Comments on the Draft Guidelines
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1. Introduction

The Commission should be commended for attempting this very difficult task of drafting guidelines on the very complex topic of information exchanges. The Draft Guidelines have many strong points. They are comprehensive, deal with all important topics and show a careful consideration of the international literature. The last part of the Guidelines is aimed at providing assistance in practical situations and that will be of considerable assistance to addressees of these Guidelines. Although this document contains many proposals for change we acknowledge the difficulty of the task that the Commission is undertaking and enormous strides that it has already made in achieving sound and useful Guidelines. We have tried to be as critical as possible in order to ensure that the ultimate Guidelines will be worthy of the Commission's reputation as one of the top competition agencies in the world. However, we have tried to build upon the very good work that has already been done.

We believe that some work can still be done to improve the Draft Guidelines. We have tried to suggest improvements for the following aspects:

- The broad conceptual legal framework within which information exchanges must be evaluated.
- Addressing difficulties that arise because of differences between South African and other competition law regimes and the integration of some uniquely South Africa concepts
- Creating drafting consistency throughout the document, and addressing unnecessary repetition.
- Improving the references that are made in the document.
- Finding the right balance between giving the competition authorities room to manoeuvre and giving clear answers to difficult problems.

2. Broad points of departure

Our broad point of departure has been the views of Robert Pitofsky expressed in the paper "Joint Venture Guidelines: Views from One of the Drafters" (available at https://www.ftc.gov/public-statements/1999/11/joint-venture-guidelines-views-one-drafters) on the goals which guidelines should achieve.

"Guidelines should seek to achieve the following:

1. Guidelines should clarify the law and not depart radically from established judicial principles. Drafts that ignore that approach - for example, the Vertical Restraints Guidelines (3) published in the 1980s - are not likely to survive the passage of time.
2. There are circumstances in which the Courts, usually at the margin of the law, have indicated an intention to follow new principles. Guidelines that incorporate likely future concepts - as long as the people doing the drafting are not carried away by their own preferences - offer useful clarification to the private sector.
3. Guideline drafting is an evolving process. The modest but constructive changes in the excellent 1982 Horizontal Merger Guidelines are examples. It is precisely because it is a process that we have put these Guidelines out in draft form and will welcome comments and suggestions.
4. Guidelines ideally have an impact on a number of constituencies. They help the staffs of the enforcement agencies to follow a more uniform approach designed to produce similar outcomes in similar cases. They advise practitioners about the standards that agency staff will employ in investigation and enforcement actions, and that in turn enables staff and private counsel to have a more constructive exchange during investigations. Finally, Guidelines should educate private practitioners who have little or no expertise in antitrust law, alerting them to questions to resolve when advising clients about potentially vulnerable agreements.

3. Comments on the definitions

- **Par 2.5**: Definition of commercially sensitive information.
  - In this context it is perhaps better to speak of "competitively sensitive information". The two concepts overlap but the latter is more relevant to this context. This is also the term that is used in the Canadian Competitor Collaboration Guidelines (2009) par 3.6.4ff. Although the EU Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01) (henceforth EU Horizontal Guidelines) freely use the term commercially sensitive information. It could even be argued that both should be included. "Commercially sensitive information" has an economic value and would lead to exclusion of firms who do not have access to it. Most but not all "commercially sensitive information" would be competitively sensitive but there will not be complete overlap.
    - It would seem that the Draft Guidelines also often prefer the expression "competitively sensitive information" (**pars 7.2. 7.3.1.2**) while the expression "commercially sensitive information" is used only once (**par 7.3.7.3**).
  - "Competitively sensitive information" was also defined and used in *Business Venture Investments no. 1658 (Pty) Ltd/Afgri Operation Ltd and Senwes Capital (Pty) Ltd* 87/LM/Dec12 015644 07/05/2013 in a merger condition as:
    > "Competitively Sensitive Information" means information belonging to a Shareholder relating to credit terms, pricing including but not limited to prices and discounts, margins, handling and storage tariffs, costs and volumes and any confidential, strategic, promotional or business plans or long term plans, budgets, methods of operating, internal control systems, contractual arrangements and financial arrangements/models not related to Newco, (i) whether oral or recorded in writing or in any other form, (ii) whether formally designated as confidential or not, and (iii) howsoever known, communicated or retained but excluding information that is readily and generally available in the market, such as crop estimates and market indicators, the exchange of which between the Shareholders may contravene section 4(1) of the Competition Act"
  - The United States Antitrust Guidelines for Collaborations Among Competitors April 2000 par 3.31(b) states: "Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables)".
  - See also the description in the Canadian Guidelines:
    > "An agreement to disclose or exchange information that is important to competitive rivalry between the parties can result in a substantial lessening or prevention of competition. For example, exchanging pricing information, costs, trading terms, strategic plans, marketing strategies or other significant competitive variables can raise concerns under the Act. Where competitors agree to share competitively sensitive information, it can become easier for these firms to act in concert, thereby reducing or even eliminating competitive rivalry".
  - It is also doubtful whether competitively sensitive information should be defined with reference to its economic value.
  - Competitively sensitive information should be defined with its relevance to the competitive process.

- The relationship between this definition and the later analysis of what constitutes information that poses risks to competition must be carefully considered (See especially the proposed par 6.2 on the "nature and characteristics" of the type of information that will be relevant here. In Canada other aspects such as age and disaggregation is also considered here. We suggest a narrower definition that for starters merely focus on the nature of the information.

- **Par 2.7**: Definition of competitor states that "Competitors" means "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"

- This definition tries to combine different definitions and it will be difficult if not impossible to apply.

- The standard definition includes firms in the market and potential entrants as competitors. This would be the better definition. However, the Tribunal has followed a wider approach when it comes to firms that are in a horizontal relationship (which normally would be the same as competitors). It has stated in *Commission v United South African Pharmacies* 04/CR/Jan02 22/01/2003

> "[w]hat the Act requires by the notion that parties are in a horizontal relationship is an allegation that they are in the same line of business. Neither the language of the Act nor the logic of how the section works requires that there be allegations that the respondents operate in the same geographical market in order to be considered competitors. Take, for instance, the prohibition on dividing markets by allocating territories, set out in section 4(1)(b). If the respondent's argument is correct, such a practice could never be instituted against those who divided markets before they were ever in one another's markets. By definition, having divided territories, they are not in the same geographic market, and indeed may never have been. It is ludicrous to suggest that for this reason they would not be competitors".

- As it is often important that the Draft Guidelines should use the more accurate definition of competitor, it is suggested that the reference to "line of business" should not be used here.

- It could help to give some meaning to the concept "potential competitor".

Par 2.10 & 2.14: Efficiencies and pro-competitive gains are complex concepts that should rather be explained in the text. The definitions given here are not very helpful in the light of difficult theory and jurisprudence.

Par 2.16: "Trading condition" means any condition which affects a~~the~~ transaction including, but not limited to, credit terms, delivery charges, delivery schedules, minimum quantities and interest charges"

- This definition does not look very valuable or helpful.

4. Comments on the current Parts 3, 4 and 5 that introduce information exchanges and explains their consequences

- Current **Par 3.1**: "These Guidelines concern~~only apply to~~ the exchange of information between competitors. An exchange of information between competitors could, however, also occur indirectly 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"
    - This provision bears comparison with the EU Horizontal Guidelines par 55 but could perhaps be seen as an improvement on that provision.
    - The relationship between this provision and par 5.1 must be carefully worked out.
- **Par 3.2**: This provision should be expanded to make it clear which groups receive what benefits. Alternatively it should be simplified to merely make the introductory point that information exchanges can be either beneficial or detrimental depending on the circumstances. The detail can then be discussed where it is more exactly relevant.
    - Alternative formulations should be considered
        - The EU Horizontal Guidelines can be compared "Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries thereby making markets more efficient. Moreover, companies may improve their internal efficiency through benchmarking against each other's best practices. Sharing of information may also help companies to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand etc. Furthermore, information exchanges may directly benefit consumers by reducing their search costs and improving choice.[par 57]" (see also par 89, 95 and perhaps the case of Case C-238/05, Asnef-Equifax)
        - See also for a comparison the NERA Economic Consulting *Competition Policy Applied to Information Exchanges between Competitors in the EU: Proceedings of the Spanish Competition Authority in a Recent Case* 22/12/2014 fn 8: "For instance, the increase in transparency may lower consumers' search costs, as it allows customers to make more informed selections between the different products, resulting in more intense competition. Transparency may also benefit the competitive process, as it permits a more profound knowledge of the market functioning, which facilitates the accomplishment by firms of more effective and efficient commercial strategies. Increased transparency also benefits new entrants, which can enter the market competing more fiercely. Additionally, the improved flow of information allows firms to conduct benchmarking analyses against their competitors (e.g., regarding production costs) and to better understand the market structure and trends. In turn, they are able to adjust their commercial strategies (e.g., investment plans), becoming more competitive in the marketplace. Information exchanges can be particularly beneficial in certain industries, such as the insurance sector and credit markets, where knowledge about data regarding customer characteristics or past claimants allows firms to design more suitable conditions and products, and to offer them to the best customers, improving their risk management."
        - UK OFT Guidance on Agreements and Concerted Practices 2004
            - 3.17 As a general principle, the more informed customers are, the more effective competition is likely to be and so making information publicly available to customers does not usually harm competition.

3.18 In the normal course of business, undertakings exchange information on a variety of matters legitimately and with no risk to the competitive process. Indeed, competition may be enhanced by the sharing of information, for example, on new technologies or market opportunities. There are therefore circumstances where there is no objection to the exchange of information, even between competitors, and whether or not under the aegis of a trade association (see the competition law guideline Trade associations, professions and selfregulating bodies.

- US Antitrust Guidelines for Collaborations Among Competitors April 2000
  - par 3.31(b) "The Agencies recognize that the sharing of information among competitors may be procompetitive and is often reasonably necessary to achieve the procompetitive benefits of certain collaborations; for example, sharing certain technology, know-how, or other intellectual property may be essential to achieve the procompetitive benefits of an R&D collaboration".
- Statements of Antitrust Enforcement Policy in Health Care Issued by the U.S. Department of Justice and the Federal Trade Commission August 1996
  - Part 6: Participation by competing providers in surveys of prices for health care services, or surveys of salaries, wages or benefits of personnel, does not necessarily raise antitrust concerns. In fact, such surveys can have significant benefits for health care consumers. Providers can use information derived from price and compensation surveys to price their services more competitively and to offer compensation that attracts highly qualified personnel. Purchasers can use price survey information to make more informed decisions when buying health care services.

- Reference is made to "Information exchanges which may benefit competitors without harming competition" but of course information exchanges may also have net benefits. This statement does not make it quite clear. There perhaps is room for distinguishing: a) information exchanges that are only efficiency enhancing b) information exchanges that are at most neutral c) information exchanges that are net beneficial d) information exchanges that are net anti-competitive e) information exchanges without redeeming features.
- The provision further states "for example, exchanges related to accounting methods, stock control or book-keeping practices, new forms of technology and research results".
  - Most of the examples are of information that is not competitively sensitive which should perhaps rather be discounted on that basis.
  - Greater care should be taken when it comes to the exchange of research and technology. It can certainly be competitively sensitive.
  - Perhaps some of this should rather be dealt with below where the influence of the nature of information is considered
- The last sentence does not really fit in this context "It is useful to bear in mind that the exchange of information can take place within different contexts". These issues will be discussed in detail below, see manner of exchange.

- **Par 3.3**: The relationship between par 3.3 and 3.4 should be more carefully considered.
  - Perhaps the wording of par 3.3 could be changed to read as follows:

"However, an information exchange could also be anti-competitive by increasing the likelihood, establishing or stabilising collusion among competitors. Furthermore, an

information exchange may also allow firms to achieve collusive outcomes without concluding agreements or concerted practices to co-operate. In some instances, an information exchange can result in foreclosure of new entrants by depriving them of access to the exchanged information or by allowing incumbents to observe and take steps to prevent or limit their entry into the market".

- Par 3.3 must be amended to make it clear that an information exchange will not only operate as a facilitating practice.

- Even if the above proposal is not accepted the provision should be reformulated as follows:

"However, information exchange could also be used to facilitate collusive behaviour among competitors~~, ultimately resulting in harm to consumer welfare~~. Information exchange between competitors may allow ~~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.~~"

Par 3.4 The function of this provision should be to explain how information exchanges can assist with collusion.

- "Information exchanges can be instrumental in performing two crucial tasks associated with collusion: coordination and monitoring.

To avoid competition, firms will have to replace their competition with coordination by for instance ~~coordinate on prices,~~ setting prices~~them~~ at a level above what would otherwise be sustainable in a competitive market, by restricting output or by sharing markets~~on a market-sharing arrangements~~ through ~~by agreeing to an~~ allocation of sales, territories, products, customers, or tenders. The transparency created by information exchanges will in the right circumstances facilitate this process.

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."

- See also the reference to the EU Horizontal Guidelines that could perhaps be used to improve this provision and the previous one:

  - One way is that through information exchange companies may reach a common understanding on the terms of coordination, which can lead to a collusive outcome on the market. Information exchange can create mutually consistent expectations regarding the uncertainties present in the market. On that basis companies can then reach a common understanding on the terms of coordination of their competitive behaviour, even without an explicit agreement on coordination.[par 66]

  - Another channel through which information exchange can lead to restrictive effects on competition is by increasing the internal stability of a collusive outcome on the market. In particular, it can do so by enabling the companies involved to monitor deviations. Namely, information exchange can make the market sufficiently transparent to allow the colluding companies to monitor to a sufficient degree whether other companies are deviating from the collusive outcome, and thus to know when to retaliate. (see Example 3, paragraph 107).[par 67]

- A third channel through which information exchange can lead to restrictive effects on competition is by increasing the external stability of a collusive outcome on the market. Information exchanges that make the market sufficiently transparent can allow colluding companies to monitor where and when other companies are attempting to enter the market, thus allowing the colluding companies to target the new entrant. This may also tie into the anti-competitive foreclosure concerns discussed in paragraphs 69 to 71. Both exchanges of present and past data can constitute such a monitoring mechanism.[par 68]
- An exclusive exchange of information can lead to anti-competitive foreclosure on the same market where the exchange takes place. This can occur when the exchange of commercially sensitive information places unaffiliated competitors at a significant competitive disadvantage as compared to the companies affiliated within the exchange system. This type of foreclosure is only possible if the information concerned is very strategic for competition and covers a significant part of the relevant market.[par 70]
- It cannot be excluded that information exchange may also lead to anti-competitive foreclosure of third parties in a related market. For instance, by gaining enough market power through an information exchange, parties exchanging information in an upstream market, for instance vertically integrated companies, may be able to raise the price of a key component for a market downstream. Thereby, they could raise the costs of their rivals downstream, which could result in anti-competitive foreclosure in the downstream market.[par 71]

Any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition by object. In assessing whether an information exchange constitutes a restriction of competition by object, the Commission will pay particular attention to the legal and economic context in which the information exchange takes place (1)[See, for example, Joined Cases C-501/06 P and others, GlaxoSmithKline, paragraph 58; Case C-209/07, BIDS, paragraphs 15 et seq]. To this end, the Commission will take into account whether the information exchange, by its very nature, may possibly lead to a restriction of competition.[par 72]

- Exchanging information on companies' individualised intentions concerning future conduct regarding prices or quantities [Information regarding intended future quantities could for instance include intended future sales, market shares, territories, and sales to particular groups of consumers] is particularly likely to lead to a collusive outcome. Informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices (see Example 1, paragraph 105). Moreover, it is less likely that information exchanges concerning future intentions are made for pro-competitive reasons than exchanges of actual data.[par 73]
- Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object[The notion of 'intended future prices' is illustrated in Example 1. In specific situations where companies are fully committed to sell in the future at the prices that they have previously announced to the public (that is to say, they can not revise them), such public announcements of

future individualised prices or quantities would not be considered as intentions, and hence would normally not be found to restrict competition by object. This could occur, for example, because of the repeated interactions and the specific type of relationship companies may have with their customers, for instance since it is essential that the customers know future prices in advance or because they can already take advanced orders at these prices. This is because in these situations the information exchange would be a more costly means for reaching a collusive outcome in the market than exchanging information on future intentions, and would be more likely to be done for pro-competitive reasons. However, this does not imply that in general price commitment towards customers is necessarily pro-competitive. On the contrary, it could limit the possibility of deviating from a collusive outcome and hence render it more stable.]. In addition, private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities. Information exchanges that constitute cartels not only infringe Article 101(1), but, in addition, are very unlikely to fulfil the conditions of Article 101(3)[par 74].

- The likely effects of an information exchange on competition must be analysed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors. The assessment of restrictive effects on competition compares the likely effects of the information exchange with the competitive situation that would prevail in the absence of that specific information exchange. For an information exchange to have restrictive effects on competition within the meaning of Article 101(1), it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation. Whether or not an exchange of information will have restrictive effects on competition depends on both the economic conditions on the relevant markets and the characteristics of information exchanged.[par 75]

- See also the United States Antitrust Guidelines for Collaborations Among Competitors April 2000 pars 2.2 and 3.31(b)

- “2.2 Potential Anticompetitive Harms Competitor: collaborations may harm competition and consumers by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. Such effects may arise through a variety of mechanisms. Among other things, agreements may limit independent decision making or combine the control of or financial interests in production, key assets, or decisions regarding price, output, or other competitively sensitive variables, or may otherwise reduce the participants’ ability or incentive to compete independently. Competitor collaborations also may facilitate explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration. Such collusion may involve the relevant market in which the collaboration operates or another market in which the participants in the collaboration are actual or potential competitors.

- 3.31(b):

  - “Agreements that facilitate collusion sometimes involve the exchange or disclosure of information”.

- "Nevertheless, in some cases, the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables".

- Statements of Antitrust Enforcement Policy in Health Care Issued by the US Department of Justice and the Federal Trade Commission August 1996.

Part 6: "Without appropriate safeguards, however, information exchanges among competing providers may facilitate collusion or otherwise reduce competition on prices or compensation, resulting in increased prices, or reduced quality and availability of health care services. A collusive restriction on the compensation paid to health care employees, for example, could adversely affect the availability of health care personnel."

- **Par 3.5** contains unnecessary repetition. At best this provision should be combined with earlier provisions. The points made here are already covered and the provision should ideally be deleted.
- **Par 3.6** The Draft Guidelines should not just describe those exchanges that are anti-competitive but also help addressees to understand which ones would be allowed. This provision should perhaps be combined with part 4. There is difficult overlap here, which may cause confusion. But see the new par 4.2 below.
- **Par 4.1**: "The primary objective of these Guidelines is to provide some measure of transparency and predictability~~objectivity~~ regarding~~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 not covered by this provision~~beneficial to competition~~".

- This provision is not well formulated at all. At its base it should be concerned with cases that fall within section 4 and cases that do not. Information exchanges may fall outside the ambit of section 4 for reasons other than being beneficial to competition.

- **Par 4.2**: A new **par 4.2** should be added stating "These Guidelines are intended to assist firms, industry associations and other stakeholders to make informed decisions about the competition law consequences of exchanges of information between competitors~~ which may be viewed as harmful to competition between parties in a horizontal relationship~~" (this is basically the current **par 3.6**)

- Footnote 1 should be more precise and elaborate. It should give a full description of some of the major sources derived from other jurisdictions.

- What is currently **par 4.2** should therefore become **par 4.3**.
- **Par 5.1**: This provision apparently tries to define an "information exchange" in competition law. However, it appears to be flawed in the sense that it confuses an information exchange with an illegal information exchange. Perhaps this definition can be simplified considerably to describe all information exchanges that take place directly or indirectly between competitors.

- A clearer relationship must be established between this provision and **par 3.1**.
- Our view would be that a broad definition of information exchange should be given in **par 3.1** so that **5.1** could more specifically deal with legal effects (see the reworking of the definition of **par 3.1**).
- The wording of this provision is problematic.
- The description of types of relevant information as "information relating to prices, output, costs or its business strategy" should rather be in the definition of "competitively sensitive information " or the more comprehensive discussion of the "nature and characteristics of information that creates anti-competitive consequences.

- As in the definition of "strategically relevant information" it is difficult to understand the importance of "economic value" as a defining characteristic. It would seem that the only importance of the fact that the information has economic value could be where the information is confidential, the value depends on confidentiality and disclosure undermines that value. In such situations it has to be considered why firms would be prepared to disclose the information.
- Ideally **par 5.1** should be scrapped and part 5 should be focused much more clearly on the legal treatment of information exchanges.

- It is proposed that the current **par 5.2** should become **par 5.1**.
- **Par 5.3** should be reformulated as **par 5.2**.
- The current **par 5.3** states that: "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".
- It should perhaps be considered to refer merely to conduct in this context and then to refer to information exchanges in the ensuing provisions but we do not feel particularly strongly about this.

Par 5.4

- It will be suggested that the rest of part 5 should be reconsidered. But we will commence with an analysis of the existing provisions. It could also be considered whether the reformulated **par 5.4** cannot replace the preceding one as there is considerable repetition in these two provisions.
- The current **par 5.4** determines that "The main difference between section 4(1)(a) and section 4(1)(b) is that the former requires proof of anti-competitive conduct while the opportunity is then also given to parties to a practice 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 s~~Section 4(1)(b) provides for an outright prohibition when information exchange results in the conduct listed under section 4(1)(b) and there is no opportunity for proof that conduct was not anti-competitive or for raising efficiency, procompetitive 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)~~".
- A wide approach to characterisation has recently been followed. This may allow for the consideration of a considerable amount of economic evidence in the context of determining whether conduct should be per se prohibited in the first place. This may sometimes play a role in the context of exchanges of price information. It may also be possible to apply the truncated or quick-look rule of reason in this context. It perhaps is necessary to say something about this.
- The last sentence really over-simplifies the extent to which questions about economic effect will impact on an analysis of an information exchange. It would perhaps be better to delete it.
- fn 2 is a completely unnecessary footnote.

- **Par 5.5**

- The current **par 5.5** reads "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)".

- The provision is somewhat unhelpful.

- It is somewhat perplexing that this provision refers to "two contexts". It should rather be stated that the law can deal with information exchanges in one of two ways.

- Again it is not quite clear what the term cartel means here.

- It overlaps with the previous two and refers to a "cartel agreement" without defining the concept. The ideas expressed here should be accommodated within a more comprehensive part 5. The second statement is probably correct but should be explained more carefully.

- **Par 5.6** should rather fall under part 6 and **Par 5.7** is inaccurate and repetitive and should be deleted.

- It is suggested that part 5 should be changed considerably to give a clear indication of the manner in which exchanges of information would be handled.

- We propose the following scheme:

- Information exchange can fulfil different functions.

- First information exchanges can take place in the context of broader co-operative conduct (agreements, concerted practices, decisions by associations of firms) and therefore serve as evidence of the co-operation with or without itself constituting co-operative conduct.

- In these types of cases the information exchange and its consequences will not be clearly separated from (other) co-operative activities.

- Here information exchange may serve as part of the evidence that shows that there was further co-operation between firms. In this sense the information exchange will be evaluated as a so-called "facilitating practice".

- Moreover, the information exchange can assist the conclusion that the co-operative conduct prevents or lessens competition where the broader co-operation is not per se prohibited or it can contribute towards a showing that the broader co-operation is not anti-competitive or has pro-competitive consequences that outweigh negative consequences.

- The information exchange could even assist in proving that a per se prohibited contravention has been committed. It can be one of the aspects considered during the characterisation process.

- In the US an exchange of price information apparently will not by itself be per se prohibited price fixing, see United States v. Container Corp. of America 393 U.S. 333 (1969), US v. United States Gypsum Co. et al., 438 US 422, 441 (1978). Perhaps a similar approach will be followed in South Africa.

- The question whether the information exchange is itself co-operative conduct is of lesser importance. However, it may be relevant to the determination of the seriousness of the contravention for purposes of imposing fines.

- Perhaps the first sentence of the existing **par 7.1** could find a place here. Alternatively it can be made part of the general definitions: "A facilitating practice or platform can be defined as activities or business structures that allow firms to coordinate their behaviour in such a manner that it may lead to anti-competitive outcomes.3[fn 3 Areeda & Hovenkamp (2010)]". Alternatively it could form part of the introduction to the new part 8. However it would appear to require some reformulation.

- The reference here must be improved.
- For other definitions of facilitating practices, see:

> "A "facilitating practice" is one that "makes it easier for parties to coordinate price or other behaviour in an anti-competitive way" Areeda and Hovenkamp, Antitrust Law, para 1407b, at 29 (2d ed. 2003)

OECD Policy Roundtables (2007) : 'Facilitating practices in Oligopolies' 111:

"Facilitating practices can be divided for convenience into two broad types. Some practices will facilitate agreement on the central provisions of price or output. These include things like agreements to exchange plans on future prices, or to take factory downtime. Others limit competition in collateral nonprice respects. They include restrictions on advertising or on overtime. These agreements can channel competition and thus limit the ways in which firms engage in non-price or quality competition as a way of cheating on a price agreement. Expressed differently, one mechanism facilitates making an initial agreement on price, and the other tends to protect a price agreement that has already been reached. Regardless of its specific type, any particular facilitating agreement may produce anti-competitive effects, or efficiencies, or both."

- What is currently **par 7.3.8** should rather be accommodated here:

"**7.3.8.1**. ~~As pointed out above, i~~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 collusion~~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[Cover-pricing takes place where~~means~~ where~~n~~ 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]. 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".

- See in this respect the European case of COMP/39.309 LCD (Liquid Crystal Displays) 8/12/2010
- See also United States Antitrust Guidelines for Collaborations Among Competitors April 2000 Par 2.2 second part "Competitor collaborations also may facilitate explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration. Such collusion may involve the relevant market in which the collaboration operates or another market in which the participants in the collaboration are actual or potential competitors".
    - Especially the last paragraph is of considerable significance.
- See also Par 3.3.1 of the same Guidelines "The nature of the agreement is relevant to whether it may cause anti-competitive harm. For example, by limiting independent decision making or combining control over or financial interests in production, key assets, or decisions on price, output, or other competitively sensitive variables, an agreement may create or increase market power or facilitate its exercise by the collaboration, its participants, or both. An agreement to limit independent decision making or to combine control or financial interests may reduce the ability or incentive to compete independently. An agreement also may increase the likelihood of an exercise of market power by facilitating explicit or tacit collusion,34 [34 As used in these Guidelines, "collusion" is not limited to conduct that involves an agreement under the antitrust laws.] either through facilitating practices such as an exchange of competitively sensitive information or through increased market concentration".

- Secondly information exchanges will sometimes be treated as independent co-operative conduct.
    - Information exchanges will not constitute contraventions of the Act in terms of s 4 unless they are co-operative conduct as defined in the Act.
    - It may be particularly difficult to determine whether an information exchange constitutes a concerted practice.
        - Even a single unilateral disclosure can sometimes constitute a concerted practice (see in this respect the current Draft Guidelines **par 6.3.4** discussed below).
        - The extension of the meaning of concerted practices in recent times in the EU may be used as authority for extending the types of information exchanges that will be covered by the Act (C 8/08 *T-Mobile Netherlands BV v Raad van bestuur van der Nederlandse Mededingingsautoriteit*).
    - Even if it is accepted that an information exchange is co-operative conduct it must still be shown that the exchange either prevents or lessens competition or is per se prohibited.
        - It may firstly be difficult to determine whether information exchanges are per se prohibited. In the US an exchange of price information will not by itself be per se prohibited price fixing, see United States v Container Corp. of America 393 US 333 (1969), US v United States Gypsum Co 438 US 422, 441 (1978). It can be argued that a similar approach should be

followed in South Africa. The EU does not clearly draw the distinction between per se prohibited conduct and conduct that should be evaluated in terms of the rule of reason. The closest that EU comes to this is in the distinction between conduct prohibited by object and conduct that is prohibited by effect. As some exchanges of prices are regarded as conduct prohibited by object it may be argued that SA could also per se prohibit some exchanges regarding information about prices or areas within which firms deal. Personally we would be in favour of regarding clear collusive exchanges of information on prices as price fixing.

- If an information exchange is not per se prohibited, then the rule of reason will require determining whether competition has been prevented or restricted and if so whether there are pro-competitive consequences outweighing the negative effects.
    - Anti-competitive effects can be found in the elements mentioned previously in **par 3.3**.
        - It could increase the likelihood of greater collusion even if it has not as yet occurred through facilitation or enforcement.
        - It could lead to oligopolistic conduct that is less efficient than would be the case without the exchange and could even reach the stage where the market reaches the collusive outcome without express or evidence of agreement (frequently referred to as tacit collusion). This must be clearly distinguished from collusion as this form of tacit collusion is not really collusion in the sense described in the s 4 of the Act.
        - Information exchanges may be used to monitor compliance with a collusive agreement and it may be used by the parties to collusion to monitor the entry of new entrants who could undermine the agreement.
        - Information exchanges restricted to particular firms in a market may put others at a competitive deficit.

        [Perhaps there is a need to look at causality as this was required in Netstar (Pty) Ltd v Competition Commission 97/CAC/May10 15/02/2011 but is not an element of any other country]
    - Even if it is then shown that an exchange prevents or lessens competition, the parties to the exchange may still show that it produces technological, efficiency or other pro-competitive gains which outweigh the anti-competitive ones. This issue requires further analysis as many aspects regarding pro-competitive gains is still uncertain. What is now discussed under the heading "**6.6.3**. Indispensability" should rather be covered here

as this part of the existing Guidelines is currently difficult to follow and out of any context. We would propose that at least the following should be set out in the Draft Guidelines.

"Where it is shown that an information exchange or a restriction of which an information exchange forms a part substantially prevents or lessens competition is may still be possible for the parties to show that the exchange produces technological, efficiency or other pro-competitive gains that outweigh those effects.

1) An efficiency gain from an information exchange will have to be real. It will have to increase innovation or more efficient production. Mere pecuniary benefits or redistributions in favour of firms will not suffice.

2) Although efficiencies created by an information exchange will not have to be quantitatively and qualitatively verifiable it will strengthen the case of parties who want to justify an exchange if they can verify gains in this manner.

3) An efficiency gain from an information exchange must be timely. They will not have to take effect immediately but the harm that may be done where benefits will be delayed must be taken into account in determining whether a restriction should be allowed.

4) The restriction created by the information exchange and the wider restriction of which the information exchange forms a part must be reasonably necessary to achieve the efficiency gain. The exchange of information must be limited to the competitively relevant information that is reasonably relevant and necessary for the attainment of the claimed efficiency gains. When it comes to the type of data, the extent to which it is aggregated, the age of the data, ~~and~~ the extent to which the information is kept confidential, as well as the frequency of the exchange must carry the lowest possible risk~~s~~ to competition and must be reasonably necessary for creating any efficiency gains resulting from the exchange that may be claimed by firms".

5) An efficiency gain must outweigh anti-competitive effects. A precise weighing of interests will not always be required. Where there is a strong verified real pro-competitive gain it will be accepted that the benefit outweighs the harm. Where efficiencies are less compelling it will have to be shown that consumers will receive a net benefit from the efficiency gain."

- Point 4) above combines **6.6.3.2** "The exchange of information must be limited to the competitively relevant information that is reasonably relevant and necessary for the

attainment of the claimed efficiency gains" and **6.6.3.1**. "When it comes to t~~T~~he type of data, the extent to which it is aggregated ~~aggregation~~, the age of the data, ~~and~~ the extent to which the information is kept confidentiality thereof, as well as the frequency of the exchange must carry the lowest possible risk~~s~~ to competition and must be reasonably necessary~~indispensable~~ for creating any efficiency gains resulting from the exchange that may be claimed by firms".

- It could also be argued that **par 6.6.3.1** should be further abbreviated: "When it comes to the nature and characteristics of the information and the manner in which the information is exchanged or the system by which the information is exchanged, ~~The type of data, the aggregation, age and confidentiality thereof, as well as the frequency of~~ the exchange must carry the lowest possible risk~~s~~ to competition and must be reasonably necessary~~indispensable~~ for creating any efficiency gains resulting from the exchange that may be claimed by firms".

- A more general point is made in **6.6.3.2** and therefore it was placed before **6.6.3.2**.
- Perhaps a footnote can be added that refers to the analysis of the list of factors that must be considered in terms of **6.6.3.1**.
- It is important that the differences between SA and European law when it comes to pro-competitive gains should be taken into account: Art 101(3) of the Treaty on the Functioning of the European Union determines that a co-operative practice "which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

- The use of the term indispensable in the original **par 6.6.3** is perhaps too strict. The SA Act does not set out such a strict

test although this is a requirement in Europe.

- In South Africa, unlike Europe there is also no requirement that a fair share of the benefit should go to consumers. It is suggested that this should not be set out as a requirement in the South African Guidelines. The statements in **par 7.3.4.3** and **7.3.4.4** that "The information exchange should also not have the effect of eliminating all competition between the competitors" are therefore open to doubt.

- It is also not a requirement in South Africa that the restriction must not "afford an undertaking the possibility of eliminating competition in respect of a substantial part of the products in question".

- Finally, the requirement that pro-competitive gains must outweigh any prevention or lessening of competition is a difficult one in South Africa because of the Tribunal judgment of *Trident Steel* (*Pty*) *Ltd/Dorbyl Ltd* 89/LM/Oct00 par 81. There in the context of mergers it was stated that "where efficiencies constitute "real" efficiencies and there is evidence to verify them [efficiencies] of a quantitative and qualitative nature, evidence that the efficiencies will benefit consumers, is less compelling. On the other hand, where efficiencies demonstrate less compelling economies, evidence of a pass through to consumers should be demonstrated and although no threshold for this is suggested, they need to be more than trivial, but neither is it necessary that they are wholly passed on. The test is thus one where real economies and benefit to consumers exist in an inverse relationship". But it is somewhat difficult to give meaning to this dictum. See for instance *Masscash Holdings (Pty) Ltd/Finro Enterprises (Pty) Ltd t/a Finro Cash and Carry* 04/LM/Jan09 30/11/2009 pars 184-189 where a more careful weighing was done.

- Again a comparison with the relevant European provisions will be useful
  - EU Horizontal Guidelines
    - Information exchange takes place in different contexts. There are agreements, decisions by associations of undertakings, or concerted practices under which information is exchanged, where the main economic function lies in the exchange of information itself.

Moreover, information exchange can be part of another type of horizontal co-operation agreement (for example, the parties to a production agreement share certain information on costs). The assessment of the latter type of information exchanges should be carried out in the context of the assessment of the horizontal co-operation agreement itself.[par 56]

- Moreover, communication of information among competitors may constitute an agreement, a concerted practice, or a decision by an association of undertakings with the object of fixing, in particular, prices or quantities. Those types of information exchanges will normally be considered and fined as cartels. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel.[par 59]

- Information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice or a decision by an association of undertakings. The existence of an agreement, a concerted practice or decision by an association of undertakings does not prejudge whether the agreement, concerted practice or decision by an association of undertakings gives rise to a restriction of competition within the meaning of Article 101(1). In line with the case-law of the Court of Justice of the European Union, the concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so- called has been concluded, practical co-operation between them is knowingly substituted for the risks of competition. The criteria of coordination and co-operation necessary for determining the existence of a concerted practice, far from requiring an actual plan to have been worked out, are to be understood in the light of the concept inherent in the provisions of the Treaty on competition, according to which each company must determine independently the policy which it intends to adopt on the internal market and the conditions which it intends to offer to its customers. This does not deprive companies of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does, however, preclude any direct or indirect contact between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings, and the volume of the said market. This precludes any direct or indirect contact between competitors, the object or effect of which is to influence conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, thereby facilitating a collusive outcome on the market. Hence, information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic.

Consequently, sharing of strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete.[par 61]

- A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice. Such disclosure could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour. For example, mere attendance at a meeting (7) where a company discloses its pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices. When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.[par 62]

- Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1). However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination.[par 63]

- Once it has been established that there is an agreement, concerted practice or decision by an association of undertakings, it is necessary to consider the main competition concerns pertaining to information exchanges.[par 64]

- Any negative effects arising from the exchange of information will not be assessed separately but in the light of the overall effects of the agreement. A production agreement 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. Whether the exchange of information in the context of a production agreement is likely to lead to restrictive effects on competition should be assessed according to the guidance given in Chapter 2.[par 181]

- See especially the EU Horizontal Guidelines on pro-competitive gains:

- Information exchange may lead to efficiency gains. Information about competitors' costs can enable companies to become more efficient if they benchmark their performance against the best practices in the industry and design internal incentive schemes accordingly.[par 95]
- Moreover, in certain situations information exchange can help companies allocate production towards high-demand markets (for example, demand information) or low cost companies (for example, cost information). The likelihood of those types of efficiencies depends on market characteristics such as whether companies compete on prices or quantities and the nature of uncertainties on the market. Some forms of information exchanges in this context may allow substantial cost savings where, for example, they reduce unnecessary inventories or enable quicker delivery of perishable products to areas with high demand and their reduction in areas with low demand (see Example 6, paragraph 110).[par 96]
- Exchange of consumer data between companies in markets with asymmetric information about consumers can also give rise to efficiencies. For instance, keeping track of the past behaviour of customers in terms of accidents or credit default provides an incentive for consumers to limit their risk exposure. It also makes it possible to detect which consumers carry a lower risk and should benefit from lower prices. In this context, information exchange can also reduce consumer lock-in, thereby inducing stronger competition. This is because information is generally specific to a relationship and consumers would otherwise lose the benefit from that information when switching to another company. Examples of such efficiencies are found in the banking and insurance sectors, which are characterised by frequent exchanges of information about consumer defaults and risk characteristics.[par 97]
- Exchanging past and present data related to market shares may in some situations provide benefits to both companies and consumers by allowing companies to announce it as a signal of quality of their products to consumers. In situations of imperfect information about product quality, consumers often use indirect means to gain information on the relative qualities of products such as price and market shares (for example, consumers use best-selling lists in order to choose their next book) [par 98].
- Information exchange that is genuinely public can also benefit consumers by helping them to make a more informed choice (and reducing their search costs). Consumers are most likely to benefit in this way from public exchanges of current data, which are the most relevant for their purchasing decisions. Similarly, public information exchange about current input prices can lower search costs for companies, which would normally benefit consumers through lower final prices. Those types of direct consumer benefits are less likely to be generated by exchanges of future pricing intentions because companies which announce their pricing intentions are likely to revise them before consumers actually purchase based on that information. Consumers generally cannot rely on companies' future intentions when

making their consumption plans. However, to some extent, companies may be disciplined not to change the announced future prices before implementation when, for example, they have repeated interactions with consumers and consumers rely on knowing the prices in advance or, for example, when consumers can make advance orders. In those situations, exchanging information related to the future may improve customers' planning of expenditure.[par 99]

- Exchanging present and past data is more likely to generate efficiency gains than exchanging information about future intentions. However, in specific circumstances announcing future intentions could also give rise to efficiency gains. For example, companies knowing early the winner of an R&D race could avoid duplicating costly efforts and wasting resources that cannot be recovered.[par 100]
- Restrictions that go beyond what is necessary to achieve the efficiency gains generated by an information exchange do not fulfil the conditions of Article 101(3). For fulfilling the condition of indispensability, the parties will need to prove that the data's subject matter, aggregation, age, confidentiality and frequency, as well as coverage, of the exchange are of the kind that carries the lowest risks indispensable for creating the claimed efficiency gains. Moreover, the exchange should not involve information beyond the variables that are relevant for the attainment of the efficiency gains. For instance, for the purpose of benchmarking, an exchange of individualised data would generally not be indispensable because information aggregated in for example some form of industry ranking could also generate the claimed efficiency gains while carrying a lower risk of leading to a collusive outcome (see Example 4, paragraph 108). Finally, it is generally unlikely that the sharing of individualised data on future intentions is indispensable, especially if it is related to prices and quantities.[par 101]
- Similarly, information exchanges that form part of horizontal co-operation agreements are also more likely to fulfil the conditions of Article 101(3) if they do not go beyond what is indispensable for the implementation of the economic purpose of the agreement (for example, sharing technology necessary for an R&D agreement or cost data in the context of a production agreement).[par 102]
- Production agreements may also result in the coordination of the parties' competitive behaviour as suppliers leading to higher prices or reduced output, product quality, product variety or innovation, that is to say, a collusive outcome. This can happen, subject to the parties having market power and the existence of market characteristics conducive to such coordination, in particular when the production agreement increases the parties' commonality of costs (that is to say, the proportion of variable costs which the parties have in common) to a degree which enables them to achieve a collusive outcome, or if the agreement involves an exchange of commercially sensitive information that can lead to a collusive outcome.[par 158]
- Alternatively, a production agreement can lead to a collusive outcome or anti-competitive foreclosure by increasing the companies' market power or their commonality of costs or if it involves the

exchange of commercially sensitive information. On the other hand, a direct limitation of competition between the parties, a collusive outcome or anti-competitive foreclosure is not likely to occur if the parties to the agreement do not have market power in the market in which the competition concerns are assessed. It is only market power that can enable them to profitably maintain prices above the competitive level, or profitably maintain output, product quality or variety below what would be dictated by competition.[par 165]

- If the information exchange does not exceed the sharing of data necessary for the joint production of the goods subject to the production agreement, then even if the information exchange had restrictive effects on competition within the meaning of Article 101(1), the agreement would be more likely to meet the criteria of Article 101(3) than if the exchange went beyond what was necessary for the joint production. In this case the efficiency gains stemming from producing jointly are likely to outweigh the restrictive effects of the coordination of the parties' conduct. Conversely, in the context of a production agreement the sharing of data which is not necessary for producing jointly, for example the exchange of information related to prices and sales, is less likely to fulfil the conditions of Article 101(3).[par 182]

- Canadian Competitor Collaboration Guidelines (2009)

  - par 3.7 "Cartel agreements often involve the exchange of competitively sensitive information between competitors. Indeed, activities that assist competitors in monitoring one another's prices or conduct otherwise consistent with the existence of an agreement may be sufficient to prove that an agreement was concluded between the parties for the purpose of subsection 45(1) of the Act[22]. Accordingly, information sharing agreements between competitors should be structured carefully to ensure that they do not raise concerns under the criminal prohibitions in subsection 45(1) of the Act".

- See the US part of the OECD Report on Information Exchanges 21/10/2010

  - par 5 fn 3 "Although an agreement to exchange price information is not itself illegal per se, proof that competitors have shared information sometimes has served as evidence of a per se illegal conspiracy to fix prices." ABA Section of Antitrust Law, 1 Antitrust Law Developments 93 (6th ed. 2007) citing, inter alia, In Re Flat Glass Antitrust Litig., 385 F.3d 350, 368—69 (3rd Cir. 2004) cert. denied , 544 U.S. 948 (2005); Petroleum Products Antitrust Litigation, 906 F.2d 432, 445-50 (9th Cir. 1990)".

  - par 8 "Information exchanges can be treated as circumstantial evidence of an unlawful price fixing or market allocation agreement among competitors, and in such a case are analyzed under the per se rule as a violation of the antitrust laws. For example, in In re Petroleum Prods. Antitrust Litigation, the 9th Circuit explained that "[i]nformation exchanges help to establish an antitrust violation only when either (1) the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices, or the exchange is made pursuant to an express or tacit agreement that is itself a violation of § 1 under a rule of reason analysis." The court further held that evidence of

pricing information exchanges was supportive of a conspiracy inference under Section 1 of the Sherman Act, but not conclusive of such a conspiracy".
- par 9: "In addition to serving as evidence of an unlawful agreement, information exchanges likely to affect prices may, under certain circumstances, be illegal in and of themselves. For example in United States v Container Corp. of America the Supreme Court found "exchange of price information but no agreement to adhere to a price schedule….". It held, nonetheless, that exchanges of information concerning the "most recent price charged or quoted" among sellers of corrugated shipping containers, albeit on an irregular basis, unlawfully stabilized prices. Consequently, the Court concluded that the exchange of price information, involving a highly concentrated industry and a fungible product with inelastic demand, "had an anticompetitive effect in the industry, chilling the vigor of price competition." It therefore found the exchange to amount to concerted action and thus sufficient to establish a combination or conspiracy in violation of Sherman Act §1".
- par 6.2.3 Airline Tariff Publishing Company (ATP) 34. In December 1992, DOJ sued eight of the largest U.S. airlines and the Airline Tariff Publishing Company (ATP) for price fixing and for operating ATP, their jointly-owned fare exchange system, in a way that facilitated collusion, in violation of §1 of the Sherman Act.86 ATP was a complex information exchange system among airlines that was widely and openly operated to disseminate fare information through computer reservation systems and travel agents. ATP provided both a means for the airlines to disseminate fare information to the public and a means for them to engage in essentially a private dialogue on fares. The defendants designed and operated ATP's computerized fare exchange system in a way that unnecessarily facilitated coordinated interaction among them so that they could (1) communicate more effectively with one another about future fare increases, restrictions, and elimination of discounted fares, (2) establish links between proposed fare changes in one or more city-pair markets and proposed changes in other city-pair markets, (3) monitor each other's changes, including changes in fares not available for sale, and (4) reduce uncertainty about each other's pricing intentions. The ATP case involved "cheap talk"--communication that does not commit firms to a course of action -- such as announcing a future price increase but leaving open the option to rescind or revise it before it takes effect. If the terms of agreement are complex (e.g., specifying prices in numerous markets) but there is a common desire to reach agreement, cheap talk can help firms reach a collusive equilibrium. ATP collected fare information from the airlines and distributed it daily to all the airlines and to the major computer reservation systems (CRSs) that serve travel agents. This arrangement was an efficient instrument for cheap talk. The case was resolved with a consent decree crafted to ensure that the airline defendants did not continue to use any fare dissemination system in a manner that unnecessarily facilitated price coordination or that enable them to reach specific price-fixing agreements.

5. Comments on the setting out of those aspects that determine the competition law consequences of information exchanges

- A new Part 6 should focus strictly on the type of factors that have to be considered in determining whether an information exchange prevents or lessens competition
- New **par 6.1**: The elements that currently form part of par 5.6 can best be used as a starting point.
    - Currently the first part of **par 5.6** reads: "In the first instance there could be harm to competition depending on the circumstances and facts of the case".
    - Perhaps part 6 should commence with the very important statement that: "The question whether an information is anti-competitive will depend on the facts of every case".
    - The second part of **par 5.6** should be combined with the current part 6, which can perhaps be structured better to create a clearer scheme of analysis.
- A new **par 6.2** should contain a clear statement of the general principles. Currently an attempt is made to do this in the second part of **par 5.6** and **6.1**. They should be clarified and combined for this purpose.

"Although other issues may also impact on the analysis, the evaluation of the competitive consequences will turn on three elements: 1) the market conditions on the relevant markets in which the firms compete and other markets that could be affected by the information 2) the nature and characteristics of the information 3) the manner in which the information is exchanged or the system by which the information is exchanged".

- Perhaps it should also be made clear that these aspects should not be viewed in isolation.
- Aspect of the current **pars 5.6, 6.1** and **6.2** have been built into this proposed provision. The problem with these provisions is that they fall between two stools and that there is too much confusing overlap between these provisions inter se and between these and other provisions. They are somewhere between the level of abstraction that is needed to create broad context and the detailed analysis that should follow upon it. Parts of the provision should therefore be shifted into a more general statement and parts should rather be moved into the more detailed analysis to allow for a clear methodological scheme to emerge.
    - The second part of the current **par 5.6** determines "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 frequency of exchanges and the age of the information at the time of the exchange, as will be discussed below.
        - The literature recognizes the circumstances in the market as a broad category for analysis although the term "structure" may be a little too narrow and although the examples given here should best be left to a more detailed analysis to avoid confusion.
        - The level of disaggregation is perhaps an issue that should be discussed in greater detail under the heading "nature and characteristics of information". The provision starts with detail and then works to general principles which perhaps is the wrong way round.

- The age of the information again is a return to the "nature and characteristics of information" that should be addressed but it comes after a reference to the frequency of exchange which rather relates to the nature of the exchange.
- The following aspects derived from this provision should rather be taken up later:
    - the aspects regarding market structure mentioned in the first parenthesis.
    - the issue of the level of disaggregation mentioned here.
    - issues regarding the frequency and age of information.

- The current **par 6.1** reads "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".
    - The provision contains important information but it is unstructured. It first refers to the nature of information and the structure of the market. It then goes into the issue of collusion, which is perhaps too detailed for a broad discussion, and then returns to the nature of the exchange and characteristics of the market.
    - It is submitted that the part on collusive conduct should rather be left for a detailed analysis.
    - It is not clear whether the reference to characteristics of the market but to structure of the market in other parts of the Draft Guidelines is intentional. It is difficult to see why a different terminology is used here. We prefer the broader term "characteristics" or "conditions".
    - We have used the term "nature and characteristics" of information but are not quite convinced by the use of both terms.
- The proposed provision above builds on the last part of **par 6.2** but it is believed that **par 6.2** currently gets lost in the detailed preceding analysis. The last part of this provision reads "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".
    - This part rightly refers to "market conditions" rather than the more limited "market structure".
    - It is not quite clear what the "with regard to anti-competitive behaviour" is supposed to mean.
    - The earlier part of the provision is detail that should be discussed later on.
    - The first part relates to the nature of the information: "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)".
    - The middle part relates the nature of the exchange: "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".

- Perhaps the EU Horizontal Guidelines can again be viewed in comparison.
  - "However, the exchange of market information may also lead to restrictions of competition in particular in situations where it is liable to enable undertakings to be aware of market strategies of their competitors. The competitive outcome of information exchange depends on the characteristics of the market in which it takes place (such as concentration, transparency, stability, symmetry, complexity etc.) as well as on the type of information that is exchanged, which may modify the relevant market environment towards one liable to coordination.[par 58]".
    - This provision suffers from many of the same weaknesses as the equivalent South African ones.

- New **par 6.3**: It is proposed that market conditions are central to an analysis of the competitive effects of information exchanges and that this should be covered first. Such an approach would also accord with international practice. Currently the Draft Guidelines only deal with this issue in par **6.6.1** after several aspects regarding the nature of information exchanged have been discussed. This will be discussed under a new **par 6.3**.
  - The reference to market structure has already been criticised. It is proposed that the expression market conditions or market charactristics, which would include market structure, should rather be utilised.
  - Several aspects that should be relevant here are mentioned in par **6.6.1.1** "The particular characteristics~~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 extent to which information was available to participants in the market);
  - the symmetry and stability of the~~ir~~ market shares of the competing firms;
  - barriers to entry".
    - This provision perhaps only requires minor editing as proposed. It should also be considered whether this list is complete.
  - There is perhaps a need to a provision that is equivalent to this from the Canadian Competitor Collaboration Guidelines (2009) par 3.7.3 "As noted above, an agreement is likely to substantially lessen or prevent competition in a relevant market where the agreement is likely to create, maintain or enhance the ability of the parties to the agreement to exercise market power. As a result, the Bureau will not challenge under section 90.1 an agreement to share information unless the parties to the agreement have or are likely to have market power or the relevant market is concentrated such that firms are able to engage in a coordinated exercise of market power. Agreements to share information between participants who collectively hold market power have the potential to substantially lessen competition in the relevant market".

- Where the information is merely exchanged between firms that do not have market power and it is limited to them but they will not have market power then no harm can be done to competition.

- New par **6.3.1**: A more detailed analysis of these factors is required. The current par **6.6.1.2** is entirely inadequate and is arbitrary in the issues that are listed here: "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".

- Considerable extension is required here.

- This provision also contains unnecessary qualifications and the point about the absence of all these elements perhaps is not necessary. Perhaps as in the EU Horizontal Guidelines it should merely be stated that it may sometimes be the purpose of an information exchange to overcome characteristics in the market that may make collusion more difficult.

- The EU Horizontal Guidelines make the important point that it must be asked in every case whether the exchange increases the likelihood of collusion or other anti-competitive consequences.

- Certain market conditions may make coordination easier to achieve, sustain internally, or sustain externally. Exchanges of information in such markets may have more restrictive effects compared to markets with different conditions. However, even where market conditions are such that coordination may be difficult to sustain before the exchange, the exchange of information may change the market conditions in such a way that coordination becomes possible after the exchange – for example by increasing transparency in the market, reducing market complexity, buffering instability or compensating for asymmetry. For this reason it is important to assess the restrictive effects of the information exchange in the context of both the initial market conditions, and how the information exchange changes those conditions [first part of par 76].

- Companies are more likely to achieve a collusive outcome in markets which are sufficiently transparent, concentrated, non-complex, stable and symmetric. In those types of markets companies can reach a common understanding on the terms of coordination and successfully monitor and punish deviations. However, information exchange can also enable companies to achieve a collusive outcome in other market situations where they would not be able to do so in the absence of the information exchange. Information exchange can thereby facilitate a collusive outcome by increasing transparency in the market, reducing market complexity, buffering instability or compensating for asymmetry. In this context, the competitive outcome of an information exchange depends not only on the initial characteristics of the market in which it takes place (such as concentration, transparency, stability, complexity etc.), but also on how the type of the information exchanged may change those characteristics.[par 77]

- Collusive outcomes are more likely in transparent markets. Transparency can facilitate collusion by enabling companies to reach a common understanding on the terms of coordination, or/and by increasing internal and external stability of collusion. Information exchange can increase transparency and

hence limit uncertainties about the strategic variables of competition (for example, prices, output, demand, costs etc.). The lower the pre-existing level of transparency in the market, the more value an information exchange may have in achieving a collusive outcome. An information exchange that contributes little to the transparency in a market is less likely to have restrictive effects on competition than an information exchange that significantly increases transparency. Therefore it is the combination of both the pre-existing level of transparency and how the information exchange changes that level that will determine how likely it is that the information exchange will have restrictive effects on competition. The pre-existing degree of transparency, inter alia, depends on the number of market participants and the nature of transactions, which can range from public transactions to confidential bilateral negotiations between buyers and sellers. When evaluating the change in the level of transparency in the market, the key element is to identify to what extent the available information can be used by companies to determine the actions of their competitors. [Par 78]

- Tight oligopolies can facilitate a collusive outcome on the market as it is easier for fewer companies to reach a common understanding on the terms of coordination and to monitor deviations. A collusive outcome is also more likely to be sustainable with fewer companies. With more companies coordinating, the gains from deviating are greater because a larger market share can be gained through undercutting. At the same time, gains from the collusive outcome are smaller because, when there are more companies, the share of the rents from the collusive outcome declines. Exchanges of information in tight oligopolies are more likely to cause restrictive effects on competition than in less tight oligopolies, and are not likely to cause such restrictive effects on competition in very fragmented markets. However, by increasing transparency, or modifying the market environment in another way towards one more liable to coordination, information exchanges may facilitate coordination and monitoring among more companies than would be possible in its absence.[par 79]
- Companies may find it difficult to achieve a collusive outcome in a complex market environment. However, to some extent, the use of information exchange may simplify such environments. In a complex market environment more information exchange is normally needed to reach a common understanding on the terms of coordination and to monitor deviations. For example, it is easier to achieve a collusive outcome on a price for a single, homogeneous product, than on numerous prices in a market with many differentiated products. It is nonetheless possible that to circumvent the difficulties involved in achieving a collusive outcome on a large number of prices, companies may exchange information to establish simple pricing rules (for example, pricing points). [par 80]
- Collusive outcomes are more likely where the demand and supply conditions are relatively stable. In an unstable environment it may be difficult for a company to know whether its lost sales are due to an overall low level of demand or due to a competitor offering particularly low prices, and therefore it is difficult to sustain a collusive outcome. In this context, volatile demand, substantial internal growth by some companies in the market, or frequent entry by new companies, may indicate that the current situation is not sufficiently stable for coordination to be likely. Information exchange in certain situations

can serve the purpose of increasing stability in the market, and thereby may enable a collusive outcome in the market. Moreover, in markets where innovation is important, coordination may be more difficult since particularly significant innovations may allow one company to gain a major advantage over its rivals. For a collusive outcome to be sustainable, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be capable of jeopardising the results expected from the collusive outcome. In this context, the existence of barriers to entry makes it more likely that a collusive outcome on the market is feasible and sustainable.[par 81

- A collusive outcome is more likely in symmetric market structures. When companies are homogenous in terms of their costs, demand, market shares, product range, capacities etc., they are more likely to reach a common understanding on the terms of coordination because their incentives are more aligned. However, information exchange may in some situations also allow a collusive outcome to occur in more heterogeneous market structures. Information exchange could make companies aware of their differences and help them to design means to accommodate for their heterogeneity in the context of coordination.[par 82]
- The stability of a collusive outcome also depends on the companies' discounting of future profits. The more companies value the current profits that they could gain from undercutting versus all the future ones that they could gain by the collusive outcome, the less likely it is that they will be able to achieve a collusive outcome.[par 83]
- By the same token, a collusive outcome is more likely among companies that will continue to operate in the same market for a long time, as in such a scenario they will be more committed to coordinate. If a company knows that it will interact with the others for a long time, it will have a greater incentive to achieve the collusive outcome because the stream of future profits from the collusive outcome will be worth more than the short term profit it could have if it deviated, that is to say, before the other companies detect the deviation and retaliate.[par 84]
- Overall, for a collusive outcome to be sustainable, the threat of a sufficiently credible and prompt retaliation must be likely. Collusive outcomes are not sustainable in markets in which the consequences of deviation are not sufficiently severe to convince coordinating companies that it is in their best interest to adhere to the terms of the collusive outcome. For example, in markets characterised by infrequent, lumpy orders, it may be difficult to establish a sufficiently severe deterrence mechanism, since the gain from deviating at the right time may be large, certain and immediate, whereas the losses from being punished small and uncertain, and only materialise after some time. The credibility of the deterrence mechanism also depends on whether the other coordinating companies have an incentive to retaliate, determined by their short-term losses from triggering a price war versus their potential long-term gain in case they induce a return to a collusive outcome. For example, companies' ability to retaliate may be reinforced if they are also interrelated by vertical commercial relationships which they can use as a threat of punishment for deviations.[par 85]
- For an information exchange to be likely to have restrictive effects on competition, the companies involved in the exchange have to cover a

sufficiently large part of the relevant market. Otherwise, the competitors that are not participating in the information exchange could constrain any anti-competitive behaviour of the companies involved. For example, by pricing below the coordinated price level companies unaffiliated within the information exchange system could threaten the external stability of a collusive outcome [par 87].

- What constitutes 'a sufficiently large part of the market' cannot be defined in the abstract and will depend on the specific facts of each case and the type of information exchange in question. Where, however, an information exchange takes place in the context of another type of horizontal co- operation agreement and does not go beyond what is necessary for its implementation, market coverage below the market share thresholds set out in the relevant chapter of these guidelines, the relevant block exemption regulation (1) or the *De Minimis* Notice pertaining to the type of agreement in question will usually not be large enough for the information exchange to give rise to restrictive effects on competition [par 88].

- New **par 6.4** should concern the nature and characteristics of information exchanged:
  - The basic aspects that are relevant here should first be listed and this should form the new **par 6.4**. The list should at least include the following issues:
    - The new **par 6.4.1** should concern "The subject covered by the information". **Par 6.6.3.1** refers to the "type of data" that is exchanged.
      - The definition of commercially/competitively sensitive information and its role should be considered here.
      - For the types of information that will be relevant here a list of factors can be given with reference to **pars 5.1, 7.3.2.2.3-7.3.2.8**, information on (see also the aspects mentioned in current **pars 6.3.1, 6.4.1, 7.3.3.4**):
        - pricing, margins and costs;
        - budget, business and investment plans;
        - capacity, output, production volumes and sales figures;
        - Customers and marketing strategies
      - **Par 3.2** also refers to examples of information that will not be relevant to competition (information about accounting methods, stock control or book-keeping practices, new forms of technology and research results) and this list could perhaps rather be dealt with here although it will appear from the discussion under **par 3.2** that the list given is not unproblematic.
      - See for purposes of the description of this aspect the EU Horizontal Guidelines:
        - It will also be necessary to examine the frequency of the information exchanges, the type of information exchanged (for example, whether it is public or confidential, aggregated or detailed, and historical or current), and the importance of the information for the fixing of prices, volumes or conditions of service [1. Case C-238/05, *Asnef-Equifax*, paragraph 54]. The following factors are relevant for this assessment.[par 76]
        - The exchange between competitors of strategic data, that is to say, data that reduces strategic uncertainty in the market, is more likely to be caught by Article 101 than exchanges of other types of information. Sharing of strategic data can give rise to

restrictive effects on competition because it reduces the parties' decision-making independence by decreasing their incentives to compete. Strategic information can be related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes and their results. Generally, information related to prices and quantities is the most strategic, followed by information about costs and demand. However, if companies compete with regard to R&D it is the technology data that may be the most strategic for competition. The strategic usefulness of data also depends on its aggregation and age, as well as the market context and frequency of the exchange.[par 86]

- United States Antitrust Guidelines for Collaborations Among Competitors April 2000 par 3.31(b) "The competitive concern depends on the nature of the information shared. Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables".

- The new **par 6.4.2** should concern "Whether the information is confidential or public"

- It appears that the concepts used here should be more carefully defined. For this purpose the EU Horizontal Guidelines could be used.

- It may be argued that there cannot be harm in exchanging of information that is already publicly available but of course the problem here is that it is difficult to see why firms would want to exchange public information. Care must be taken to determine exactly when information should be regarded as public.

- See again the EU Horizontal Guidelines for a more comprehensive analysis of this issue.

- In general, exchanges of genuinely public information are unlikely to constitute an infringement of Article 101 [5. Joined Cases T-191/98 and others, Atlantic Container Line (TACA), [2003] ECR II-3275, par 1154. This may not be the case if the exchange underpins a cartel]. Genuinely public information is information that is generally equally accessible (in terms of costs of access) to all competitors and customers. For information to be genuinely public, obtaining it should not be more costly for customers and companies unaffiliated to the exchange system than for the companies exchanging the information. For this reason, competitors would normally not choose to exchange data that they can collect from the market at equal ease, and hence in practice exchanges of genuinely public data are unlikely. In contrast, even if the data exchanged between competitors is what is often referred to as being 'in the public domain', it is not genuinely public if the costs involved in collecting the data deter other companies and customers from doing so. A possibility to gather the information in the market, for example to collect it from customers, does not

necessarily mean that such information constitutes market data readily accessible to competitors (2)[See Joined Cases T-202/98 and others, Tate & Lyle v Commission, paragraph 60]. [par 92]

- Even if there is public availability of data (for example, information published by regulators), the existence of an additional information exchange by competitors may give rise to restrictive effects on competition if it further reduces strategic uncertainty in the market. In that case, it is the incremental information that could be critical to tip the market balance towards a collusive outcome. [par 93]

- The question whether a disclosure of information will be benign if it is also made public will be discussed below (see manner in which information is disclosed).

- The new **par 6.4.3** relates to "Whether the information is aggregated or disaggregated".

- Disaggregation is accurately defined in the current **par 2.9**.

- The importance of disaggregated information is stressed in **6.6.2.2** although the provision actually concerns how widely information must be disseminated (see also **7.3.1.1** on the requirement that trade associations must keep disaggregated information confidential and that they must only disclose aggregated information, **7.3.1.3** on the collection of disaggregated information, **7.3.1.4** on the disclosure of aggregated information, **7.3.2.2.2, 7.3.2.2.9** on the disclosure of information provided to government and **7.3.2.2.4, 7.3.2.2.7, 7.3.2.2.8** on the information which firms may use in discussions with one another, **7.3.7.2** on benchmarking).

- See the EU Horizontal Guidelines provision: "Exchanges of genuinely aggregated data, that is to say, where the recognition of individualised company level information is sufficiently difficult, are much less likely to lead to restrictive effects on competition than exchanges of company level data. Collection and publication of aggregated market data (such as sales data, data on capacities or data on costs of inputs and components) by a trade organisation or market intelligence firm may benefit suppliers and customers alike by allowing them to get a clearer picture of the economic situation of a sector. Such data collection and publication may allow market participants to make better-informed individual choices in order to adapt efficiently their strategy to the market conditions. More generally, unless it takes place in a tight oligopoly, the exchange of aggregated data is unlikely to give rise to restrictive effects on competition. Conversely, the exchange of individualised data facilitates a common understanding on the market and punishment strategies by allowing the coordinating companies to single out a deviator or entrant. Nevertheless, the possibility cannot be excluded that even the exchange of aggregated data may facilitate a collusive outcome in markets with specific characteristics. Namely, members of a very tight and stable oligopoly exchanging aggregated data who detect a market price below a certain level could automatically assume that someone has deviated from the collusive outcome and take

market-wide retaliatory steps. In other words, in order to keep collusion stable, companies may not always need to know who deviated, it may be enough to learn that 'someone' deviated"[par 89].

- United States Antitrust Guidelines for Collaborations Among Competitors April 2000 par 3.31(b) "Finally, other things being equal, the sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data".

- The new **par 6.4.4** should deal with "Frequency of exchanges"

  - See the EU Horizontal Guidelines:

    "Frequent exchanges of information that facilitate both a better common understanding of the market and monitoring of deviations increase the risks of a collusive outcome. In more unstable markets, more frequent exchanges of information may be necessary to facilitate a collusive outcome than in stable markets. In markets with long-term contracts (which are indicative of infrequent price re- negotiations) a less frequent exchange of information would normally be sufficient to achieve a collusive outcome. By contrast, infrequent exchanges would not tend to be sufficient to achieve a collusive outcome in markets with short-term contracts indicative of frequent price re-negotiations. However, the frequency at which data needs to be exchanged to facilitate a collusive outcome also depends on the nature, age and aggregation of data".[par 91]

  - See also on the frequency of exchange NERA Economic Consulting *Competition Policy Applied to Information Exchanges between Competitors in the EU: Proceedings of the Spanish Competition Authority in a Recent Case* 22/12/2014 "The frequency of the exchange. Frequent data exchanges permit companies to better and more quickly adapt their commercial policies to their competitors' strategies. Moreover, for a collusive outcome to be sustained, the punishment for deviations from the agreement ought to be credible and effective. Therefore, the detection of deviations must be timely in order to limit the extra profits obtained by the disloyal firm. Again, the frequency of the information exchange necessary to reach a collusive outcome also depends on the nature, age, and the disaggregation level of the data".

- The new **par 6.4.5** should deal with the "Age of the information"

  - The first part of **par 6.2** states that "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)".

  - **Par 6.3-6.5** looks at the analysis of information exchanges from the vantage point of the age of information although it also goes considerably further. At first we were somewhat perplexed by this but we believe that it makes practical sense to do so. Nevertheless we feel that it will help if a broader framework as suggested here is first established. The first statement in **par 6.2** should be sufficient to introduce this topic with a reference to the later more detailed analysis.

- The EU Horizontal Merger Guidelines can again be compared here: "90. The exchange of historic data is unlikely to lead to a collusive outcome as it is unlikely to be indicative of the competitors' future conduct or to provide a common understanding on the market (1). Moreover, exchanging historic data is unlikely to facilitate monitoring of deviations because the older the data, the less useful it would be for timely detection of deviations and thus as a credible threat of prompt retaliation (2)[For example, in past cases the Commission has considered the exchange of individual data which was more than one year old as historic and as not restrictive of competition within the meaning of Article 101(1), whereas information less than one year old has been considered as recent; Commission Decision in Case IV/31.370, UK Agricultural Tractor Registration Exchange, paragraph 50; Commission Decision in Case IV/36.069, Wirtschaftsvereinigung Stahl, OJ L 1, 3.1.1998, p. 10, paragraph 17.]. There is no predetermined threshold when data becomes historic, that is to say, old enough not to pose risks to competition. Whether data is genuinely historic depends on the specific characteristics of the relevant market and in particular the frequency of price re-negotiations in the industry. For example, data can be considered as historic if it is several times older than the average length of contracts in the industry if the latter are indicative of price re- negotiations. Moreover, the threshold when data becomes historic also depends on the data's nature, aggregation, frequency of the exchange, and the characteristics of the relevant market (for example, its stability and transparency)."
- **Par 5.6** of the Draft Guidelines currently states that a relevant factor in determining competitive consequences of an information exchange is "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)" and it also mentions the two factors listed after that in the list given by us (frequency of exchanges and age of information).
- They are then mentioned in the further analysis in the part that uses the age of information as a point of departure (see **par 6.3.2** and **6.3.6** on the relationship between aggregation and age of information, **par 6.3.3** where it is argued that frequency increases transparency, **par 6.3.4** on the age of information and its relationship to frequency of exchange) in the part on indispensability (see **par 6.6.3.1** where reference is made to aggregation, age and frequency of the exchange).
- United States Antitrust Guidelines for Collaborations Among Competitors April 2000 par 3.31(b) "Similarly, other things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information".

- New **par 6.5** should cover the manner in which information is exchanged. Here the statement in the middle of **par 6.3** of the existing Draft Guidelines appears useful. "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". This should be

combined with the statement in the current second sentences of **par 7.1** "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".

- The new **par 6.5** should therefore be phrased as follows:

  "In assessing information exchange between competitors it is important to identify the mechanism used:

  a) information can be directly exchanged between competing firms themselves whether through bilateral communications or otherwise;

  b) information can be indirectly exchanged through the participation of another entity acting on their behalf such as a trade association or an accounting firm, a private company that provides a subscription service to collect and disseminate information, as well as other intermediaries;

  c) information can be exchanged through public announcements."

- It is important to determine to whom information has been disclosed.
  - Several provisions in the existing Draft Guidelines deal with this
    - See the analysis in **par 6.4.3** below it refers to "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".
    - See also the analysis of **par 6.5.2** below. It refers to "Sharing of such information through a medium or in a setting such that the information is exclusive to firms, will raise competition concerns".
    - The first sentence of the existing **par 7.2** states "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". However, it has already been stated that this statement is perhaps not accurate and should rather be rejected.
    - It is further suggested that the current **par 6.6.2** should separate the issue of public availability and the manner in which information is exchanged. The parts that concern availability should rather be covered here.
      - **Par 6.6.2.1** determines "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."

- **Par 6.6.2.2** determines "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". It would seem that the statements made in these paragraphs are too general and should be more carefully formulated.

- This provision will also make it unnecessary to maintain the current **par 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" although some aspects of this statement may be used to state when unilateral disclosures will constitute concerted practices.

- It is not made clear why the current **pars 6.4.3, 6.5.2** and **6.6.2** draw the distinction between information addressed at competitors and information that is not so addressed.

- First, the cases where an exchange is directly addressed at and restricted to all competitors to the exclusion of others may be problematic because it is difficult to explain except on the basis that the firms intend to collude.

- Secondly, exchanges of information may be addressed and restricted to only some competitors. These situations may also be difficult to explain except on the basis that they constitute joint ventures or other co-operative relationships. It may create the added difficulty that these types of exchanges may harm other actual and potential competitors and thereby further restrict competition.

- The statement in the second sentence of the existing **par 7.2** is perhaps relevant here: "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[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]". These types of communications often will be viewed as an indication of a cartel (although the term cartel perhaps still requires definition).

- Proper references are required in all these cases.

- Where competitively sensitive information is not or is not just addressed at competitors it may be easier to show that there is a good commercial justification for providing it and that the disclosure is either not anti-competitive or it can be justified on the basis of pro-competitive consequences that outweigh anti-competitive ones. However, a disclosure of information will not necessarily be justified simply because it was not addressed at competitors.

- Finally, information can be exchanged with persons that are not competitors and it can be restricted to prevent the public or competitors from obtaining the information. This of course will also not be problematic from a competition law perspective.

- See in this respect Canadian Competitor Collaboration Guidelines (2009) par 3.7.4 "Information exchanged directly

between competitors is more likely to raise concerns than information that is supplied to an independent third party. In addition, information that is aggregated so as not to disclose information specific to any given firm is less likely to raise concerns than information that is shared in a disaggregated form. For example, firms wishing to determine costs relative to industry averages or industry trends may agree to supply current sales information to a third party for disclosure in an aggregated form that does not reveal the sales information of any specific firm, as distinct from sharing that information directly".

- These aspects will be particularly relevant in the context of information exchanges with government or policymakers (the new **par 8.1**, benchmarking and market surveys **par 8.2**, industry associations **par 8.3**.

- Steps that are taken to restrict exchanged information to competitors or particular competitors are also relevant to the competition analysis.

- Where the information is only disclosed to some competitors, it would strengthen the exclusionary effect of the disclosure on competitors who do not have the information.

- Where information is disclosed to all competitors, it is suggested, it will not make a major difference whether steps are taken to restrict the information to those competitors (see the next point).

- It could be argued that it may be more difficult for firms to harm competition by exchanging information if the information is made public. However, this must be distinguished from the situation where information, which is already public, is disclosed. Where competing firms make information public it may still be harmful as it may create artificial market transparency that could increase the likelihood of effective collusion and less efficient outcomes even where there is no collusion (so-called tacit collusion).

- The first sentence of the existing **par 7.2** states "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". We believe that this statement is based on the misunderstand that tacit collusion is a form of collusion to which firms resort. Although we agree that public announcements can lead to tacit collusion, the terminology used here is somewhat problematic. We have not again taken up the wording of the existing **par 7.2** although some of the ideas behind it is found in this part.

- However, publication could reduce the likelihood that a disclosure by a firm would harm competition of harm.

- It would at least mean that all actual and potential competitors would have access to the information and would not be hampered in their own participation in a market.

- Clients would also have the information, and this could make it more difficult for competing firms to undermine competition, but the importance of this point should not be exaggerated as

parties outside of competing firms may find it difficult to see the significance of information.

- [One question that has not been addressed is: what would be the effect of a delay, see the new **par 7.2.4.2** discussed below]

- It may be useful to consider the EU Horizontal Guidelines in this context: "An *information exchange* is genuinely public if it makes the exchanged data equally accessible (in terms of costs of access) to all competitors and customers [3. This does not preclude that a database be offered at a lower price to customers which themselves have contributed data to it, as by doing so they normally would have also incurred costs]. The fact that information is exchanged in public may decrease the likelihood of a collusive outcome on the market to the extent that non- coordinating companies, potential competitors, as well as costumers may be able to constrain potential restrictive effect on competition [4. Assessing barriers to entry and countervailing 'buyer power' in the market would be relevant for determining whether outsiders to the information exchange system would be able to jeopardise the outcomes expected from coordination. However, increased transparency to consumers may either decrease or increase scope for a collusive outcome because with increased transparency to consumers, as price elasticity of demand is higher, pay-offs from deviation are higher but retaliation is also harsher.] However, the possibility cannot be entirely excluded that even genuinely public exchanges of information may facilitate a collusive outcome in the market.[par 94]

- See also in this respect the Canadian Competitor Collaboration Guidelines (2009) par 3.7.1: "In general, the Bureau does not consider publicly available information to be competitively sensitive. However, the Bureau may be concerned with an agreement between competitors to publicly disclose competitively sensitive information. For example, an agreement to publicly disclose future pricing information can raise concerns under the Act where it is likely to have the effect of substantially lessening competition and where such disclosure is not in furtherance of some legitimate objective".

- In the light of these comments it is suggested that the existing **par 6.6.2.1** can be reformulated as follows:

"From a competition perspective it raises the greatest concern if competitively relevant i~~I~~nformation ~~that~~ is shared only 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~~. Even if competitively sensitive information is not directly provided to competitors ~~The sharing of information~~ but through a medium or in a setting, for which the immediate audience is not competitors, it could be of concern~~s~~ where it can be expected that competitors will receive and respond to 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.~~

- On the topic of the nature of the exchange reference can be made to the EU Horizontal Guidelines par 76: “This will include an assessment of the specific characteristics of the system concerned, including its purpose, conditions of access to the system and conditions of participation in the system”.

6. Special section regarding the age of information

- This section will be par 7 and will concern the more detailed impact of the age of information. Currently covered in **par 6.3-6.5**.
    - It could nevertheless also be considered to accommodate this under the new **par 6.4.5**.
- The new par 7.1 would then concern past information
    - The first relevant provision **par 7.1.1** would be the current **par 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".
        - The list of types of information mentioned here will probably be of practical relevance to readers of the Guidelines but perhaps the first part could be phrased more accurately to read: "Competitively sensitive 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".
        - See also here Canadian Competitor Collaboration Guidelines (2009) par 3.7.2: "However, it should be noted that an agreement to disclose historical information could raise concerns where such information provides a meaningful indication of future intended pricing or other competitively significant factors".
    - New **par 7.1.2** will be the current **par 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".
        - Perhaps the last sentence requires some reformulation "Data that allows identification of particular ~~the~~ firms or ~~the~~ customers [or a narrow product-geographic area will raise competition concerns]".
            - It is not clear what the part in square brackets means. Does it refer to a product or geographic market? What is a product area? What is a narrow market? If proper answers to these questions cannot be found this part should rather be deleted.
    - New **par 7.1.3** could be the current **par 6.3.3** determining that "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".
        - Perhaps there is a need to provide some further detail. We suppose frequent exchanges may make it easier to punish departures from the collusive outcome timeously. It is in this sense that transparency is increased. However, this would to some extent depend on the nature of the market. Where long-term contracts are concluded punishment could be possible even where exchanges are infrequent as long as they are detailed. Frequently exchanged information

of course will not necessarily be more detailed than infrequent exchanges. The important point about frequent exchanges is that the information exchanged is current

- In the EU as stated above frequency of exchange is mentioned in the context of the establishment of collusion (See EU Horizontal Guidelines par 91 quoted above).

- New **par 7.1.4** could be the current **par 6.3.4**, it determines "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".

- This provision is oddly formulated and it requires considerable reformulation.

- The first sentence correctly states that frequency relates to the age of the information in the sense that regular disclosures always will mean that the information will not merely be of historical value. Perhaps this should not be a separate aspect and perhaps the first sentence should simply be added to the new **par 7.1.4**.

- The rest of the provision is particularly problematic.

- However, it is not at all clear what the phrase "and the presence of both of these factors could facilitate collusion". It is not clear what "both factors" mean here.

- The last sentence that concerns the issue whether a singular exchange may suffice is perhaps out of place. It does not concern the age of information. It should be mentioned earlier on either in part 5 (see the reference to **par 6.3.4**) or in the basic description of the meaning of "frequency of exchange" (**new par 6.4**).

- New **par 7.1.5** could be the current **par 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 to be~~as~~ historical".

- Again some aspects regarding this paragraph nevertheless should be considered.

- This part really concerns historical information and not information that is useful for supporting collusion.

- It is not clear whether the phrase "or historic" merely creates confusion or provides further clarity. It should be considered whether this phrase should not be deleted. Even if the phrase is not abandoned it should perhaps read "or historical".

- The term "several times over" is rather vague. Perhaps a more precise term can be used.

- New **par 7.1.6** would then be the current **par 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".

- This statement provides considerable clarity and will be practically useful.

- The phrases "delayed annually" and to a lesser extent "aggregated nationally" perhaps requires clarification.

- New **par 7.2** should concern exchanges of information about current and future conduct.

- We believe that there is unnecessary duplication between the part on current and future conduct and that they can be effectively combined.

- New **par 7.2.1**. should be the current first part of **par 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."

- Perhaps the first sentence should again read "Current competitively sensitive information ~~conduct refers~~concerns the present or recent state and conduct of firms including existing prices and other terms of trade, as well as ~~and the~~ the prices and other terms of trade of recent transactions".

- The second part of the existing **par 6.4.1** should be separated out as it makes an important but distinct point.

- New **par 7.2.2** should be the current **par 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".

- The first sentence requires the following reformulation "The exchange of current competitively sensitive information, including information about the terms of trade of recent transactions, among competitors can ~~also~~ facilitate coordination, as well as serve to monitor compliance with a collusive arrangement.

- The example mentioned in the existing **par 6.4.2** is a complex but important one which requires refinement. Where real-time prices are disclosed but they are the result of competitive processes and do not reflect the prices charged by individual firms, it should not be illegal. Prices of shares in an exchange or vegetables in a fruit market should not be illegal.

- This sentence should be changed to read "~~For example, t~~The use of a subscription service that provides real-time or close to real-time dissemination of prices among competitors can for example be a device by which to propose and coordinate on collusive prices. Such information exchange can serve anti-competitive goals

- It should be considered whether "facilitate coordination" is the correct term as it may suggest that the exchange cannot itself be a form of collusion.

- New **par 7.2.3** should be the current **par 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, could be~~is~~ anti-competitive, because it could facilitates reaching a collusive understanding among firms".

- This part is subject to the same criticisms as the previous part.

- The provision should therefore read "As a general rule, a firm that provides competitively sensitive information about the future such as ~~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."

- New **par 7.2.4** should then reflect what is currently in **paras 6.4.3, 6.5.2**, the second part of **6.4.1** and **6.5.1** as well as **6.5.3**.

- These provisions currently read as follows (with one minor proposed change if these provisions are to be maintained):

- The combined second parts of the existing effect of paras **6.4.1 and 6.5.1** "Any discussion among competitors about their current or 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".

- **Par 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".
- **Par 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".

- The new **par 7.2.4** should start with the amended general statement which is currently the first sentence in **par 6.5.2** which reads "A firm that shares information with competitors on its future prices, quantities and other elements of a business plan, is generally anti-competitive":
  - It is not clear what quantities means here and perhaps the information to which the provision refers should again be broadened.
  - This sentence should be broadened somewhat to refer to all *current* and future competitively sensitive information.
  - Again the qualification of joint ventures should be added.
  - It does not make sense to say that a firm "is generally anti competitive".
  - The sentence should be made the general introductory sentence of **par 7.2.4**.
  - The sentence therefore should read: "**7.2.4**. Outside of joint ventures, the sharing by a~~A~~ firm of ~~that shares~~ competitively sensitive information about current or future conduct such as information about~~with competitors on its future~~ prices, outputs~~quantities~~ and other elements of a business plan, with competitors is generally anti-competitive".
    - [just think carefully about this issue. Think about the per se prohibition point earlier perhaps they should be combined here].

- The second and third sentences of **par 6.5.2** require considerable reformulation and simplification and the second sentence has to be combined with **par 6.4.3**.
  - There is too much repetition in these two sentences and they are quite convoluted. The terminology used is also pretty vague. The second sentence also covers two issues that should be separated out.
  - The second sentence of **par 6.5.2** can be rephrased and can be combined with **par 6.4.3** as follows **par 7.2.4.1**: "Sharing of such information that will be available exclusively to competitors or some competitors in a market, will raise competition concerns".
  - The first sentence of the existing **par 6.4.3** can then be combined with this provision.
    - That would mean that the first part of the first sentence stating that "information sharing of the current terms of trade that is conducted in a manner that is exclusive to competitors will raise competition concerns" would be redundant.

- See the analysis of the meaning and effect of exclusivity above.
- The last part of the first sentence of the current **par 6.4.3** could then be added to the second sentence of **par 6.5.2** "even if such information is publicly available" although it appears to be problematic and requires reformulation.
    - This part must be refined with reference to EU Horizontal Guidelines par 92 mentioned above. Exchanges of truly public information is unproblematic, but the mere fact that some members of the public has access to information or that information could also be obtained by other means does not mean it is public information. If information is exchanged between competitors it nevertheless indicates that information is not publicly available in the true sense. Why otherwise would information be exchanged in this manner?
    - Perhaps the last part of this paragraph should be changed to read "though that information may be known to some customers or could be established by means of independent actions that require cost or effort such as going to the business premises of the competitor".
- Finally a qualification should be added that "This form of information sharing will require justification such as that the exchange is necessary for the proper operation of a legitimate joint venture".
- So to conclude **par 7.2.4.1** should read "Sharing of such information that will be available exclusively to competitors or some competitors in a market, will raise competition concerns though that information may be known to some customers or could be established by means of independent actions that require cost or effort such as going to the business premises of the competitor. This form of information sharing will require justification such as that the exchange is necessary for the proper operation of a legitimate joint venture. As an 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".

- The third sentence of the current **par 6.5.2.** can be rephrased as follows **7.2.4.2**. "Disclosure of such information in a setting where the direct or indirect addressees are competitors raise competition concerns, even when the information is subsequently made public. An announcement at an industry gathering (such as a trade association meeting) of which the proceedings are then made public will, for example, continue to raise competition concerns".

- A combined second part of **pars 6.4.1** and **6.5.1** should then be added here to create a logical flow from general to specific points.
    - Again the Draft Guidelines should make it clear whether this provision concerns a direct contravention or a facilitating practice.
    - As this provision concerns price fixing, which is per se prohibited, it is not necessary to refer to "anti competitive conduct".
    - Finally, the provision should not merely cover per se prohibited agreements but it should also include concerted practices or decisions by associations of firms. The references to agreement should therefore be deleted: "Any discussion among competitors about their current or future prices is likely to be regarded as ~~giving rise to an anti-competitive~~ price-fixing ~~agreement~~:

- Perhaps the following should be added at the end of this sentence "unless the exchange is a necessary element of a joint venture between them".
- In summary **par 7.4.2.3** should read "Any discussion among competitors about their current or future prices is even likely to be regarded as price-fixing unless the exchange is a necessary element of a joint venture between them".

7. Comments on the Draft Guidelines regarding the different platforms that can be used for information exchanges

- Part 8 Should concern the **Platforms through which information can be exchanges and their impact**. The current heading is vague and requires editing "**TYPES OF~~AND~~ PLATFORMS FOR THE EXCHANGE OF INFORMATION BETWEEN COMPETITORS AND GENERAL GUIDELINES"**
    - This perhaps is the most important part of the Draft Guidelines as it provides practically useful information to addressees.
- Perhaps this part can commence with the last sentence of the current **par 7.1** as part of the new **par 8**.
    - "There are various platforms through which information exchange may take place."
    - It could also be considered to add the first sentence of the current **par 7.1** here although that definition of facilitating practice or platform could also added elsewhere (see comments above).
- The current **par 7.3** can then be added to the current **par 7.1** so the final **par 8** should read. "There are various platforms through which information exchange may take place. In this section~~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".

7.1. Comments on the Draft Guidelines regarding information exchanges with government or policy-makers

- The new **par 8.1** should be the previous **par 7.3.1~~. Trade / industry associations and~~ Government regulators and~~/~~ policy-makers**
    - Some further consideration of this heading is required. Perhaps it should be **Government policy-makers or regulators**
- The new **par 8.1.1** is the current **7.3.1.1**. "Government p~~P~~olicy-makers usually require data from market participants in order to formulate policy~~ies~~. Government regulators require data to allow them to regulate industries. It is perfectly legitimate from a competition perspective, for policy-makers and regulators to collect and process ~~the~~ information from market participants for firms to provide relevant information. However, ~~the~~ competition concerns arise~~s~~ when ~~the~~ industry participants themselves collect and process the information.5[See Annexure: The UK Agricultural Tractor Registration Exchange] The Commission therefore recommends that policy-makers and regulators themselves collect and process the information or appoint~~s~~ an independent party to collect and process the information. In addition, once the information has been collected and processed, steps ~~there~~ need~~s~~ to be ~~steps~~ taken to ensure that the disaggregated information remains confidential and is not provided to competing firms. Market participants must only be entitled to view the aggregated information."
- The new **par 8.1.2** is the current **7.3.2.1**. "Governmental ~~P~~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."

- It is proposed that the previous **par 7.3.1** and the previous **par 7.3.2**. "Information exchange within the context of governmental supplier development initiatives" can be effectively combined.
- The new **par 8.1.2.1** is the current **par 7.3.2.2**. "The Commission provides the following general guidance for participation by firms~~companies,~~ that are competitors, in discussions with Government aimed at the development of local suppliers and local supply chains:"
- The new **par 8.1.2.1.1** is the current **7.3.2.2.1**. "All information shared among~~by~~ competitors must be relevant and necessary to achieve the object of the initiative;"
    - It is assumed in this and up to the current **par 7.3.2.2.8** concerns information discussed among competitors.
- The new **par 8.1.2.1.2** is the current **7.3.2.2.2** "All competitively sensitive information shared among~~by~~ competitors must be aggregated at least nationally quarterly in arrears and contain information of not less than five competitors"
    - When compared to the rest of the Draft Guidelines this is very specific and it looks somewhat out of place. The measures used perhaps requires some further consideration.
    - The idea that shared information must "contain information of not less than five competitors" appears arbitrary. This idea comes from the Statements of Antitrust Enforcement Policy in Health Care Issued by the U.S. Department of Justice and the Federal Trade Commission August 1996 but it perhaps should be considered carefully.
- The new **par 8.1.2.1.3** is the current **par 7.3.2.2.3**. "~~Competitors~~Firms must not share and discuss individualised data on pricing, margins and costs with competitors. They can however, discuss aggregated market trends, e.g. the aggregated national annual industry demand or supplier information, which do not identify individual company data".
    - The second part is taken from what previously was **par 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".
- The new **par 8.1.2.1.4** is the current **par 7.3.2.2.6**. "Competitors may not discuss individualised data on capacity, production volumes and sales figures. However, competitors can discuss aggregated total annual national figures (which must at all times include data of not less than five firms~~companies~~) which should be prepared by an independent third party. The aggregated ~~total annual national~~ figures should not identify individual firm~~company~~ data and~~or~~ should be prepared in such a way that it is not possible to extrapolate individual company data".
    - Again this provision combines the existing pars **7.3.2.2.6** and **7.3.2.2.7**.
    - The existing **par 7.3.2.2.7**. determines "Competitors can discuss aggregated total annual national figures (which must at all times include data of not less than five firms~~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".
    - It is assumed that "figures" in the current **par 7.3.2.2.7** refers to "capacity, production volumes and sales figures".
    - Again the reference to no less than five firms seems arbitrary. See the discussion above, especially of Statements of Antitrust Enforcement Policy in Health Care Issued by the U.S. Department of Justice and the Federal Trade Commission August 1996.

- It is also not clear why several restrictions on exchange of information are mentioned here, that are not mentioned with reference to other forms of information. There perhaps is a need for greater consistency here.

- The new **par 8.1.2.1.5** is the current **par 7.3.2.2.8**. "In this context c~~C~~ustomer information, marketing strategies, budgets, as well as business and investment plans cannot be discussed among competitors either in an individualised or aggregated format"
  - This provision now also contains information from the current **par 7.3.2.2.5**. "Information relating to budget, business and investment plans should not be exchanged by competitors", although we are not sure that this is quite correct".
- The new **par 8.1.2.1.6** is the current **par 7.3.2.2.9** "Government policy-makers may~~is entitled to~~ obtain disaggregated information directly from firms without harming competition as long as they themselves~~Government itself~~ collate~~s~~ the information or appoints an independent party to collate the information. In addition, once the information has been collated, adequate~~there needs to be~~ steps need to be taken to ensure that the disaggregated information remains confidential to ensure that it is not provided to competing firms. Market participants may only view the information in an aggregated format".
  - The idea that government is "entitled" to request information has been removed as it suggested that government would in these cases be limited by the Competition Act which mostly will not be true.
  - This in some ways conflicts with the Statements of Antitrust Enforcement Policy in Health Care Issued by the U.S. Department of Justice and the Federal Trade Commission August 1996, which apparently requires that competitors can only disclose aggregated information to an independent collating body but the South African provisions appear to be more logical.

7.2 Comments regarding the Draft Guidelines on Benchmarking and market surveys

- The new **Par 8.2** should now be the existing **par 7.3.7**. **Market studies and benchmarking**
- The new **Par 8.2.1** should be the existing **par 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 shares, 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. Nevertheless, care should be taken to ensure that competitively sensitive information provided by a firm to the benchmarking company does not become available to competitors and that information provided by the benchmarking entity to a particular firm does not include the competitively sensitive information of competitors."
- The new **Par 8.2.2**. can be loosely based on the existing **par 7.3.7.2**. It provides "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".
  - But as we understand the description of benchmarking in the existing **par 7.3.7.1** information in benchmarking exercises is not generally disclosed to competitors. As long as information is only provided to a particular competitor it can contain disaggregated information about that firm. It is therefore suggested that there is no need to say anything about benchmarking in this context.
  - Perhaps this provision should be reformulated to focus on market surveys.

  "A market survey for purposes of these Guidelines involves a situation where an independent company collects and processes individual firm data from market players

and then uses the information to compile a report about the state of the market. Again such a survey can have pro-competitive consequences as it will allow firms in a market to make informed decisions. However, the information that is provided in such a survey must be in aggregated form and it must not be possible to glean competitively sensitive information regarding particular firms from a report regarding the survey".

- **Par 8.2.3** should be the current **par 7.3.7.3**. "Information exchanges can also arise through the collection of information by other third parties such as independent consultants, university research centres and other entities not considered to be ~~a~~ competitors of firms. In these~~is~~ situations ~~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. This will not be anti-competitive as long as the information is not provided to competitors in disaggregated form". ~~The aforementioned is not a contravention of the Act.~~
- See generally on issues in this section Statements of Antitrust Enforcement Policy in Health Care Issued by the U.S. Department of Justice and the Federal Trade Commission August 1996 Part 6
- See also on benchmarking the example in See in this respect Canadian Competitor Collaboration Guidelines (2009) par 3.7.4. This paragraph is quoted above.

7.3 Comments on the Draft Guidelines regarding industry associations

- The new **Par 8.3** "**Industry Associations"**
    - This should be added as a new topic. It does not appear to fit in properly with "Regulators and policy-makers" where it is currently situated. The two topics are in some ways related but they are also quite different.
- The new **Par 8.3.1** should contain a broad description of the types of industry associations that could be covered here. The Draft Guidelines currently does not contain such a provision.
    - "Industry associations are bodies that are created by some or all the participant in a particular industry or sector to promote the interests of that industry or sector. The decisions of these associations are specifically covered in s 4(1) as decisions of associations of firms. The promotion of the interests of a particular industry or sector is not prohibited in competition law and may often promote competition. The exchange of information that is not competitively sensitive such as information relating to health and safety matter could for instance be beneficial to workers in an industry or sector".
        - This paragraph at the end also adequately covers the point that is currently made in **par 7.3.1.2**. "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".
- The new **Par 8.3.2** should be the first part of the current **par 7.3.1.3**. "However, industry associations can also constitute or facilitate anti-competitive practices. These associations ~~also~~ provide ~~a~~ platforms for information sharing among competitors. Industry associations must take steps to ensure that information sharing between members of the association does not prevent or lessen competition".
- The new **Par 8.3.3** should contain the second point that is currently made in **par 7.3.1.3** "In particular ~~this regard it should be noted that~~ most~~an~~ industry associations are ~~is~~ not truly independent of their~~its~~ members, since representatives of the members often form the

decision-making bodies of the association. Therefore, the collection of disaggregated competitively sensitive information from the ~~its~~ members ~~or from their representatives in the different markets~~, to be collated by ~~the~~ associations before distribution to their~~its~~ members, could ~~also~~ be problematic. The Commission ~~therefore~~ recommends that industry associations should appoint ~~an~~ independent parties~~y~~ to collect and to collate the information.

- The new **Par 8.3.4** should be the current **par 7.3.1.4**. "If~~n relation to~~ competitively sensitive information is gathered by an industry association on behalf of its members it should only ~~, to be~~ disseminate~~d~~ the information among these ~~same~~ members, if it will not prevent or lessen competition~~this information should comply with the competition values set out in paragraph 6 above~~. Generally if information is aggregated nationally and annually delayed, it will ~~it is~~ not be problematic, depending on the characteristics~~structure~~ of the market. Disaggregation which would allow competitors to derive information by district, by customers, by individual firm or sub-product category is usually problematic".
    - The reference to the "competition values set out in paragraph 6 above" is perhaps too vague and unhelpful. It has been deleted.
    - The precise suggestions regarding the nature of information has already been criticised. Some more thought should perhaps be put into this but the proposals have been left in their current form. See the comments already above with reference to Statements of Antitrust Enforcement Policy in Health Care Issued by the U.S. Department of Justice and the Federal Trade Commission August 1996.
    - The different provisions regarding aggregation and delay are not consistent: some provisions refer to quarterly and others to annual aggregation. Was this done on purpose or is consistency still required? See current **pars 7.3.2.2.2, 7.3.2.2.4, 7.3.2.2.7**.
- The new **Par 8.3.5** should be based on the current **par 7.3.1.2**. which would again relate this part to the previous one concerning regulators and policy-makers: "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. However, associations should take steps to ensure that this does not lead to the dissemination of competitively sensitive information to the association or among its members".
- The current **par 7.3.1.5**. has not been added here on the basis that it is too vague to be of much use. If it is included here or in the previous section some reformulation nevertheless is necessary "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 competitively sensitive information".
- See also on industry or trade associations Canadian Competitor Collaboration Guidelines (2009) par 3.7 "Collaborations can involve a considerable degree of information exchange between competitors. Similarly, trade associations may gather information from industry participants to further the objectives of the association, perform benchmarking exercises or otherwise benefit members. For the most part, such exchanges do not raise concerns under the Act because competitors generally avoid sharing information that is competitively sensitive in order to preserve their competitive advantage. In certain cases, an agreement that involves a unilateral disclosure or exchange of information between competitors can impair competition by reducing uncertainties regarding competitors' strategies and diminishing each firm's commercial independence"

7.4 Comments on the Draft Guidelines regarding joint ventures

- The new **par 8.4** should have the heading that is currently **par 7.3.4**. **"Joint ventures and other competitor collaborations"**
- This part should start with a description of Joint Ventures for purposes of this part. The current **par 7.3.4.1** is in some ways problematic. "Joint ventures8[See Commission's Guidelines on Joint Ventures. This requires better reference not sure what it references] 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".
    - This provision in its current form is open to criticism.
        - It is not clear what fn 8 refers to. There are no Guidelines on joint ventures issued either by the South African or European Commissions. This provision must be made much more precise. It could perhaps refer to the now defunct Commission Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty 1993 O.J. C 43/2, No. 8 (1993) or the EU Horizontal Guidelines (although these Guidelines do not really deal separately with joint ventures)
        - The second sentence does not appear to be appropriate for South African competition law.
            - Unlike Europe the SA merger rules do not deal explicitly with joint ventures. See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) art 3(4) and Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) par 91ff. In Europe the level of integration will determine whether a joint venture is a merger but the position would seem to be somewhat different in South Africa.
            - In South Africa the creation of a joint venture will only be a merger if control or joint control is established thereby.
            - Where the establishment of a joint venture constitutes a merger it will not necessarily mean that co-operation between a joint venture and its controllers could still fall within section 4. Where a joint venture and its controllers are regarded as a single economic entity or the other requirements of section 4(5) are met, co-operation will no longer be covered section 4. See *Competition Commission v Mediclinic Southern Africa (Proprietary) Limited* (020743) [2015] ZACT 23 (18 March 2015), *Netcare Hospital Group (Pty) Ltd and Community Hospital Group (Pty) Ltd* (27/CR/Mar07) [2008] ZACT 19 (10 March 2008).
    - The new introductory paragraph (**par 8.4.1**) perhaps should simply state that "A joint venture exists where firms collaborate to conduct business activities whether it is established by means be in the form of a cooperation agreement or in a jointly controlled company or both"
        - The last sentence has been taken from the current **par 7.3.4.2** "whether it is established by means ~~be in the form~~ of a cooperation agreement or in a jointly controlled company or both"
- The new **par 8.4.2** should set out the basic competition law rules that apply to joint ventures. Perhaps the following points should be made here:
    - "Where competing firms collaborate in a joint venture the question whether any aspect of their conduct is anti-competitive must be judged in the light of the broader

co-operation. Even determination of prices and allocations of markets in a joint venture, will have to be characterised in the context of the broader cooperative relationshipand will frequently will be covered by section 4(1)(a) rather than 4(1)(b). However, where there is no true economic collaboration or the determination of prices and allocation of markets is not reasonably necessary for the cooperation, such determination or allocation will continue to be per prohibited in terms of section 4(1)(b) despite allegations of the existence of a broader joint venture. Information exchanges in joint ventures also have to be judged according these general principles".

- This statement would now also accommodate the last sentence of the existing **par 7.3.4.1** "Some joint ventures are not legitimate and are simply a guise for a cartel". Nevertheless this sentence has been changed to remove the idea that a joint venture can be a cartel. It is perhaps better to take the view that a purported joint venture could rather be a cartel.

- The new **par 8.4.3** should now describe the status of information exchanges in joint ventures with reference to the current **par 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[For example toll manufacturing agreements and supply or distribution agreements.] ~~whether it be in the form of a cooperation agreement or in a jointly controlled company~~. Any anti-competitive 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.

- Footnote 9 should be made more accurate
- The expression "legitimate joint venture" is probably the correct term but it perhaps requires some consideration.

- The new **par 8.4.4** could therefore absorb the first part of **par 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 competitively sensitive ~~commercially strategic~~ information that can lead to a collusive outcome or anti-competitive foreclosure. The broader joint venture can help to show either that the information does not prevent or lessen competition in the sense described here or that it produces technological, efficiency or other pro-competitive gains that outweigh negative consequences.

- See above the criticism of the use of the term "commercially sensitive information".
- The last sentence of **par 7.3.4.3** has been separated out to avoid repetition in the new **par 8.4.4**.

- The new **par 8.4.5** should combine the last sentence of **pars 7.3.4.3** and **7.3.4.4**. "The efficiency gains that may be claimed as a result of the exchange of information would not be considered to outweigh any anti-competitive effects if the exchange went beyond what was reasonably necessary for achieving efficient cooperation~~the output of~~ in the joint venture. ~~The information exchange should also not have the effect of eliminating all competition between the competitors."~~ Where a research joint venture is established only technology necessary to the research project should be exchanged. Where a production joint venture is created only relevant cost data should be disclosed".

- See the criticism of the deleted sentence already expressed above.
- The current **par 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."

- The first sentence of **par 7.3.4.4** has already been expressed more accurately (for South Africa) in **par 7.3.4.3**.
- The second sentence has to be deleted both in par **7.3.4.4** and **par 7.3.4.3**. For the reasons see above.
- The examples given here are important but they have been reformulated in an attempt to better explain their role.

- See also generally for joint ventures the Canadian Competitor Collaboration Guidelines (2009) par 3.6.4: "The Bureau will consider whether a commercialization agreement and/or joint selling agreement provides an opportunity for the disclosure or exchange of competitively sensitive information, such as information regarding costs, prices to be charged and marketing strategies. The Bureau will consider opportunities for the sharing of information directly between participants, as well as opportunities for indirect exchanges, such as through a common agent. Parties are encouraged to include in the terms of the agreement appropriate safeguards against the disclosure of competitively sensitive information. For further discussion of these issues, please see section 3.7 below regarding information sharing between competitors".
- There is also a need to consider whether a safe harbour for joint ventures is possible. As previously mentioned, there is no risk if information is merely exchanged between and restricted to firms that do not have market power Canadian Competitor Collaboration Guidelines (2009) par 3.7.3. Perhaps a safe harbour can be established on this basis.
- Perhaps reference should also somewhere be made to Canadian Competitor Collaboration Guidelines (2009) par 3.7.4: "In evaluating an agreement to exchange information, the Bureau will also consider the safeguards established through the organization and governance of the collaboration that are directed at preventing or minimizing the disclosure of competitively sensitive information. For example, participants in the collaboration can limit disclosure of information to personnel who are not engaged in sales or marketing activities, or can prevent sales and marketing personnel from participating in a research and development joint venture".

7.5 Comments on information exchanges in the context of cross-directorships

- The new **par 8.5** should be based on the current **par 7.3.5**. **Cross-directorships/cross-shareholding**
  - Perhaps the emphasis here should be on cross-directorships as the existence of cross-shareholding will not by itself lead to exchanges of competitively sensitive information. See the further analysis below of the effect of cross-shareholding.
  - Although cross-shareholding is also relevant in section 4(2) of the Act, it has very little or nothing to do with information exchange.
- **Par 8.5.1**. should describe cross-directorships. This can be done with reference to **par 7.3.5.3**. "Cross-directorships will exist between two firms if they share a director or directors whether those directorships result from other structural links such as cross-shareholding or notAs 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 or other anti-competitive consequences.
  - It does not appear as if structural links beyond cross-directorships is relevant in the context of information exchanges as competitively sensitive information will not be exchanged on the basis of mere cross-shareholding. This issue nevertheless will be taken up in the last paragraph of this section.

- The existing **par 7.3.5.1**. therefore does not add anything to the points already made and it can be deleted "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 shareholder has the right to appoint board members of the target company. Cross-directorship is also possible when there is no cross-shareholding".
    - The sentence "As a consequence of the cross-shareholding, one or more board members become members of the boards of both companies" does not appear to be clear enough.
    - All aspects, except for some aspects regarding shareholding are already in **par 7.3.5.3**. As previously mentioned there is no need to extend these provisions to cross-shareholding.
    - In particular the reference to "express or tacit collusion" does not have to be in the Draft Guidelines. This phrase is difficult to interpret while the anti-competitive consequences of information exchanges are discussed in detail and the issue can be left at that.
- As support for the view taken in this section, see Main Street 333 (Pty) Ltd/Kumba Resources Limited 14/LM/Feb06 14/09/2006:
    "[48] From this literature, it would seem that cross-directorships provide at least two solutions to the cartel problem. Firstly, they provide a forum for the exchange of information in a setting conducive to an innocuous explanation. Secondly, they provide a highly efficient and expeditious mechanism for monitoring compliance with the terms of the co-ordination."
- See also the reference in Main Street 333 (Pty) Ltd/Kumba Resources Limited 14/LM/Feb06 14/09/2006 fn 36 to the Clayton Act section 8.

- Care should be taken in deciding whether the current **par 7.3.5.2**. should be maintained. See Sutherland & Kemp part 5.9 the last part where an unsuccessful attempt is made to make sense of this provision. This provision is problematic and does not say quite what **par 7.3.5.2** proposes. If this provision is maintained it should at least be rephrased as follows:
    - Although there are several drafting difficulties with s~~S~~ection 4(2) of the Act, it contains a presumption for the existence of an agreement to engage in a restrictive horizontal practice between two or more firms in contravention of section 4(1)(b) 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.
    - Perhaps Main Street 333 (Pty) Ltd/Kumba Resources Limited 14/LM/Feb06 14/09/2006 fn 36 can be considered for this purpose.
- The final provision in this section, **par 8.5.2/8.5.3**, should be based on **par 7.3.5.4**.
    - Par 7.3.5.4 nevertheless is not easy to understand. It determines that: "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".
        - It is not at all clear what is meant with preferred remedy. Does it mean the remedy that is granted to prevent horizontal restrictions or does it refer to conditions imposed in merger cases. It would seem that these issues have mostly been relevant in South Africa in the merger context (see Main Street 333 (Pty) Ltd/Kumba Resources Limited 14/LM/Feb06 14/09/2006; Anglo American Holdings Ltd/Kumba Resources Ltd 46/LM/Jun02; Momentum Group Ltd/African Life Health (Pty) Ltd 58/CAC/DEC05 14/02/2006).

Perhaps reference is indirectly made to a particular settlement in a prohibited practice case with which we are not familiar if so a reference should perhaps be made to it.

- Think of the meaning of firewall. The term used in Anglo American Holdings Ltd/Kumba Resources Ltd 46/LM/Jun02 par 133-136 and see par 135 is "Chinese wall" and we would suggest that this is the better term.
- The broad principle stated here may require more careful consideration in the light of Momentum Group Ltd/African Life Health (Pty) Ltd 58/CAC/DEC05 14/02/2006.
- Main Street 333 (Pty) Ltd/Kumba Resources Limited 14/LM/Feb06 14/09/2006

- This provision **par 8.5.2/8.5.3** should address the difficulties that arise where there are structural links between firms that would normally require the appointment of directors of one firm to the board of another or a directors of the holding company of both to also serve on the boards of one or more of the subsidiaries. Where in these situations there is a risk that cross-directorships can be used to exchange competitively sensitive information in an anti-competitive manner other mechanisms should be used for governing those inter-linked firms. It may be necessary to create Chinese walls between the directors who serve on the boards of competing firms.

7.6 Comments on customer requests for information

- The new **par 8.6** should commence with the current and amended **par 7.3.6**. "**Customer requests for information**~~quotations~~
- The new **par 8.6.1** should be the existing **par 7.3.6.1**. with some amendments "~~Whereas~~ Responses by firms to customer requests for quotations, commitments to charge certain prices for future periods or annual price reductions are mostly lawful. Where customers request the information there mostly will be good economic reasons why customers would request the information.~~,~~ ~~they may, h~~However, request for information by customers may provide an opportunity for competitors to exchange competitively sensitive ~~anti-competitive~~ information ~~exchange~~ among~~st~~ competing firms in order to establish or promote collusion between them.~~ 10[See Annexure: The Automotive Wire Harnesses case]~~ For example, the transparency created by responses to common customers may make it easier for firms to collude on their future responses 10[See Annexure: The Automotive Wire Harnesses case Automotive wire harnesses (Case COMP/39748)] while competitors~~ng suppliers~~ can ~~exchange information by~~ collud~~e~~ing on their responses to requests ~~regarding quotations and annual price reductions~~ submitted by common customers, ~~which~~ will make it difficult to depart from the collusive outcome without being detected~~they have in common~~".
  - The focus here should be on the responses of firms rather than the requests of customers.
  - The provision has been extended to commitments to charge particular prices.
  - Requests by customers may often have a pro-competitive basis and may explain conduct that would otherwise appear to be anti-competitive (the locus classicus in this area is C-89/85 *Re Wood Pulp Cartel: A Ahlstrom Oy v Commission (Wood Pulp II)* ECJ March 31 1993, [1993] ECR 1).
  - Footnote 10 has to be moved and expanded.
  - The examples given have been extended. Hopefully the proposed extension makes sense.
- It appears that the current **par 7.3.6.2**. does not add anything of value and it can be deleted "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".

7.7 Comments on the Draft Guidelines concerning public announcements and market signalling

- The new **Par 8.7** should be the current **par 7.3.3**. "**Public announcements and market signalling**".
- This is an exceedingly difficult topic. It would appear that this part of the Draft Guidelines is too strictly formulated. It would bring many forms of advertising and communication with investors into question. It would appear that considerable refinement is necessary here.
- The new **Par 8.7.1** can still make use of **par 7.3.3.1**. "Public announcements ~~in the context of competition matters entail~~ in this context refers to, inter alia, announcements to the financial community such as analysts~~earnings information~~, public speeches, declarations or articles and notifications through various forms of media, such as the firm's or other website, the press, or television~~the press, etc. about future business plans of firms~~.
    - The statement regarding "earning information" conflicts with the idea that the provision only deals with future "business plans".
    - For a US case that concerns disclosure during an earnings conference see In re Valassis Communications, Inc., F.T.C. No. C-4160 (April 19, 2006) (consent order), available at http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisDecisionandOrder.pdf.
    - See also for the US *In re Delta/Airtran Baggage Fee Antitrust Litigation* 2015 U.S. Dist. LEXIS 101474; 2015-2 Trade Cas. (CCH) P79,258 03/08/2015
- Add a new **par 8.7.2** which merely states the general principles that apply here:
    - The existing **par 7.3.3.2** can assist the formulation of this provision. This paragraph should at least be reformulated to read as follows:
    7.3.3.2. "Public announcements that contain competitively sensitive information such as~~about~~ future prices can in certain circumstances constitute or 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.~~ ~~T~~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~~.
        - It is perhaps too narrow to say that collusion can only be facilitated by these types of actions as they also can constitute collusion.
        - The statement that signalling will allow colluding firms "to act in concert as a monopolist" may be theoretically accurate but it is unnecessary and confusing to make this statement in Guidelines.
        - The statement "cartel members will be able to artificially manipulate the concerned market through price movements and volumes" is vague and difficult to understand. It should perhaps rather be deleted.
        - It is not clear what is meant with reciprocal disclosure. It could perhaps be an expression of the European case of C 8/08 *T-Mobile Netherlands BV v Raad van bestuur van der Nederlandse Mededingingsautoriteit* to the effect that a disclosure by a firm that is received by competitors could constitute a

concerted practice but this is unlikely to apply to public announcements. We believe that this statement should rather be deleted.

- Perhaps some aspects of **par 7.3.3.2** should rather be absorbed into a more carefully worded **par 8.7.2**: "Public disclosure of competitively sensitive information will generally not constitute collusive conduct in the form of an agreement or concerted practice. However, further facts can in particular circumstances lead to a finding that it is collusive, for instance, where it is followed by public responses of competitors that cannot be explained on the basis that they are independent reactions to the firms disclosure. Moreover, the public disclosure will sometimes be evidence of broader collusion between the parties. . 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 competitors 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 through the coordination of pricing signals."

- Public announcements about future prices, better known as 'advance price announcements' (APAs), have received significant attention in the economics literature of recent years. The conclusion of this research – also as reflected in the Guidelines of the European Commission – is that APAs are not necessarily anti-competitive. In particular, there are legitimate reasons for firms using price announcements to shift demand or to provide buyers with information for planning purposes.

- This paragraph is based on the Horizontal Guidelines par 63: "Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1). However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination".

- The new **par 8.7.3** should attempt to give some guidance when it comes to public announcements but it will have to remain necessarily vague. Perhaps a mere range of factors should be set out. In this respect considerable guidance can be obtained from the current **par 7.3.3.6 and 7.3.3.7**.

- **Par 8.7.3** should state: "Although it may be difficult to generalise about the types of public announcements that will contravene the law, the following aspects may indicate collusion or at least an invitation to collude:"

- This provision is loosely based on **par 7.3.3.7**. "Public announcements can be construed as invitations to collude in the following circumstances".

- However the introducing statement is more tentative.

- The statement does not merely refer to invitations.

- **Par 8.7.3.1**: "If a firm does not publicly commit to complying with announcements about future conduct such as announced future prices, it may be an indication that the announcement was made in order to communicate with competitors in order to coordinate future conduct. Public announcements backed by commitments will generally not be anti-competitive unless special facts point in the opposite direction. Commitments will be for

instance be problematic if the announced action to be taken by the firm is made contingent on what competitors or the industry at large will do".

- This provision is based on the current **par 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 publicly~~ally~~ 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".
    - However, the last sentence deals with a separate issue that will be discussed later.
- The role of so-called cheap talk in the US can be considered with reference to the case of United States v. Airline Tariff Publishing Co., 1994-2 Trade Cas. (CCH) ¶70,687 (D.D.C. Aug. 10, 1994) see http://www.usdoj.gov/atr/cases/dir23.htm.
- The last part of the provision is based on the current **par 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".

- The new **par 8.7.3.2** should be based on the current **par 7.3.3.3**. "Public announcements by firms which comment on the past and possible future conduct of competitors should be approached with care. It will be particularly problematic if such comments can be construed as condonation of activities of those competitors to reduce competition or as requests to prevent or as requests to reduce future competition. In particular it will be unacceptable if an announcement includes threats to competitors or other market players if they do not comply with requests to reduce competition. For example, an announcement that competitors should not price aggressively or statements commending competitors for constraining capacity investment, for not pricing aggressively, or for focusing on enhancing profits and not revenues are likely to be anti-competitive".
    - The current **par 7.3.3.3** determines "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 likely to be~~are~~ anti-competitive, because they could increase the risk of coordination~~run the risk of coordinating on constraining competition~~."
        - It is not clear why reference is made to past and future conduct. It is difficult to think how comments, in the sense described can be made about conduct which must still occur in future. In such situations one is rather concerned with future statements that will fall under the next provision.
        - The broad statement at the outset appears to be too broad.
        - "Commending firms" have been changed to "commending competitors".
        - The exact anti-competitive consequences do not have to be described the current final sentence probably only creates uncertainty because it is not quite sophisticated.
    - It may nevertheless be difficult to distinguish condonation from mere factual statements about the market situation. The latter may relevant to investors.
    - The part concerning threats has been taken from the current par 7.3.3.7.3. "If the announcement includes threats to competitors or other market players".
- The new **par 8.7.3.3** can be based on the current **par 7.3.3.4** "Predictive public announcement and forecasts about market variables that are not within the control of firms, such as market demand and input prices, do not raise competition concerns. Predictive statements and forecasts about variables that firms control, such as prices, production, investment, advertising, and capacity, must be approached with greater care. Predictions that

prices will be high, capacities will not expand, supply will be limited, and the like, should be avoided where it is likely that they will be self-fulfilling. For example, a public announcement that firms are likely not to price aggressively may cause firms to coordinate on not pricing aggressively.

- If **par 7.3.3.4**. is maintained it should be rephrased as follows "Firms should also avoid public announcements that make predictive statements or forecasts about competitors' future conduct. Predictions~~ng~~ that prices will be high, capacities will not expand, supply will be limited, and the like, should be avoided where it is likely that they will be~~ can make such forecasts~~ self-fulfilling. For example, a public announcement that firms are likely ~~should~~ not to price aggressively may cause firms to coordinate on not pricing aggressively. While predictive statements and forecasts about market variables that are not within the control of firms~~extensively exogenous to firms' conduct~~, such as market demand and input prices, do not raise competition concerns~~run the risk of anti-competitive implications~~. Predictive statements and forecasts about ~~factors~~variables that firms control, such as prices, production, investment, advertising, and capacity, is a concern."
    - It is perhaps too strict to say that predictive statements and forecasts about competitors' future conduct "should be avoided".
    - Perhaps this provision should not (only) concern statements about competitors' future conduct but about a market as a whole (that could include conduct of competitors)
    - The example has been changed to bring it in line with the concern of this paragraph with market predictions the current statement which concerns a comment about a competitors future conduct has been moved to the previous paragraph
    - Perhaps the logic of this paragraph can be changed somewhat to improve the logical flow. Currently the different sentences are disconnected.
- The current **par 7.3.3.5**. also deals with some of the issues mentioned here. But it is broadly and vaguely formulated. It is suggested that it should not be included in the final text. "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[Areeda & Hovenkamp (2010)]".
    - If this provision is maintained some changes will be required.
    - "could reduce the uncertainty about competitors' behaviour or actions in the market" should be changed to "could increase transparency in the market".
    - Furthermore the footnote will have to be improved.

- The new **par 8.7.3.4** should be based on the current **par 7.3.3.7.1**. "Competition authorities will be particularly concerned with a public announcement if it contains information, which is not necessary to achieve the goals of the announcement to addressees such as customers,7[See Annexure: C-89/85 *Re Wood Pulp Cartel: A Ahlstrom Oy v Commission (Wood Pulp II)* ECJ March 31 1993, [1993] ECR 1] investors or the general public, but also includes additional competitively sensitive information targeted at competitors".
    - The wording is quite close to par 8.3.7.5 it has just been adapted to the slightly different context "When the announcement is not limited to what is necessary to communicate to customers,7[See Annexure: The Wood Pulp Case] but also includes additional information targeted at competitors and which is not strictly necessary for the purposes of the announcement".

- The footnote must contain a fuller reference of the Woodpulp Case: C-89/85 *Re Wood Pulp Cartel: A Ahlstrom Oy v Commission (Wood Pulp II)* ECJ March 31 1993, [1993] ECR 1)

- See in this regard the recent EU Commission Case AT.39850 Container Shipping 07/07/2016

- The new **par 8.7.3.5** should build on the last sentence of the existing **par 7.3.3.6**. "The question whether a public announcement will raise competition concerns will also depend on the nature of the market in which the firm operates. These announcements are more likely to have anti-competitive effects in highly concentrated markets for more or less homogeneous products where it is easy to send signals to each other where signals can be easily conveyed from one competitor to another.

  - This provision merely adapts the wording of par 7.3.36 to the particular context and expands it somewhat. The latter existing provision determines "Public announcements are also problematic in highly concentrated markets where it is easy to send signals to each other".

- Perhaps par 8.7.3.6. can be added. "Public announcements must also be considered in the light of the announcement of competitors. Public announcements will be problematic where they are made at times or in ways that would not have been in the best interest of a firm if there were no collusion. If firms for example, make public announcement at almost the same time and for the similar amounts it may be justifiable on the basis that reflects the best individual responses of all firms, but it may depending on other facts be an indication of collusion."

8. Annexure case analysis

We have not carefully considered the analyses of the cases in the annexure but the summaries leave much to be desired. Perhaps it would be better to create case examples after the example of the EU Horizontal Guidelines

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2017/09/20

Original Provisions	New Numbering
2.5	**2.5**
2.7	**2.7**
2.9	**6.4.3**
2.10 & 2.14	**2.10 & 2.14**
2.16	**2.16**
3.1	**3.1**
3.2	**3.2, 6.6.3.1**
3.3 &3.4	**3.3 &3.4, new part 5**
3.5	**3.5**
3.6	**4.2**
4.1	**4.1**
4.2	**4.3**
5.1	**5.1?, 6.6.3.1**
5.2	**5.1**
5.3	**5.2**
5.4	
5.5	
5.5.1	
5.5.2	
5.6	**6.1, 6.2, 6.4.5**
5.7	**Deleted**
6.1	**6.2**
6.2	**6.2**
6.3	**6.5**
6.3.1	**6.6.3.1. 7.1.1**
6.3.2	**6.4.5, 7.1.2**
6.3.3	**6.4.5, 7.1.3**
6.3.4	**New part 5, 6.4.5, 7.1.4**
6.3.5	**7.1.5**
6.3.6	**7.1.6**
6.4	
6.4.1	**6.6.3.1, 7.2.1, 7.2.4**
6.4.2	**7.2.2**
6.4.3	**6.5, 7.2.4**
6.5	
6.5.1	**7.2.3, 7.2.4**
6.5.2	**6.5, 7.2.4**
6.5.3	**6.5, 7.2.4**
6.6	
6.6.1	**6.3**
6.6.1.1	**6.3**
6.6.1.2	**6.3.1**
6.6.2	**6.5**
6.6.2.1	**6.5**
6.6.2.2	**6.4, 6.5**
6.6.3	**New part 5**
6.6.3.1	**New Part 5, 6.4.1. 6.4.5**

6.6.3.2	**New Part 5**
7.	
7.1	New par 5, **par 6.5, 8**
7.2	**6.5**
7.3	8
7.3.1.1	**6.4.3, 8.1**
7.3.1.2	**8.3.1, 8.3.5**
7.3.1.3	**6.4.3. 8.3.2, 8.3.3**
7.3.1.4	**6.4.3, 8.3.4**
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7.3.2	
7.3.2.1	8.1.2
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