# COMPETITION LAW COMPLIANCE GUIDELINES

## FOR SAMED AND SAMED MEMBERS

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### 1. Introduction

SAMED brings together suppliers and others involved in the South African Medical Device sector to discuss issues of industry-wide importance. Members may compete directly with each other and both individual SAMED Members and the Association have to comply fully with South African Competition law.

It is the responsibility of SAMED and each of SAMED's Members individually, to ensure compliance with competition law. This document contains guidelines which will help ensure compliance. The Competition Commission has suggested that SAMED members consider informing the Commission if they suspect anti-competitive conduct in addition to informing their company counsel.

## 2. Associations and competition law

When considering associations from a competition law perspective, two forms of conduct immediately come to the fore.

The first concerns decisions or recommendations made by the Association, the effect of which may be anti-competitive.

The second concerns the facilitation, by the Association, of the exchange of commercially sensitive information which may lead to an anti-competitive agreement between competitors or may result in the replacement of individual conduct with a co-ordinated conduct by members.

## 3. The prohibition of anti-competitive agreements - general

The Competition Act 89 of 1998 prohibits competitors (which include potential competitors) from concluding agreements which restricts competition or from operating in a co-ordinated manner. In particular, price fixing, dividing markets and collusive tendering are strictly prohibited.

Agreements between parties in a vertical relationship (i.e. at different levels of the supply chain) are prohibited if they restrict competition. In particular, the practice of minimum resale price maintenance is prohibited. This refers to an agreement between a supplier and a customer in terms of which that customer must sell the supplied product on to its customers at a price determined by the original supplier, rather than by market forces.

No Member should ever discuss or be involved in any of the following anti-competitive activities or agreements:

a. price-fixing, including the co-ordination of prices, discounts or any other element of pricing, and even discussing prices with competitors;

b. market division such as the allocation of customer groups or territories between competitors;

c. agreements on investment levels or production quotas;

d. the exchange of competitively sensitive information, for instance, on business plans, customer relations or ongoing or planned bids or tenders;

e. agreed restrictions on trade such as export bans, or prohibitions on sales to certain customers;

f. joint negotiations, selling or buying with competitors, except after obtaining legal advice;

g. any other agreement restricting competition such as, a collective boycott, any arrangement to avoid direct competition, or joint action to exclude competitors or new entrants;

h. resale price maintenance arrangements.

The Competition Act defines an agreement as including,

*“a contract, arrangement or understanding, whether or not legally enforceable”*

To be prohibited, an anti-competitive agreement need not be written down or binding. The same is true of the decision of an association of undertakings. A verbal information exchange or an informal agreement can be an infringement even if it is a mere understanding or "gentleman's agreement".

From an Association point of view, a recommendation (binding or non-binding) or a decision requiring members to operate in a particular manner could be anti-competitive depending on the nature of the recommendation or decision.

For example, the Association’s criteria for admission as a member must be based on non-discriminatory and objective criteria as exclusion of some potential members on subjective criteria may be anti-competitive to the extent that the potential member cannot participate and benefit from the Association’s work.

Another example would be rules of an Association which dictate pricing strategies or affect the price-quality-quantity nexus of a member's product. Such a rule would likely be anti-competitive.

**4. Information Exchange**

Although there is not yet a precedent in our law prohibiting information exchange in itself, the Competition Commission views exchange of information between competitors as an area of extreme concern. This is particularly so where the exchange of information leads to a replacement of individual conduct on the market by members to a co-ordinated conduct. Please see the example below.

The Commission has registered the concern that information exchange should be aggregated and historical. Exchange of disaggregated and current data and information may serve to chill competition by increasing transparency in the market thereby either facilitating or stabilizing collusion.

Members must not exchange information regarding price, volume, commercial strategy, business secrets or any other competitively sensitive information. Members should take particular care in discussions with fellow-Members who are or who may become competitors, whether the discussions are formal or informal.

In short, although the exchange of information may have some pro-competitive aspects, by increasing transparency in a market, where the exchange of information reaches a level of transparency wherein confidential competitive information relating to one or more individual members may be ascertained, then such level of transparency is likely to be anti-competitive.

In September 2014, the Competition and Market's Authority in the UK published some general dos and don'ts. The following would be problematic:

a. Having rules preventing members from taking commercially independent decisions;

b. Issuing pricing or output recommendations to members

c. Restricting members from competing with each other;

d. Requiring members to provide the Association with commercially sensitive information;

e. Publishing messages associating lower prices with lower quality

More specifically, subjects to avoid are:

f. Prices and discounts, or price-related contractual terms (although you may discuss Government-imposed pricing principles and reimbursement policies as they impact on the industry as a whole);

g. Client relations, ongoing bids or plans to bid for business;

h. Business plans or commercial strategy;

i. Competitive strengths/weaknesses in particular areas;

j. Production planning or output levels;

k. Product development or investment in research programs which is not yet widely known;

l. Individualized market share data;

m. Benchmarking is allowed, provided the entity collecting and processing the data is bound by a confidentiality undertaking, and the data is not and cannot be linked to specific competitors. Market surveys are allowed provided results are presented in statistical form, individual price information is excluded and competitively sensitive information such as market share and export volumes remain anonymous.

It is acceptable to discuss public policy, educational and scientific developments, regulatory matters of general interest (including Government-imposed prices or reimbursement policies), demographic trends, publicly available information and historical information that has no impact on future business. Members may display or demonstrate new or existing products, but not discuss non-public R&D or production plans.

**EXAMPLE – the bike retailer cartel**

The Competition Commission investigated a potential cartel between a large number of bicycle wholesalers and retailers. It was alleged by the Competition Commission that at a meeting held between the retailers and wholesalers, certain increases to the mark-ups on bicycles and cycling accessories were agreed to as well as to stop discounting products. It was also alleged that wholesalers would be asked to recommend higher retail prices. It is unclear whether these were ever put into place.

Unfortunately some of the retailers that simply attended the meeting and did not expressly consent to the proposals were also held to have contravened the competition act, their mere attendance, without more, being sufficient to allege guilt.

The example is important to the extent that it demonstrates that even though anti-competitive conduct was not carried out, mere attendance and discussion of price sensitive information is sufficient to attract the risk of contravening the Competition Act.

See the end of this document for further examples.

**5. Abuse of a dominant position prohibited**

Dominant firms have an added responsibility to behave in a way which does not exploit consumers or prevent or impede competitors from entering into or expanding within the market. A firm which has a market share of 45% or more is automatically dominant. A firm which has less than 45% of the market is dominant if it has 'market power' which means it can control prices, exclude competition, or behave to an appreciable extent independently of its suppliers, customers or competitors.

Members should be aware of the market in which they operate because the smaller the market, the easier it is for a firm to exercise market power and therefore be classified as dominant.

In the medical sector, certain areas / markets tend to be highly concentrated (only a few, relatively big competitors). It is concentrated markets such as this where competition concerns are greatest.

As soon as a dominant firm's behavior has an anti-competitive object or effect, unless it can be justified on efficiency, technological or other pro-competitive grounds, it may result in fines and civil liability. There is no need to demonstrate the existence of an agreement or collusion. Examples of abuse of dominance which are specifically prohibited by the Competition Act include:

a. Charging an excessive price to the detriment of consumers;

b. Refusing to give a competitor access to an essential infrastructure or resource when it is economically feasible to do so;

c. Engaging in any act which impedes or prevents a firm entering into or expanding within the market;

d. Requiring or inducing a supplier or customer not to deal with a competitor;

e. Refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

f. Selling goods or services on condition that the buyer purchase separate, unrelated goods or services;

g. Forcing a buyer to accept a condition unrelated to the object of a contract;

h. Selling goods or services below cost in order to drive a competitor out of the market;

i. Buying up a scarce supply of intermediate goods or resources required by a competitor;

j. Charging different prices to different customers when the difference in price cannot be justified by cost considerations.

**6. What to do if you suspect a breach of these guidelines**

Presence at meetings where anti-competitive conduct is discussed can be enough to incur liability under the Competition Act. Check the agenda, object in advance to impermissible discussion items and stay away if the agenda is not changed. As soon as you become aware of an infringement, walk out of the meeting and have it minuted that you left the meeting and contact your legal counsel, express your disagreement and ensure that a record is kept of your disagreement. If you miss a meeting, check the minutes upon receipt, and warn your legal counsel if these suggest an infringement. If there is a possibility that sensitive matters are discussed, consider having legal counsel present at meetings.

*If you are uncertain whether a particular agreement, discussion or information exchange between competitors is allowed, immediately contact your company lawyer, who will take appropriate steps.*

**7. Do's and Don'ts: Guidelines on participation in SAMED meetings**

**7.1 DON'TS**

**Don't** reach understandings or agreements or even hold discussions (especially with a competitor) on anything relating to commercially sensitive topics such as prices, credit terms and billing practices, production, inventory, supply volumes, sales, costs, future business plans, bids or matters relating to individual suppliers or customers.

**Don't** attend meetings without written agenda or clear indication of the purpose.

**Don't** attend unscheduled gatherings unless you know that they are for a bona fide purpose or that they are purely social gatherings.

**Don’t** discuss business related topics at social functions.

**Don't** accept written non-public information or agree to the exchange of oral non-public information with Members who market competing products.

**Don't** participate in information exchanges, market surveys, or benchmarking exercises that allow access to individualized competitive information.

**Don't** engage in joint negotiations, joint sales or joint buying without legal advice.

**Don't** agree to exclude competitors or engage in collective boycotts.

**7.2 DO'S**

**Do** read the SAMED Competition Law Compliance Guidelines that precede Don’ts’s and Do’s.

**Do** discuss public policy, education, scientific developments, regulatory matters of general interest, general industry trends, non-individualized (statistical) market surveys or benchmarking projects, publicly available information and historical information, but be prepared to terminate the discussion and record your disagreement if anyone mentions any of the subjects listed in the "Don't" list above.

**Do** inform SAMED if you disagree with any of its decisions and keep a copy for your files of any such correspondence.

**Do** return commercially sensitive information you receive, without keeping copies, and explain in writing that you do not wish to obtain such information.

**Do** inform your company counsel and / or the Competition Commission of any approaches seeking to exchange non-public information or coordinate conduct on the market.

**Do** ask SAMED to have counsel attend SAMED meetings if you or your company has any doubts.

### 8. Exchanging Data and Information

Any discussions where information is exchanged between competitors, whether in a formal or informal context, can constitute an anti-competitive agreement or practice.

If you are part of information or benchmarking 'pool' or other market survey, ensure that individual manufacturers are not identifiable from the data, avoid meetings to discuss the results of the information gathering exercise, and allow open and voluntary participation in the exchange. Exchanging certain types of sensitive information may be more anti-competitive than is the case with other forms of information. Factors that could make for a high risk of infringement of the competition rules are set out in the table overleaf.

*Note that although the conduct listed in the right hand column is 'low risk', exchange of all types of information should be regarded with caution and if in doubt, legal advice should be sought. The Competition Commission has suggested that in general when information is exchanged it should be aggregated and of a historical nature.*

| **High Risk of Infringement** | **Low Risk of Infringement** |
|---|---|
| Supply, acceptance or exchange of information with competitors or potential competitors | Publication of information; exchange of information with customers or non-competitors |
| Supply/accept/exchange information on prices and discounts, individual bids, customer relations, supply volumes, costs, investment and general business strategy, production levels | Exchange information on public policy matters, educational and scientific developments, regulatory matters of general interest, demographic trends, publicly available information |
| Confidential information | Public information |
| Current information | Historic information |
| Individual company data | Aggregated industry data |
| Implied or explicit recommendations or agreements accompanying the exchange | No further discussion of the information exchanged |

### 9. Lodging a complaint with the Competition Commission

Any person may provide information concerning an allegation of a breach of a prohibited practice to the Commission. See: http://www.compcom.co.za/lodge-a-complaint

### 10. Requesting an advisory opinion from the Competition Commission

An advisory opinion is a written opinion of the Commission's position in respect of a set of facts submitted by external parties. Its aim is to assist in interpreting provisions of the Act and to provide business with guidance on the position that the Commission is likely to take in respect of certain transactions, agreements or practices. An advisory opinion is not binding on the Commission. The Commission may at any time review its position vis-à-vis the facts presented. Furthermore, the Commission will only formulate an opinion on the basis of a disclosed set of facts. Should the facts change in any way, the Commission may revise its position.

For a party to obtain an advisory opinion a letter outlining the facts on the matter in question must be sent to the Competition Commission's Registry on fax number (012) 394 0166 or post it to Private bag x 23, Lynwood Ridge, 0040 or email ccsa@compcom.co.za.

**Fees**

In terms rule 10.4 of the Rules for the Conduct of Proceeding in the Competition Commission, a fee of two thousand five hundred rand only R2500 is payable by the party requesting an advisory opinion.

See: http://www.compcom.co.za/request-an-advisory-opinion/

**11. Further examples**

In 2015, the Federal Trade Commission (the US equivalent to our competition commission) found the conduct of the North Carolina State Board of Dental Examiners (the Board) to be anti-competitive. In short the Board members got together to discuss and take action against third parties that were providing tooth whitening services at much lower prices than what dentists were charging. The Board issued some 47 cease and desist letters to these third parties on the basis that unlicensed practice of dentistry was a criminal offence. The legislation cited by the Board did not include, within its ambit tooth whitening as the practice of dentistry and the conduct was held to be anti-competitive.

In 2014, the Indian Competition Commission found the Kerala Film Exhibitors Federation, an association of some 315 film theatres, guilty of anti-competitive conduct. The association controlled and restricted the exhibition of new movies in Kerala and in 2012 directed its members to strike or stop screening films as a mark of protest against an increase in service charges. The complainant was placed in a position such that it could not sit out the strike and would incur huge losses. The complainant resigned from the association with the result that in 2013 the association directed distributors not to distribute movies to the complainant.