

ESWATINI COMPETITION COMMISSION



Eswatini
Competition Commission

GUIDANCE NOTE ON ADVISORY OPINIONS TO NON-GOVERNMENTAL PERSONS

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A. Introduction

1. These Guidelines provide assistance to both staff and members of the public on the nature and process governing issuance of Advisory Opinions by the Eswatini Competition Commission (ESCC) to enterprises. The Guidelines do not replace the Competition Act, 2007 (“the Act”) or the Competition Regulations, 2010 and 2016 as amended (“the Regulations”) to the extent where there may be inconsistencies.
2. The Guidelines are useful for transparency, consistency, predictability and accountability of the competition and consumer law implementation framework as contained in the Act.

B. Advisory Opinions to Government and its Agents

3. The Guidelines do not cover advisory opinions to Government. This is because the Act already addresses these under section 11(2) where there is provision for the functions of the ESCC, as follows (emphasis added):

(h) advise the Minister on such matters relating to the operation of this Act as it thinks fit or as may be requested by the Minister, including the determination of penalties to be imposed for the infringement of this Act;

(i) review this Act and any other legislation which inhibit fair competition and make proposals to the Minister for the amendment of such legislation;

(k) enter into discussions on contentious issues with any regulatory authority in order to harmonise and ensure consistent application of the competition principles;

4. For other Government Ministries, departments or agents, the ESCC may provide opinions to them under Section 3 exemption provisions and section 11(2)(l) of the Act.
5. The ESCC can disseminate information in a general context to consumers and businesses in its advocacy initiatives, as provided for under section 11(2) of the Act, thus:

(d) provide persons, engaged in business, with information regarding their rights and duties under this Act;

(e) provide information for the guidance of consumers regarding their rights under this Act;

(f) undertake studies and make available to the public reports regarding the operation of the Act;

Amicus Curiae Opinions

6. Alternatively, the ESCC can apply to Court as “amicus curiae”¹ under section 11(2)(l) of the Act. This would be instances where matters of competition or consumer protection are at play and there is need for specialised and well informed opinion to assist the Court in understanding issues that are complex or new before the Court. Such would be cases involving government of other government agencies. The ESCC may equally play such a role to Parliament when there is a proposed Bill or Amendments to existing laws that are likely to adversely affect competition and consumer protection in the country.

C. The Nature of Advisory Opinions under this Guide

7. The outputs on the advocacy functions of the ESCC under section 11(2) of the Act do not amount to advisory opinions envisaged in this Guide. The advisory opinions in this Guide are those related to specific requests made by non-governmental actors for the ESCC to comment on or provide advice or opinion on matters such as:
 - (i) the nature of their proposed conduct i.e., whether it falls under the ambit of the Act;
 - (ii) possible anti-competitive provisions in their proposed agreement, decision or concerted practice;
 - (iii) prospective merger - whether it is notifiable or not in terms of the Act;
 - (iv) nature of leniency policy and any other settlement that the ESCC is empowered to engage in; and
 - (v) those that are not a subject of investigation under the Act. Whatever the ESCC provides in instances of an on-going investigation must be related to traversing the claims of a respondent enterprise.

¹ See Commission observations to National Courts (*Amicus curiae* observations, Article 15(3)), https://ec.europa.eu/competition/court/antitrust_amicus_curiae.html

8. The proposed agreement, decision or concerted practice to which the opinion relates must²:
 - (i) be prospective, rather than already implemented and reasonably in contemplation rather than purely hypothetical,
 - (ii) raise novel or unresolved questions about the application of any provision of the Act, its Regulations and any Guidelines thereunder, clarification of which would benefit a wider audience, or
 - (iii) have a material link to Eswatini and not based on material links in other countries.

9. It is important to note that the ESCC can never be a legal advisor to any institution other than the Government through the Minister of Commerce, Industry and Trade on matters as highlighted already under section 11(2) of the Act. The ESCC should equally not be seen to provide legal advice to Government agents such as regulators as these have their own legal advisors.

10. Equally, in relation to non-governmental actors, the ESCC should never be perceived to be providing “legal advice” in the context of legal practice rules. This is because none of the members of the public are “clients” of the ESCC. The only clients that the ESCC has that it may come close to providing legal advice are consumers and Government (notwithstanding that for Government the principal legal advisor is the Attorney-General).

11. Therefore, it would be erroneous for the ESCC to provide advisory opinions to private enterprises, in whatever shape or form, that is related to:
 - (i) the marketing or other strategy;
 - (ii) the legality of a conduct that any enterprise is about to or has engaged in;
 - (iii) whether enterprises should engage in an agreement or not;
 - (iv) an investigation that is ongoing at the ESCC;
 - (v) an investigation that is ongoing with any Government Agency;
 - (vi) an ongoing court case;
 - (vii) an arbitration or mediation proceeding;
 - (viii) any conduct that is already under assessment by the ESCC; or
 - (ix) a matter of public policy that has been handled by Government.

² Guidance on the CMA’s approach to Short-form Opinions, CMA27, 2014. CMA = Competition & Markets Authority of the UK

12. The Act and Regulations are very clear on a number of issues. Where the requesting enterprise seeks to understand the interpretation of a certain section of the Act, the ESCC may refer parties to an explanation that has been adopted in any Guidelines or Regulations.

D. Legal Basis for Advisory Opinions to Non-Governmental Actors

13. There is no express provision in the Act giving the ESCC powers to provide advisory opinions to individual enterprises who are expected to comply with the provisions under the Act. This does not prevent the ESCC from doing so. The ESCC can do so pursuant to section 11(2)(l) of the Act. This section gives authority to the ESCC *to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act.*

14. This Guideline is therefore supported by the Act as it assists in the better carrying out of competition assessments/analysis under the same Act.

E. Who in the ESCC should provide Advisory Opinions?

15. Advisory Opinions shall not be given by the Commission members i.e., (Board) (not even the Chairperson) rather by the Executive Director or other person acting in this position. The Commission members are potential adjudicators and thus their input at this stage not required.

F. Disclaimers

16. Every advisory opinion given by the ESCC must contain the following disclaimer:

This is a general opinion provided by the Secretariat of the Commission to provide guidance for compliance purposes. The opinion provided is based on the information that was provided to the Commission on this specific issue addressed herein. The advice is not binding upon the Commission and is given without prejudice to the right of the Commission to later rescind the advice and, when appropriate, to deal with any observed competition or consumer protection violations under the Act.

17. The ESCC's opinion is meant to assist the requester/s to make more meaningful decisions or understand an issue better. Ultimately, the decision they take is theirs and they must own it thus without undue reference to the ESCC's opinion.

G. Structure of the Advisory Opinion

18. The structure of the opinion letter is recommended as follows:

You have submitted to have an advisory opinion rendered to yourself(ves) pursuant to section 11(2)(l) of the Competition Act 2007 of Eswatini, which provides that:

Further, we noted that based on the “Guidance Note on Advisory Opinions to Non-Governmental Persons”, the issue you raise is one that the Commission can provide such opinion on.

You have sought that we provide an opinion on the following:

[QUOTE verbatim what has been presented]

We understand from the above that you want us to.... [Paraphrase into simple language what the Commission thinks should be the advise]

We opine as follows:

- 1.
 - 2.
 - x.
- [These should focus on the Act, the Regulations and the guidance given in any existing Guidelines in Eswatini.]

[Then ..End with “Disclaimer” as provided for under paragraph 16 above]

H. Publication of the Advisory Opinion

19. The ESCC notes that a number of competition authorities (EU, UK and USA) publish on their websites advisory opinions that are not confidential in nature or otherwise publish without any confidential information. These competition authorities will only agree to provide such opinion subject to its later publication. The purpose of this is to ensure that there is a public record of the opinion so rendered, which other enterprises in similar state may benefit from. It also provides for transparency as there should not be any secret dealings between the competition authority and the public. The names of the requesters are not considered to be confidential. The ESCC will take a similar approach.

20. Where an advisory opinion on similar facts exists, the ESCC may simply refer the requester to the published opinion.

I. Structure of the Request for an Advisory Opinion from the Private Enterprise

21. The ESCC should not be unduly rigid in relation to structure of the request for an opinion. However the format, requesters must provide sufficient information that discloses³:

- (i) the parties to, and the markets affected by, the proposed agreement;
- (ii) the background to and commercial rationale for the proposed agreement;
- (iii) a description of the likely effect of the proposed agreement on competition within the relevant market(s); and
- (iv) clear and concise outline of the questions that the ESCC is asked to address.

J. Fees for the Advisory Opinion

22. The Minister may prescribe fees payable for advisory opinions through Regulations. The opinion shall in this instance only be rendered after the requisite payment has been made. For now, Competition Regulations Legal Notice 62 of 2010 under Regulation 11(3) contain such fees.

K. Review of the Guidance

23. These Guidance note may be reviewed from time to time to reflect changing market circumstances and law governing their implementation.

L. Entry into Force

24. These Guidelines shall enter into force upon approval by the Board.

DATE OF COMMISSION APPROVAL: 20 APRIL 2021

³ See also: Guidance on the CMA's approach to Short-form Opinions, CMA27, 2014, paragraph 5.2 page 11