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Competition Law
ALERT

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To share or not to share? A discussion on the Competition Commission's Guidelines on the Exchange of Competitively Sensitive Information

The Competition Commission (Commission) published its final set of Guidelines on the Exchange of Competitively Sensitive Information between Competitors (Guidelines) on 24 February 2023. While the Guidelines are not binding on the Commission, Competition Tribunal or Competition Appeal Court in the exercise of their respective discretions and interpretations of the Competition Act 89 of 1998 (Competition Act), the Guidelines must be considered when interpreting and applying the Competition Act.

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The Competition Commission (Commission) published its final set of Guidelines on the Exchange of Competitively Sensitive Information between Competitors (Guidelines) on 24 February 2023. While the Guidelines are not binding on the Commission, Competition Tribunal or Competition Appeal Court in the exercise of their respective discretions and interpretations of the Competition Act 89 of 1998 (Competition Act), the Guidelines must be considered when interpreting and applying the Competition Act.

The guidelines discuss the general approach which the Commission will follow in determining whether conduct which arises from information exchanged between competing firms, amounts to a contravention in terms of section 4 of the Competition Act. However, instances of information exchange between competitors must be considered on a case-by-case basis depending on, amongst other things, the nature of the information sought to be exchanged, the purpose for which it is exchanged, and the market characteristics and dynamics.

The guidelines define competitively sensitive information as:

> *"Information that is important to rivalry between competing firms and likely to have an appreciable impact on one or more of the parameters of competition (for example, price, output, product quality, product variety or innovation). Competitively sensitive information could include prices, customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies, research and development programmes and their results."*

Competing firms should take into account the factors set out below when considering the exchange of competitively sensitive information.

Market characteristics

The particular features of a market wherein competitors operate is an important consideration when evaluating information exchange between competitors. The features include whether the products are homogenous, the level of concentration, the transparency of information, the symmetry and stability or market shares of competing firms, barriers to entry and the history of collusion within the market. The assessment is done on a case-by-case basis.

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Exchanging competitively sensitive information on non-historical current and future conduct

A firm that provides competitively sensitive information to competitors about future conduct, such as future prices or its expectations regarding its competitors' future conduct, is anti-competitive because it could constitute or facilitate a collusive understanding among firms. Such exchanges may affect the firm's independent decision-making regarding its conduct in a market. Any exchange of information among competitors about their future prices is likely to be regarded by the Commission as giving rise to an anti-competitive price-fixing agreement or concerted practice in contravention of section 4(1)(b) of the Competition Act. The level of aggregation is an important factor in evaluating whether the sharing of historical competitively sensitive information may result in anti-competitive behaviour. The exchange of aggregated information is less likely to result in a collusive arrangement.

Availability and mechanism

Competitively sensitive information shared among competitors (to the exclusion of the general public) may be considered by the Commission to be evidence of a likely contravention of the Competition Act, since it enables participating firms to achieve coordinated outcomes to the detriment of consumers. In assessing the exchange of competitively sensitive information, the Commission will consider the mechanism used to exchange the information (for example, direct exchange between the firms or indirect exchange through a trade association). The Commission is more likely to view direct communication between competitors as evidence of a contravention of section 4 of the Competition Act.

Indispensability

Where it is necessary or indispensable for competitors to exchange information to achieve a pro-competitive gain, the type of information, the aggregation, age and confidentiality of the information and the frequency of the exchanges are all factors in assessing whether the exchange of information will result in anti-competitive outcomes. However, the Competition authorities may not agree with the parties' view that information exchanges are

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indispensable and many consent orders have been entered into by firms who believed that they were acting in the best interests of the industry when they exchanged competitively sensitive information, but where the competition authorities viewed the information exchanges as collusive in nature.

European case law on information exchange

There is very little South African jurisprudence, besides various consent orders, dealing with the exchange of competitively sensitive information from a competition law perspective, and foreign jurisprudence is therefore helpful in providing examples of instances where the exchange of competitively sensitive information between competitors has resulted in anti-competitive outcomes. In European law, the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal agreements (EU Guidelines) provide guidance on the principles to consider when assessing information exchange in terms of Article 101 of the Treaty on the functioning of the European Union (EU Treaty).

In *P Hüls AG v Commission of the European Communities* [1999] ECR I-04287 the European Court of Justice (ECJ), had to consider evidence obtained by the Commission of the European Communities (EU Commission) following investigations into the European petrochemical industry. The evidence obtained led to the EU Commission forming a view that between 1977 and 1983 several undertakings had colluded to set "*target*" (minimum) prices and develop a system of annual volume control. Importantly, the EU Commission found that, among other things, the producers contacted and met with each other regularly to determine their commercial polices, set target prices from time to time, and shared the market by allocating to each producer an annual sales target or quota. The ECJ stated that, subject to proof of the contrary, which is for the parties to adduce, there is a presumption that "*the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for purposes of determining their conduct on that market*". This is especially true in circumstances where the information exchanged

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occurred on a regular basis over a long period. The presumption also applies to situations in which the undertaking is merely receiving information. The onus then lies on the parties to prove that the exchange of information did not have any influence whatsoever on their own conduct in the market.

In *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR.I-456, representatives of Dutch mobile telecommunications operators held a meeting in which they discussed things such as the reduction of standard dealer remunerations for post-paid subscriptions which was to take effect on 1 September 2001.

The Dutch courts referred the matter to the ECJ to determine whether it was possible for an anti-competitive practice to have resulted from an information exchange at a single meeting when there was no evidence of an ongoing system of information exchange being agreed upon or undertaken. Secondly, the court had to determine whether there was a causal connection between the concerted practice and the market conduct of the operators in question. THE ECJ held that information exchange that influenced or had the capacity to influence a competitor's conduct in the market could result in anti-competitive outcomes. Importantly, the ECJ held that for an anti-competitive concerted practice to arise, there must not only be some form of co-ordination resulting from an information exchange, but also subsequent conduct in the market by the participants and a relationship of cause and effect between the two. The ECJ confirmed the rebuttable presumption that the parties involved have taken account of the information received from their competitors in subsequently operating in the market.

The principles which have developed in the EU are useful in understanding the Commission's approach to the exchange of competitively sensitive information. While the Guidelines may create the impression that the mere exchange of competitively sensitive information would result in a contravention of sections 4 and 5 of the Competition Act, the

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exchange of such information must result in conduct, such as price fixing or a substantial lessening of competition, for it to be prohibited under the Competition Act. While a presumption exists in the EU that exchanges of competitively sensitive information result in collusion, we do not yet have similar case law in South Africa and the South African Competition Commission would bear the onus of showing that the conduct contravenes the Competition Act.

The Guidelines aim to assist trade associations and other stakeholders to make information decisions about the competition law consequences of the exchange of competitively sensitive information between competitors. It is therefore imperative for businesses to take note of these guidelines when exchanging competitively sensitive information. However, since this is a complex area of competition law, it is important to take legal advice in relation to the risks of information exchange between competitors.

Andries Le Grange and
Shandré Smith

OUR TEAM

For more information about our Competition Law practice and services in South Africa and Kenya, please contact:

Chris Charter
Practice Head & Director:
Competition Law
T +27 (0)11 562 1053
E chris.charter@cdhlegal.com

Sammy Ndolo
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

Albert Aukema
Director:
Competition Law
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com

Lara Granville
Director:
Competition Law
T +27 (0)11 562 1720
E lara.granville@cdhlegal.com

Andries le Grange
Director:
Competition Law
T +27 (0)11 562 1092
E andries.legrange@cdhlegal.com

Susan Meyer
Sector Head: Healthcare & Pharmaceuticals
Director: Competition Law
T +27 (0)21 481 6469
E susan.meyer@cdhlegal.com

Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Leago Mathabathe
Senior Associate:
Competition Law
T +27 (0)11 562 1927
E leago.mathabathe@cdhlegal.com

Reece May
Senior Associate:
Competition Law
T +27 (0)11 562 1071
E reece.may@cdhlegal.com

Duran Naidoo
Senior Associate:
Competition Law
T +27 (0)21 481 6463
E duran.naidoo@cdhlegal.com

Nelisiwe Khumalo
Associate:
Competition Law
T +27 (0)11 562 1116
E nelisiwe.khumalo@cdhlegal.com

Mmakgabo Makgabo
Associate:
Competition Law
T +27 (0)11 562 1723
E mmakgabo.makgabo@cdhlegal.com

Alistair Dey Van Heerden
Associate Designate:
Competition Law
T +27 (0)11 562 1680
E alistair.dey-vanheerden@cdhlegal.com

Taigrine Jones
Associate Designate:
Competition Law
T +27 (0)11 562 1383
E taigrine.jones@cdhlegal.com

Ntobeko Rapuleng
Associate Designate:
Competition Law
T +27 (0)11 562 1847
E ntobeko.rapuleng@cdhlegal.com

Shandré Smith
Associate Designate:
Competition Law
T +27 (0)11 562 1862
E shandre.smith@cdhlegal.com

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA