
GENERAL NOTICES • ALGEMENE KENNISGEWINGS

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NOTICE 2265 OF 2023

INVITATION FOR THE PUBLIC TO COMMENT ON THE PROPOSED REGULATIONS ON NON-BINDING ADVISORY OPINIONS

By virtue of the powers vested in me in terms of section 21(4) of the Competition Act, 1998 (Act No. 89 of 1998) (the Act), I, Ebrahim Patel, Minister of Trade, Industry and Competition, after consultation with the Competition Commission, hereby intend to prescribe regulations in terms of section 79A of the Act as set out in the Schedule hereto.

Stakeholders and interested parties are invited to submit comments in writing on the proposed regulations within a period of 30 calendar days of the publication of this notice to the Director-General of Trade, Industry and Competition, for the attention of Ms Tanya van Meelis, email: TvMeelis@thedtic.gov.za or hand delivered to 3rd Floor, Block E, 77 Meintjes Street, Sunnyside, 0132.



EBRAHIM PATEL
MINISTER OF TRADE, INDUSTRY AND COMPETITION
DATE: 22 DECEMBER 2023

SCHEDULE

DEFINITIONS

- 1 In these regulations any word or expression to which a meaning has been assigned in the Act shall bear that meaning and, unless the context otherwise indicates, -
- 1.1 "**Act**" means the Competition Act, No. 89 of 1998, as amended;
- 1.2 "**Commission**" means the Competition Commission of South Africa;
- 1.3 "**Competition Commission Rules**" means the Rules for the Conduct of Proceedings in the Competition Commission published in Government Notice No. 22025 in Government Gazette Vol. 428 on 1 February 2001;
- 1.4 "**Constitutional Institutions**" means an institution listed in Schedule 1 of the PFMA;
- 1.5 "**Department**" means a national or provincial department or a national or provincial government component;
- 1.6 "**Firm**" has the meaning set out in section 1(1)(xi) of the Act;
- 1.7 "**Major public entities**" means the entities listed Schedule 2 of the PFMA;
- 1.8 "**Micro, small or a medium enterprise**" is a firm that satisfies the criteria mentioned in column 3 and 4 of the schedule to the National Small Enterprise Act No. 102 of 1996, as amended;
- 1.9 "**Non-binding advisory opinion**" means a written advisory opinion as contemplated in section 79A of the Act;
- 1.10 "**Non-profit organisation**" has the meaning set out in section 1 of the Non-profit Organisations Act No. 71 of 1997, as amended;
- 1.11 "**Other public entities**" means the entities listed in Schedule 3 of the PFMA;
- 1.12 "**PFMA**" refers to the Public Finance Management Act No. 1 of 1999, as amended; and
- 1.13 "**Requesting party**" means a firm that has requested a non-binding advisory opinion from the Commission, whether or not legally represented.

PURPOSE

- 2 The purpose of these regulations is to set out –

- 2.1 the process for requesting a non-binding advisory opinion contemplated in section 79A of the Act;
- 2.2 the legal status of a non-binding advisory opinion; and
- 2.3 the fees payable for a non-binding advisory opinion.

REQUEST FOR A NON-BINDING ADVISORY OPINION

- 3 A request for a non-binding advisory opinion must be made in writing to the Commission.
- 4 The request for a non-binding advisory opinion must include, *inter alia*, the following:
 - 4.1 the name of requesting party;
 - 4.2 market(s) in which the requesting party operates (if any);
 - 4.3 reason(s) why a non-binding advisory opinion is sought from the Commission;
 - 4.4 nature of the legal advice sought;
 - 4.5 the relevant information to enable the Commission to determine whether the requesting party falls within the category of firms contemplated in regulation 7; and
 - 4.6 all relevant facts, information and supporting documents that may assist the Commission in providing the non-binding advisory opinion.
- 5 The Commission may request additional facts, information and/or supporting documents for purposes of considering a request for a non-binding advisory opinion.
- 6 The requesting party shall be entitled to claim confidentiality over any aspect of the request for a non-binding advisory opinion in terms of section 44 of the Act and the Competition Commission's Rules.

FEES FOR NON-BINDING ADVISORY OPINIONS

- 7 The following fee structure is applicable to requests for a non-binding advisory opinion:

No.	Requesting party	Fee payable
1.	Medium enterprises and firms contemplated in regulation 8	R24 000.00 (twenty-four thousand Rand)
2.	Other Firms	R60 000.00 (sixty thousand Rand)

- 8 Notwithstanding regulation 7, the Commission may, in its discretion and on good cause shown, waive the payment of a fee for a non-binding advisory opinion in a particular case in respect of the following entities:
- 8.1 constitutional institutions;
 - 8.2 departments;
 - 8.3 major public entities;
 - 8.4 micro enterprises;
 - 8.5 non-profit organisations;
 - 8.6 other public entities;
 - 8.7 small enterprises; and
 - 8.8 municipalities.
- 9 In exercising its discretion contemplated in regulation 8, the Commission may take into account, amongst others, the complexity of the matter in respect of which a non-binding advisory opinion is sought and the resources required to provide it.

LEGAL STATUS OF A NON-BINDING ADVISORY OPINION

- 10. The objective of the non-binding advisory opinion is to assist firms to comply with the provisions of the Act and to provide firms with non-binding guidance on compliance with the Act.
- 11. A non-binding advisory opinion does not constitute a decision or a finding of the Commission in terms of the Act and does not fetter the Commission's discretion in the exercise of its functions in terms of the Act. A non-binding advisory opinion is issued based on information submitted to the Commission by the requesting party.
- 12. A non-binding advisory opinion contemplated in section 79A has no binding legal effect on the Commission, the Competition Tribunal, the Competition Appeal Court, and the requesting party but any person interpreting or applying the Act may take it into account when doing so.
- 13. The Commission may, in the exercise of its reasonable discretion, at any time review, revise or withdraw its non-binding advisory opinion if the advisory opinion

is likely to undermine the objectives of the Act after having given the requesting party reasonable notice thereof.

14. Should the facts and information submitted to the Commission in the request for a non-binding advisory opinion change in any way, the non-binding advisory opinion issued by the Commission will not apply to such changed facts.

OUTCOME OF REQUEST FOR ADVISORY OPINION

13. Upon receipt of a request for a non-binding advisory opinion, the Commission may, in its reasonable discretion:

- 13.1. issue a non-binding advisory opinion to the requesting party within a reasonable period after receiving the request;

- 13.2. inform the requesting party in writing within a reasonable time after receiving the request that it declines to issue a non-binding advisory opinion and thereafter without delay refund the fee paid by the requesting party, if it appears from the facts that the issues set out in the request for a non-binding advisory opinion do not fall within its jurisdiction or the issuing of a non-binding advisory opinion is likely to undermine the objectives of the Act; or

- 13.3. inform the requesting party in writing within a reasonable time after receiving the request that it has determined, in the exercise of its reasonable discretion, that the issues set out in the request for a non-binding advisory opinion should be dealt with in an investigation or any other appropriate process in terms of the Act, as indicated by the Commission, and thereafter refund without delay the fee paid by the requesting party.

REPEAL

14. The fees set out in Regulation 10(4) of the Competition Commission Rules for advisory opinions are hereby repealed.

SHORT TITLE

15. These regulations shall be cited as the *Regulations on Non-Binding Advisory Opinions, 2023*.

COMMENCEMENT

16. These regulations shall come into operation on the date of publication in the government gazette.