

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 2526

23 September 2022

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**.