Sharing of such information through a medium or in a setting such that the information is exclusive to firms, will raise competition concerns. Sharing of such information through a medium or in a setting, for which the immediate audience is competitors, is highly suspect, even when the information is subsequently made public. An example is an announcement at an industry gathering (such as a trade association meeting) for which the proceedings are then made public.

6.5.3. Any communication about future conduct for which it is reasonable to expect that competitors will receive that information may facilitate a collusive understanding.

6.6. General factors in evaluating information exchange

6.6.1. Market structure

6.6.1.1. 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 their market shares of the competing firms; barriers to entry.

6.6.1.2. Generally, the higher the concentration and the lesser the degree of product differentiation in a specific market, the more likely it is that information exchanged between competitors may facilitate coordinated outcomes in the market. The assessment of the market structure will be done on a case by case basis and it is important to note that information exchange 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.

6.6.2. Availability and medium

6.6.2.1. Information that is shared among competitors to the exclusion of the general public could be suspect and enable participants to achieve coordinated outcomes to the detriment of consumers in that market. The sharing of information through a medium or in a setting, for which the immediate audience is not competitors could be of concerns where it can be expected that competitors will receive the information. Examples are a press-release or standard form letter to customers describing price changes, or a company executive announcing a change in its pricing strategy during an earnings call for analysts. Any communication about future conduct for which it is reasonable to expect that competitors will receive that information may facilitate a collusive understanding.

6.6.2.2. Aggregated information that is to be disseminated among industry players must be accessible to all the industry players simultaneously, whether or not they form part of a particular industry association.

6.6.3. Indispensability

6.6.3.1. The type of data, 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.

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

7. TYPES AND PLATFORMS FOR THE EXCHANGE OF INFORMATION BETWEEN COMPETITORS AND GENERAL GUIDELINES

7.1. A facilitating practice or platform can be defined as activities or business structures that allows firms to coordinate their behaviour in such a manner that it may lead to anti-competitive outcomes.[3] In assessing information exchange between competitors it is important to identify the mechanism used – whether the exchange of information was carried out in terms of direct exchange between the firms themselves, or in terms of indirect exchange through the participation of a trade association or another entity acting on their behalf. There are various platforms through which information exchange may take place.

7.2. Firms that have reached a tacit collusive agreement do so without direct communication with one another. Such collusive firms would resort to using indirect forms of communication, such as public price announcements, or other forms of indirect communication, in order to reduce the uncertainty of market outcomes. Explicit cartels tend to coordinate their behaviours through more direct means of communication. Some of these more direct forms of communications include telephone calls, face to face meetings and written exchanges of competitively sensitive information.[4]

[3] Areeda & Hovenkamp (2010).
[4] See Annexure: The wheat milling cartel, The CRT Glass case, The Liquid Crystals Displays case, The Exotic Fruit (Bananas) case and The Gas Insulated Switchgear case.

7.3. Below we discuss a variety of platforms used for information exchange between competitors, making reference to some cases, both in South Africa as well as in other jurisdictions. It should, however, be noted that the platforms and the forms of information exchange discussed in these Guidelines are not exhaustive, but are common ways in which information can be exchanged between competitors.

7.3.1. Trade / industry associations and regulators / policy-makers

7.3.1.1. Policy-makers usually require data from market participants in order to formulate policies. It is perfectly legitimate for regulators to collect and process the information from market participants. However, the concern arises when the industry participants themselves collect and process the information.[5] The Commission therefore recommends that policy-makers themselves collect and process the information or appoints an independent party to collect and process the information. In addition, once the information has been collected and processed, there needs to be steps taken to ensure that the disaggregated information remains confidential. Market participants must only be entitled to view the aggregated information.

7.3.1.2. It is generally accepted by competition authorities globally that one of the legitimate and key objectives of industry associations is to engage with regulators on policy matters in so far as they affect the particular markets in which their members are active. Members of an industry association may legitimately exchange non-competitively sensitive information on a variety of matters without posing a risk to the competitive process, such as information related to safety and health matters.

[5] See Annexure: The UK Agricultural Tractor Registration Exchange

7.3.1.3. However, industry associations also provide a platform for information sharing among competitors. In this regard it should be noted that an industry association is not truly independent of its members, since representatives of the members often form the decision making bodies of the association. Therefore the collection of disaggregated information from its members or from their representatives in the different markets, to be collated by the association before distribution to its members, could also be problematic. The Commission therefore recommends that industry associations appoint an independent party to collect and to collate the information.

7.3.1.4. In relation to information gathered by an industry association on behalf of its members, to be disseminated among these same members, this information should comply with the competition values set out in paragraph 6 above. Generally if information is aggregated nationally and annually delayed it is not problematic, depending on the structure of the market. Disaggregation by district, by customers, by individual firm or sub-product category is usually problematic.

7.3.1.5. The information exchanged should be limited to what is relevant and necessary to achieve the purposes of the regulation and should not include incremental or additional information.

7.3.2. Information exchange within the context of governmental supplier development initiatives

7.3.2.1. Policy-makers may request market participants to participate in discussions with Government aimed at the development of local suppliers and local supply chains. The principles set out in paragraph 7.3.1 above would also apply to the exchange of information in these discussions. The question as to whether the programmes that flow from these discussions with Government

raise competition concerns falls outside the scope of these Guidelines.

7.3.2.2. The Commission provides the following general guidance for participation by companies, that are competitors, in discussions with Government aimed at the development of local suppliers and local supply chains:

7.3.2.2.1. All information shared by competitors must be relevant and necessary to achieve the object of the initiative;

7.3.2.2.2. All information shared by competitors must be aggregated nationally quarterly in arrears and contain information of not less than five competitors;

7.3.2.2.3. Competitors must not share and discuss individualised data on pricing, margins and costs;

7.3.2.2.4. Competitors can, however, discuss aggregated market trends, e.g. the aggregated national annual industry demand or supplier information, which do not identify individual company data;

7.3.2.2.5. Information relating to budget, business and investment plans should not be exchanged by competitors;

7.3.2.2.6. Competitors may not discuss individualised data on capacity, production volumes and sales figures;

7.3.2.2.7. Competitors can discuss aggregated total annual national figures (which must at all times include data of not less than five companies) which should be prepared by an independent third party. The aggregated total annual national figures should not

identify individual company data or should be prepared in such a way that it is not possible to extrapolate individual company data;

7.3.2.2.8. Customer information and marketing strategies cannot be discussed by competitors either in an individualised or aggregated format;

7.3.2.2.9. Government is entitled to obtain disaggregated information from firms 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, there needs to be steps taken to ensure that the disaggregated information remains confidential. Market participants may only view the information in an aggregated format.

7.3.3. Public announcements and market signalling

7.3.3.1. Public announcements in the context of competition matters entail, *inter alia*, announcements to the financial community such as earnings information, public speeches, declarations or articles and notifications through various forms of media, such as the firm's website, the press, etc. about future business plans of firms.

7.3.3.2. Public announcements about future prices facilitate collusion by exchanging pricing information. For example, a firm in a cartel may send out public announcements regarding their future pricing plans on certain products on a given date, signalling to other cartel members as to when and how to increase prices. By sending out signals to the market, it reduces uncertainty regarding how competitors respond to one another's actions. Therefore, public announcements or market signalling may allow colluding firms to act in concert as a monopolist. Through the coordination of pricing

signals, cartel members will be able to artificially manipulate the concerned market through price movements and volumes. Reciprocal disclosure is not a condition for establishing an infringement.

7.3.3.3. Firms should avoid public announcements that comment on past and future conduct of competitors. For example, statements commending firms for constraining capacity investment, for not pricing aggressively, or for focusing on enhancing profits and not revenues are anti-competitive, because they run the risk of coordinating on constraining competition.

7.3.3.4. Firms should also avoid public announcements that make predictive statements or forecasts about competitors' future conduct. Predicting that prices will be high, capacities will not expand, supply will be limited, and the like, can make such forecasts self-fulfilling. For example, a public announcement that firms should not price aggressively may cause firms to coordinate on not pricing aggressively. While predictive statements and forecasts about variables that are extensively exogenous to firms' conduct, such as market demand and input prices, do not run the risk of anti-competitive implications. Predictive statements and forecasts about factors that firms control, such as prices, production, investment, advertising, and capacity, is a concern.

7.3.3.5. Public announcements and public commitments about market analyses and/or future plans could be an indication of information sharing and could reduce the uncertainty about competitors' behaviour or actions in the market.[6]

7.3.3.6. Public announcements backed by public commitment facilitate access to information and ensures informed consumer choices. However, when there is no public commitment, for example to

[6] Areeda & Hovenkamp (2010).

publically announced prices, one can conclude that the purpose of such announcements is the intention to coordinate market conduct. Public announcements are also problematic in highly concentrated markets where it is easy to send signals to each other.

7.3.3.7. Public announcements can be construed as invitations to collude in the following circumstances:

7.3.3.7.1. When the announcement is not limited to what is necessary to communicate to customers,[7] but also includes additional information targeted at competitors and which is not strictly necessary for the purposes of the announcement;

7.3.3.7.2. If the announced action to be taken by the firm is made contingent on what competitors or the industry at large will do; and/or

7.3.3.7.3. If the announcement includes threats to competitors or other market players.

7.3.4. Joint ventures and other competitor collaborations

7.3.4.1. Joint ventures[8] take various forms and depending on the level of integration of the business activities of the parent companies of the parties that established the joint venture, some joint ventures may amount to mergers which ought to have been filed with the Commission. Some joint ventures are not legitimate and are simply a guise for a cartel.

[7] See Annexure: The Wood Pulp Case
[8] See Commission's Guidelines on Joint Ventures.

7.3.4.2. Information exchange between competitors can, however, also take place within the context of a legitimate joint venture or other competitor collaborations,[9] whether it be in the form of a co-operation agreement or in a jointly controlled company. Any negative effects arising from the exchange of information will be assessed in the light of the overall effects of the agreement on competition rather than separately.

7.3.4.3. A joint venture agreement or other competitor collaboration can give rise to restrictive effects on competition if it involves an exchange of commercially strategic information that can lead to a collusive outcome or anti-competitive foreclosure. The efficiency gains that may be claimed as a result of the exchange would not be considered to outweigh any anti-competitive effects if the exchange went beyond what was necessary for achieving the output of the joint venture. The information exchange should also not have the effect of eliminating all competition between the competitors.

7.3.4.4. The exchange of information that forms part of competitor collaboration agreements or joint ventures must not go beyond what is indispensable for the implementation of the economic purpose of the joint venture. For example, sharing technology necessary for a research and development agreement or cost data in the context of a production agreement. The information exchange should not result in the elimination of competition between the firms involved in such an agreement.

7.3.5. Cross-directorship / cross-shareholding

7.3.5.1. Express or tacit collusion may be facilitated by information exchange resulting from structural links between competitors in the form of reciprocal minority shareholdings, where the

[9] For example toll manufacturing agreements and supply or distribution agreements.

shareholder has the right to appoint board members of the target company. Cross-directorship is also possible when there is no cross-shareholding.

7.3.5.2. Section 4(2) of the Act contains a presumption for the existence of an agreement to engage in a restrictive horizontal practice between two or more firms if, (a) any one of those firms owns a significant interest in the other, or they have at least one director in common; and (b) any combination of those firms engage in that restrictive horizontal practice.

7.3.5.3. As a consequence of the cross-shareholding, one or more board members become members of the boards of both companies. Directors common to competitors can become a conduit for information exchanges among competitors, leading to horizontal coordination between the firms.

7.3.5.4. The preferred remedy to prevent anti-competitive information exchanges resulting from cross-directorship is in most instances the elimination of the structural link and the end of the interlock. In some cases the Commission has accepted the creation of a firewall as a suitable remedy.

7.3.6. Customer requests for quotations

7.3.6.1. Whereas customer requests for quotations or annual price reductions are lawful, they may, however, provide an opportunity for anti-competitive information exchange amongst competing firms.[10] For example, competing suppliers can exchange information by colluding on their responses to requests regarding quotations and annual price reductions submitted by customers which they have in common.

[10] See Annexure: The Automotive Wire Harnesses case

7.3.6.2. In other words, the parties to the collusive arrangement are able to discuss and share information on how best to respond to the respective requests for quotations and annual price reductions.

7.3.7. Market studies and benchmarking

7.3.7.1. Benchmarking involves a situation where an independent company collects and processes individual firm data from market players and then provides this information, including for example their individual market share, back to each of them separately. The Commission recognises that in general benchmarking can be pro-competitive, thus noting that this type of information exchange is a common feature of competitive markets and it is usually adopted by firms in order to make good investment decisions.

7.3.7.2. However, benchmarking studies can also have anti-competitive effects, as it may facilitate coordination if the information contained therein is in a disaggregated format. Benchmarking studies or market studies should always contain aggregated information which is not individualised.

7.3.7.3. Information exchanges can also arise through other third parties such as independent consultants, university research centres and other entities not considered to be a competitors of firms. In this regard there is no real information exchange between the competing firms. These third parties often publish general industry reports, periodicals and establish standards, but also may compile industry statistics or conduct benchmarking exercises based on company data (including commercially sensitive information) of individual members or participants. The aforementioned is not a contravention of the Act.

7.3.8. Cartels

7.3.8.1. As pointed out above, information exchange between competitors could facilitate coordination or monitoring of cartel conduct. Information exchange can also occur within the context of a cartel or a collusive arrangement.

7.3.8.2. When competitors exchange information to either facilitate or in implementation of a cartel arrangement, the type of information typically would include, *inter alia,* information on intentions of future conduct regarding, for example, prices or cover-prices,[11] intended future sales, market shares, territories or customer lists.

7.3.8.3. Such exchanges between two or more competitors are considered to be an indication of the existence of a cartel and part of the cartel conduct. This type of information exchange is a contravention of section 4(1)(b) of the Act. Such conduct should accordingly be avoided.

8. CONCLUSION

8.1. These Guidelines present the general approach that the Commission will follow in assessing the exchange of 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.

[11]Cover-pricing means when firms agree beforehand that they will submit tenders in such a way that a designated winner will submit the lowest or most favourable bid and the other will submit bids that are not intended to win the contract.

9. EFFECTIVE DATE AND AMENDMENTS

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

10. ANNEXURE

This annexure provides summaries of cases involving information exchange contraventions. More details about the cases can be searched using the case numbers provided for each case.

10.1. The UK Agricultural Tractor Registration Exchange ("Exchange")[12]

In the United Kingdom ("UK"), the *UK Agricultural Tractor Registration Exchange* ("Exchange") allowed its members access to dealer territories based on UK postcode areas. Information was shared on volume of retail sales, as well as market shares of the eight agricultural tractor manufacturers (including importers) in the UK market. The agreement involved the exchange of aggregated data relating to particular geographic regions, breakdowns of products or time periods. The reports contained less than 10 tractor units sold for any specific breakdown by geographic region, time period or product. The European Commission concluded that there was a risk that although the data was aggregated, firms could either directly or indirectly identify the exact sales volumes of individual firms, as well as the market shares of each member of the Exchange with detailed breakdowns by product category (horse-power and drive-line), geographic areas or regions (such as countries, postcode sectors and dealer territories), by model, and by specific periods (such as daily, monthly, quarterly or yearly).[13] The EC found that the exchange of such information led to anti-competitive effects.

[12]Case number 92/157/EEC- UK Agricultural Tractor Registration Exchange

[13]Furthermore, data around sales volumes and market shares in respect of specific models and specific horsepower categories according to each member, allows the cartel members to compare the performance of a specific horsepower category and specific models for each member-competitor.

10.2. **The Automotive Wire Harnesses case**[14]

In the Automotive Wire Harnesses case, through a spate of various infringements, the parties in a horizontal relationship exchanged information concerning the supply of wire harnesses to various car manufacturers in the European Union through requests for quotations and requests through annual price reductions.[15] In the parties to the collusive arrangement also discussed in general terms how to respond to the respective requests for quotations and annual price reductions. The EC showed that subject to the conduct and during the relevant period, the parties sold important quantities of wire harnesses in the concerned geographic area.[16]

10.3. **The Wood Pulp Case**[17]

In the Wood Pulp Case, information was exchanged through direct private announcements to downstream customers or agents and public announcements through the trade press. There seem to be many instances in which wood pulp producers communicate among themselves, for example, before making their price announcements. It appears that price discussions took place through the trade association of European producers before price announcements took place. Hence, the general mechanisms for information exchange may have been used to coordinate price announcements and monitor whether firms conformed to previous agreements. However, there also seems to be some evidence that some coordination of price announcements went on through direct communications between firms. These information exchanges prior to price announcement should be considered as the central competition policy problem, not the price announcements themselves.

[14]Case number AT.39748
[15]Honda, Toyota, Nissan, Renault I and Renault II in the EU.
[16]The various infringements are as follows: Toyota and Honda infringement involving Sumitomo, Yazaki and Furukawa; Nissan infringement involving Sumitomo and Yazaki; Renault I infringement involving Sumitomo and SYS; and Renault II infringement involving Sumitomo, SYS and Leoni.
[17](OJ L85/1 1985)

10.4. **The wheat milling cartel[18]**

In 2010, the Commission established that in the wheat milling cartel, the respondents Tiger Brands, Pioneer Foods, Foodcorp, Premier Foods and Godrich Mills engaged in the following:

(i) Telephonic meetings and in various face to face meetings;
(ii) Agreed on implementation dates of price increases; and
(iii) Discussed customer allocations between competitors.

It was found that the respondents telephonically and through meetings, directly fixed the selling price of milled wheat products to their customers (such as bakeries) through uniform price increases. Furthermore, through these meetings and telephone calls, the parties to the collusive conduct were able to secure and agree on on-going price fixing arrangements and were able to agree on trading terms and customer and market sharing arrangements.

10.5. **The CRT Glass case[19]**

In the CRT Glass case, parties to the infringement coordinated their activities in the European Economic Area ("EEA") through bilateral and trilateral meetings by engaging in coordinated activities. The cartel members coordinated prices for CRT Glass for specific customers and also occasionally set target prices for certain types of CRT Glass.[20] At the bilateral and trilateral meetings there was a high degree of transparency between the members such that their past, current, future market prices, demand from key customers, supply shares for key customers, as well as ongoing capacity and developments were known amongst members. Through their respective marketing staff, the cartel members exchanged, on an *ad hoc* basis, confidential and competitively sensitive market information in terms of "*EEA sales, stock levels, customer developments, raw material costs and estimates of the demand and sales*".[21]

[18]Competition Commission of south Africa case number 2007MAR2844
[19]Asahi Glass Co. Ltd., Nippon Electric Glass Co. Ltd., Samsung Corning Precision Materials Co. Ltd. ("SCP"), and Schott AG ("Schott").
[20]Case COMP/39605-CRT Glass
[21]in other words, the parties to the cartel used their marketing departments to monitor members' compliance with the arrangements in place, by obtaining information from CRT Glass customers.

10.6. **The Liquid Crystals Displays ("LCD") case**[22]

In the Liquid Crystals Displays ("LCD") case, the exchange of information was in respect of LCD panels in the European Union. The parties exchanged information on future production planning, capacity utilisation, pricing and other commercial conditions. The parties also agreed prices, including price ranges and minimum prices. The parties exchanged information during monthly multilateral meetings and further bilateral meetings. In total, the parties met mainly in hotels in Taiwan for what they called "the Crystal meetings". As part of the collusive scheme, the participants exchanged information and adopted a common understanding on the past and present market situation as well as on a future strategy covering prices, production, shipments and production capacity. The two main pieces of information shared during the Crystal Meetings were price and shipment volume for the current and coming month. Parties also held supplier meetings once a month hosted by the Taiwanese companies on a rotating basis. The company hosting the meeting would prepare the format for exchange of sales and marketing information.

10.7. **The Exotic Fruit (Bananas) case**[23]

In the Exotic Fruit (Bananas) case, the cartel members exchanged information such as price trend data for the following weeks as well as views on future market developments and intended prices expressed in price variations through different electronic avenues. The electronic avenues employed ranged from *ad-hoc* telephone conversations to discuss particular issues pertaining to the cartel, to email exchanges between the different parties' representatives. There were also meeting notes that were taken that counted as evidence and were used by the European Commission to find the respective parties guilty of anti-competitive conduct.

[22] Case number Case: COMP/39.309. The parties to the cartel acknowledged the facts and the legal qualifications of the infringement in their settlement submissions.
[23] Case COMP/39482-Exotoc Fruit (Bananas)

10.8. **The Gas Insulated Switchgear case ("SWG")[24]**

In the Gas Insulated Switchgear case ("SWG"), parties exchanged information using a combination of two platforms which are meetings and electronic platforms. The EC found that the parties'[25] conduct with regards to the sale of GIS, constituted an infringement of Article 81 of the Treaty, and Article 53 of the Agreement on the European Economic Area. In particular the parties shared markets, allocated quotas and maintained respective market share levels, allocated individual GIS projects to certain producers (involved in bid-rigging), fixed prices, terminated the license agreements with non-cartel members and exchanged competitive market information amongst each other. The cartel members specifically exchanged their interests in certain projects at the annual general meeting or at preparatory meetings of each group,[26]where after they decided on projects.[27] The EC also found evidence through SMS messages whereby cartel members exchanged information regarding prices.

[24]Case COMP/F/38.899

[25]ABB Ltd., ALSTOM (Société Anonyme), AREVA SA, AREVA T&D AG, AREVA T&D Holding SA, AREVA T&D SA, Fuji Electric Holdings Co., Ltd, Fuji Electric Systems Co., Ltd., Hitachi Ltd., Hitachi Europe Ltd., Japan AE Power Systems Corporation, Mitsubishi Electric Corporation, Nuova Magrini Galileo S.p.A., Schneider Electric SA, Siemens AG, Siemens Aktiengesellschaft Österreich, Siemens Transmission & Distribution Ltd., Siemens Transmission & Distribution SA, Toshiba Corporation, VA TECH Transmission & Distribution GmbH & Co KEG

[26]E/J Committee which consists of the key European and Japanese cartel members

[27]In addition, a communication with regards to the results of the joint meeting was sent to those members who were not present in those meetings.