Southern African Bitumen Association

Competition Policy

2012

sabita

excellence in bituminous products

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1. Introduction

Why competition compliance is important

1.1 It is Sabita's policy that its employees and all of Sabita's members comply strictly with the competition laws of South Africa;

1.2 The term "competition compliance" refers to methods designed to assist Sabita and its members to comply with the various competition laws put in place to ensure that competition is not adversely affected;

1.3 The Competition Act 89, of 1998, as amended ("Competition Act") is the legislation in South Africa setting out the competition laws. The main purpose of the Competition Act is to promote and maintain competition amongst businesses in South Africa. In applying the law, South Africa's industrial objectives are also taken into account to promote a fair and efficient economy;

1.4 As an industry association, Sabita seeks to enable compliance by all members with South African competition laws and rules. The Competition Act applies to all economic activity having an effect within South Africa. The Competition Authorities can impose fines of up to 10% of Sabita's and/or its members' turnover, which could translate into hefty fines. The laws have now been revised[1] **to include personal fines and/or imprisonment (or both) for directors and managers.** In addition to the risk of large fines and/or jail time, breach of South African competition rules can also have the following consequences:

1.4.1 an agreement that infringes competition laws may be wholly or partially invalid, which means that Sabita and/or its members cannot enforce such an agreement;

1.4.2 an order to cease or modify an infringing agreement or practice;

1.4.3 third parties who suffer loss as a result of anti-competitive behaviour may bring an action against Sabita and/or its members for civil damages;

[1] These changes have not yet come into effect

1.4.4 investigations into Sabita and/or its members' businesses that can be very disruptive and time-consuming;

1.4.5 investigations and possible legal proceedings resulting from infringements can take years to resolve leading to high costs, reputational risks and adverse press comments to Sabita, use of management time and resources, which should be devoted to more profitable projects; and

1.4.6 increased risk of further complaints against Sabita and ongoing surveillance by the Competition Authorities.

1.5 This Policy provides an overview of the main rules of South African competition law and sets out procedures and guidelines that must be followed when dealing with matters to which competition laws may apply. In the event of any queries or uncertainty as to the application of competition laws to specific activities, competent legal advice should be sought. Readers should note that while this Policy is intended to provide all employees and members with general guidance and guidelines on the Competition Act, it is not a substitute or replacement for legal advice;

1.6 The management of Sabita is committed to complying with competition laws and all employees should be aware that any infringement of the procedures or guidelines in this manual will be viewed in a serious light. Breaking the competition rules is a disciplinary offence, leading to disciplinary action, which includes dismissal for employees. This Policy document should be studied very carefully as competition compliance is essential in the conduct of all business activities within Sabita;

1.7 In the event of any queries or uncertainty as to whether competition laws may apply to specific activities, independent and competent legal advice should be sought. Sabita encourages full compliance with competition law, but cannot accept responsibility for infringements by members.

2 Criminal/personal liability for directors and senior management

2.1 The new Competition Amendment Act introduces criminal and personal liability for directors and senior management. A person commits a criminal offence if, while acting as a director of a company, or while engaged or purporting to be engaged by a company, and in a position having management authority within the company:

2.1.1 was responsible for causing the firm to engage in a prohibited practice, business conduct comprising cartel conduct, with one of its competitors, i.e. engaging in direct or indirect price fixing, market division or collusive tendering, often referred to as cartel conduct; or

2.1.2 knowingly acquiesced in the firm engaging in a prohibited practice, i.e. the person concerned had actual knowledge of the prohibited conduct by the firm at the time when the prohibited conduct occurred and did not seek leniency or report such conduct to the Competition Commission ("Commission").

2.2 The term "management authority" is not defined in the Competition Amendment Act, but may be construed to include persons who could conceivably be deemed to occupy a "management" position. This would include persons in a middle management position, but could also extend to persons in relatively junior management positions;

2.3 Any person convicted of a cartel conduct contravention is liable to a fine not exceeding R500 000, or to imprisonment for a period not exceeding 10 years, or to both such a fine and imprisonment.

3 What practices and conduct are regulated by the Competition Act?

3.1 The Competition Act regulates certain prohibited practices and mergers. Prohibited practices fall into the following categories:

3.1.1 those that may occur between competitors, being companies in the same market (horizontal relationship), consisting of agreements or concerted practices or decisions by associations of companies; and/or

3.1.2 those practices that may occur between a firm and other parties, such as suppliers or customers (vertical relationship); and/or

3.1.3 the abusive conduct by a firm considered to be in a dominant position in a particular market.

3.2 Mergers (transactions of a certain value that involve either the disposal or acquisition of a controlling interest or shares in a business) will not be discussed in this document, and members are thus urged to obtain their own independent advice for compliance with merger regulations.

4 Arrangements with competitors

4.1 The Act states that agreements between, or concerted practices or decisions by, associations of firms are prohibited if:

4.1.1 they are made by firms in a horizontal relationship. In other words the companies concerned, conduct business in the same product or geographic market; and

4.1.2 the agreements, concerted practices or decisions of the associations are restrictive. This means that they have, or are likely to have, the effects of substantially preventing or lessening competition in a particular market.

4.2 Such agreements are justifiable only if they have positive pro-competitive effects that outweigh the negative effects, example, efficiencies or technological gains;

4.3 In particular, the law absolutely prohibits the following types of agreements:

Agreements to fix prices

4.3.1 These agreements include fixing a purchasing or selling price, as well as other trading conditions such as discounts, credit terms, price differentials (or price increases) and agreements to charge prices that are the same;

4.3.2 A price fixing agreement includes an agreement to fix:

4.3.2.1 maximum as well as minimum prices;

4.3.2.2 a range of prices within which competitors will compete;

4.3.2.3 the amount of discount to be given to customers;

4.3.2.4 any term or condition of sale, not just the price, including credit terms;

4.3.2.5 the price of a service or product;

4.3.2.6 an agreement to use a specifically agreed formula to price a good or service.

4.3.3 Price fixing happens in various ways and could include the setting of a minimum price below which prices are not to be reduced; establishing an amount or percentage by which prices are to be increased; and/or establishing a range outside of which prices are not to move;

Market-sharing agreements

4.3.4 These agreements are between competitors to not approach each others' customers. It could also be a decision to allocate customers, suppliers, territories or specific types of products or services;

4.3.5 This conduct takes place where firms agree to share markets, whether by territory, type or size of a client, thus preventing or lessening competition amongst themselves. This may be done in addition to, or instead of, agreement about prices that competitors may charge;

Collusive tendering or bid-rigging agreements

4.3.6 Tendering procedures are designed to promote competition among prospective suppliers. Tenders submitted as a result of joint activities are, therefore, likely to have the effect of preventing or lessening competition and are prohibited outright;

4.3.7 The techniques of collusive tendering may include:

4.3.7.1 *bid suppression:* when a number of potential competitors do not tender, or withdraw from the process of tendering; or

4.3.7.2 *complementary tendering:* when some potential competitors agree to submit tenders that are too high to be accepted; or

4.3.7.3 *bid rotation:* when all potential competitors submit tenders but only one of them submits the lowest and winning tender at any one time. Over time, the conspirators receive the agreed share of the value of the contracts.

Note

Any form of price-fixing, market sharing or collusive tendering is absolutely prohibited. No justifications whatsoever are permitted, and such contraventions attract the highest penalties. Further, Sabita's members must ensure that association meetings are not used as a forum or platform for discussion of or engagement in prohibited conduct. More importantly, in terms of the new amendments, persons in management authority may be imprisoned or fined in their personal capacity.

5 Agreements with suppliers and/or customers

5.1 Agreements entered into between any Sabita member and its suppliers or customers are referred to as "vertical agreements". Other examples are an agreement between a manufacturer and a wholesaler, a wholesaler and a retailer or a bitumen producer and a road contractor. These agreements, therefore, connect two markets which can constitute a relationship between supplier and customer;

5.2 The law states that agreements between parties in a vertical relationship are prohibited if restrictive practices occur between such parties in a vertical relationship and the agreement is restrictive: i.e. it has, or is likely to have, the effect of substantially preventing or lessening competition in the market;

5.3 In general, these restrictive practices are made between parties operating at different levels in the supply chain for the supply of products or services;

5.4 Where such agreements raise competition concerns, an assessment of such agreements will be made by the Competition Authorities to determine whether the anti-competitive effects outweigh the positive effects on competition;

5.5 Sabita recommends that its members obtain their own internal legal advice on compliance when dealing with customers and suppliers. The following are guidelines for members:

5.6 Resale price maintenance:

5.6.1 Resale price maintenance is vertical price fixing. It refers to agreements entered into between firms at different levels of the market structure, which establish the price at which their goods or services should be resold. It can take the form of setting either the minimum price, below which products or services may not be sold to the ultimate user, or a maximum price, above which a sale cannot take place;

5.6.2 This form of price fixing, as is the case with any other form of price fixing, is absolutely prohibited. This means that the practice is prohibited from the outset and no defence is accepted for such conduct.

6 Abuse of dominance

6.1 If any Sabita member is regarded as dominant in any of its business areas, such conduct can be scrutinised by the Competition Authorities. Infringement of the competition laws takes place if a member of Sabita abuses its dominant position in some way - e.g. through exclusionary conduct or behaviour that results in a substantial lessening or prevention of competition;

6.2 Dominance consists of having sufficient market strength to act independently of the market. It does not necessarily entail having a majority share of the market, although a market share of over 35% is closely scrutinised. In South Africa, market shares of 35% and above and "market power" are closely scrutinised for dominance. Market power is the ability of a Sabita business/company to act alone in terms of price and other market conditions. Dominance is presumed if a firm has above 45% market share;

6.3 While no wrong is perceived in being dominant, the abuse of dominance is prohibited. The following provisions on abuse of dominance are only applicable to members who are dominant in specific areas of business activity;

6.4 A dominant firm in South Africa is prohibited from the following:

Charging excessive prices

6.4.1 Charging or extracting excessive prices by a dominant firm is an infringement of the competition laws. Such prices can include any fee charged by a member of Sabita which may be dominant. "Excessive price" may be defined as a price that has no reasonable relation to the economic value of a product and/or service;

6.4.2 In respect of a complaint lodged with the Competition Authorities, a detailed analysis of costs in relation to a service or product complained of would be required before any judgment could be reached. The question to be asked is whether the difference between the price actually charged and the costs actually incurred is excessive, and if so, whether the price in itself is unfair (i.e. it bears no

reasonable relation to the economic value or when compared to other competing products);

6.4.3 Prices in a particular market can be regarded as excessive if they allow a dominant firm to sustain profits higher than it could expect to earn in a competitive market. A balance needs to be struck between a reasonable return required by investors, shareholders and lenders of the business, and prices paid by consumers.

Refusing a competitor access to an essential facility

6.4.4 The law states that refusal to supply an essential facility to a competitor may constitute an abuse of dominance if there is no objective justification for the conduct. Whether a particular facility is essential must be assessed on a case-by-case basis.

Requiring or inducing a customer or supplier not to deal with a competitor

6.4.5 The laws prohibit any member of Sabita from imposing a condition or giving incentives or inducements to another company to not deal with its competitors;

6.4.6 If a member of Sabita is dominant in any specific area of the market, it may not induce any customers to not procure services or products from its competitors. Inducements include financial incentives, rebates, discounts and any other benefit designed to secure the loyalty of any customer or supplier which has the effect of ultimately reducing competition.

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

6.4.7 A refusal to supply a product or service is prohibited when it is aimed at eliminating actual or potential competitors. A refusal to supply can take many forms, i.e. an outright refusal to supply, a refusal based on terms which the supplier knows are not acceptable, or refusal on unfair conditions;

6.4.8 Refusal to supply can impact on a secondary market, where the dominant firm competes with the customer, which it refuses to supply. Whatever the form of refusal, the intent is to eliminate or substantially reduce competition.

Selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract

6.4.9 This practice is also known as "tying". Tying means making the purchase of a particular product or service conditional on the purchase of a different product/service;

6.4.10 It is prohibited to link two products "artificially" when there is no reasonable basis to do so. The appropriate route would be to allow a consumer and/or end user a choice when opting to buy a product and/or a service;

6.4.11 Tying obligations may be justified by the nature of the products concerned. Note that each case is reviewed on its own merits to determine if tying is taking place.

Selling goods or services below their marginal or average variable cost (predatory pricing)

6.4.12 This refers to selling "below cost" to achieve market power. It is also called "predatory pricing", which is strategic conduct whereby a company deliberately incurs short-term losses in order to eliminate a competitor, and is thereby able to charge excessive prices in the future. This does not, however, imply that when an activity is run at a loss, it is in itself an infringement of the law; neither does it mean that consumers cannot benefit from such short-term conduct. The key in assessing this conduct is whether the dominant firm is covering its costs.

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

6.4.13 The above provision is self explanatory. The provision does not apply where a dominant member of Sabita can

demonstrate that there are pro-competitive gains that outweigh the negative effects of engaging in the conduct described in the preceding paragraphs.

Price discrimination by dominant companies is prohibited

6.4.14 Price discrimination takes place where a dominant firm could be considered to be applying dissimilar conditions to equivalent transactions, i.e. different prices are charged to different sets of clients. For price discrimination to be an abuse, it must also:

6.4.14.1 have, or be likely to have, the effect of preventing or lessening competition; and

6.4.14.2 relate to the sale of goods or services of like grade and quality to different buyers in an equivalent transaction; and

6.4.14.3 involve discriminating between those buyers in terms of:

(a) price charged;
(b) discount, allowance, rebate or credit given or allowed in relation to goods or services;
(c) the provision of services; or
(d) payment method and terms for payment of goods and services.

6.4.15 It is not price discrimination if the dominant member of Sabita can show that the differential treatment makes only reasonable allowances for differences in the cost of manufacture, distribution, sale, promotion, or delivery arising from differences in the places to which goods are supplied to different customers, or the methods or quantities in which they are supplied. Alternatively, there is no prohibition if a Sabita member can prove that the difference represents action taken in good faith to meet a price or benefit offered by a competitor or in response to changing conditions affecting the market which includes, deterioration of perishable goods, obsolesce of goods, liquidation or sequestration or closing down sale in good faith.

7 Exemptions

7.1 An exemption is a "written permission" by the Commission to engage in any of the prohibited practices detailed above. It should be noted that exemptions are granted only in exceptional circumstances, and only if such practice is prohibited.

Exemptions may be granted where a practice contributes to one or more of the following:

7.1.1 the maintenance or promotion of exports;

7.1.2 promotion of small businesses and companies controlled or owned by historically disadvantaged persons;

7.1.3 the reversal or reduction in the decline of a particular industry; and/or

7.1.4 the stability of an industry, as designated by the Minister.

7.2 Although the provisions for exemptions are brought to the attention of Sabita members they are encouraged, as a matter of policy, to assume that all the prohibited practices are prohibited. Any members with queries regarding an exception relating to any particular area of business are encouraged to consult directly with their legal counsel.

8 Do's and don'ts

8.1 General Considerations

It is impossible to set out a comprehensive list of "do's and don'ts", but the following considerations will serve as a guide to activities which should never be engaged in and other activities should be reviewed in advance. This list is not a substitute for developing an understanding of the principles set out in this Policy. The over-riding principle should be: If in doubt, contact your legal department or compliance officer.

8.2 General guidelines for Sabita members dealing with competitors

8.2.1 Exercise independent judgment when selling products or services to customers, and avoid any semblance whatever of collusion with competitors;

8.2.2 Make pricing decisions independently of competitors, such prices to be dictated only by company costs, market conditions and competitive prices;

8.2.3 Do not enter into any discussion with competitors concerning the following subjects:

8.2.3.1 prices, discounts, rebates or credit periods;

8.2.3.2 the timing of price reviews;

8.2.3.3 agreements to use a common formula or method of calculation to determine prices;

8.2.3.4 terms or conditions of sale (including credit terms);

8.2.3.5 costs or profit margins;

8.2.3.6 bids or intentions to bid;

8.2.3.7 allocation of sales territories, customers or products;

8.2.3.8 selection or termination of distributors or distribution channels; or

8.2.3.9 exchange of competitive information.

8.2.4 Sabita members should not remain at meetings with competitors (including Sabita or any other meetings or social gatherings, however informal) at which prices or any of the foregoing subjects are discussed. If in doubt, leave the meeting and ensure that your departure is a matter of record;

8.2.5 Sabita members should confine any discussion at Sabita meetings to topics directly involved in the purpose of the meeting and which are on the meeting agenda. If any questions arise about the agenda, independent legal advice should be obtained before attending the meeting;

8.2.6 Sabita members should not obtain information about a competitor's business (particularly price lists or other pricing information) directly from the competitor itself. This nformation can be obtained from sources other than the competitor, such as distributors, published price lists or other data generally available to the trade;

8.2.7 Sabita members should not provide competitors with price lists or other competitive information of their or any of their subsidiaries or other business units;

8.2.8 Sabita members should document the source of information obtained about competitors, e.g. the source of a competitor's price list and the date it was obtained on the copy itself;

8.2.9 Sabita members should not team up with competitors in order to drive others out of business.

8.3 Guidelines for Sabita

8.3.1 Sabita and its employees must not facilitate:

8.3.1.1 discussions on prices, discounts and calculation formulas, etc.;

8.3.1.2 the sharing of one member's competitively sensitive information with other members;

8.3.1.3 the provision of one member's price lists and formulas or other competitivel competitively sensitive information to another member;

8.3.1.4 discussions or agreements with competitors regarding certain other terms of trade, including delivery terms, contractual guarantees, information on marketing, market areas and customers;

8.3.1.5 illegal discussions before or after meetings, at e.g.:

a. dinner/bar;
b. airport;
c. taxi;
d. customer events;
e. in the customer's waiting room.

8.3.2 The more detailed and current the information discussed or shared with competitors, the higher the risk of violating competition law;

8.3.3 To avoid participating in any violations, the following additional guidelines should be followed:

8.3.3.1 anti-competitive behaviour arising out of industry association activities can be minimised if formal procedures, including preparation and circulation of a written agenda and minutes of meetings, are followed;

8.3.3.2 all discussions of competitive matters such as prices and other terms of conditions of sale, costs and future production and marketing plans should be strictly avoided at both formal meetings and informal sessions.

8.3.4 Membership in industry associations and participation in trade fairs is generally advantageous, but there are also potential risks of illegal discussions during such meetings.

Therefore:

8.3.4.1 obtain the agenda of any meetings beforehand;

8.3.4.2 if sensitive subjects are discussed during meetings of a trade association, do not participate. State your objection and leave the meeting immediately. Sitting silently and listening to improper discussions is illegal;

8.3.4.3 request that your objection and departure are recorded in the minutes;

8.3.4.4 write a short report for your own file.

9 Watch your language

9.1 Take care with your language in all business communications, whether in writing or in the course of telephone conversations or meetings. Careless language could be very damaging should Sabita or any of its members be subject to an investigation by the competition authorities or become involved in litigation with another company. A poor choice of words can make a perfectly legal activity look suspicious;

9.2 Many internal documents are likely to come under scrutiny during an investigation or legal proceedings involving a third party, even those which might be considered confidential such as diaries, telephone call records or personal note books. Documents in this context are not limited to papers, but will include any form in which information is recorded: including computer records and databases, e-mail, microfilms, tape recordings, films and videos, all of which may be examined;

9.3 Members should therefore adhere to the following guidelines:

9.3.1 consider carefully before recording anything in writing;

9.3.2 if any issue is considered to be sensitive, legal advice or the opinion of a compliance officer should be obtained before the matter is committed to paper;

9.3.3 members should be aware that anything committed to paper may one day be made public;

9.3.4 any suggestion that an "industry view" has been reached on a particular issue, e.g. price levels, should be avoided;

9.3.5 language which falsely suggests collusive conduct, e.g. "industry agreement" or "industry policy" should be rigorously avoided;

9.3.6 vocabulary which implies guilt (such as “please destroy/delete after reading”) should be avoided;

9.3.7 any speculation about whether an activity is legal or illegal should be avoided;

9.3.8 do not write anything that implies that prices are based on anything other than a Sabita member's independent business judgement;

9.3.9 do not keep papers for any longer than provided for in your Document Retention programme;

9.3.10 avoid keeping many different versions of the same document in your files or computer system;

9.3.11 state clearly the source of any pricing information (so it does not give the false impression that it came from talks between Sabita members).

9.4 Documents which contain careless and inappropriate language may make perfectly legal conduct appear suspicious or collusive. Time spent in writing clearly and following these guidelines are an important part of compliance efforts.

9.5 E-mail and Voicemail

9.5.1 E-mail and voicemail can often contain even more damaging statements than letters or memoranda, because they are usually sent or left casually, in the false belief that they are confidential or will be destroyed after a short time. Both e-mail and voicemail messages can be accessed during an inspection by the competition authorities or in legal proceedings. They are regarded as a particularly good source of information because they are stored by time and date and can give a full picture of what was done and said.

9.5.2 Members should therefore:

9.5.2.1 take as much care in sending messages by e-mail or leaving them on voicemail as when sending a letter or memorandum. It should be assumed that all e-mail or voicemail messages may be read or heard by others;

9.5.2.2 keep in mind that e-mail and voicemail messages, even if deleted, leave a potentially damaging record that may have to be

produced to the competition authorities or in legal proceedings; and

9.5.2.3 particular caution should be exercised with messages sent to or received from outside the company over the internet. Remember that e-mail messages are often appended to other e-mail messages and may be forwarded or replied to several times.

9.6 Communications with in-house and external lawyers

9.6.1 This section of the Policy contains guidelines which must be followed in order to assist Sabita or any of its members in claiming legal professional privilege for communications with in-house and external lawyers;

9.6.2 Sabita and its members are in some circumstances able to prevent the disclosure of communications with their external or in-house lawyers on the ground that the communications are protected by the right of legal professional privilege, and can therefore be kept confidential;

9.6.3 To enable Sabita and its members to substantiate any claim of legal professional privilege which it may wish to make in order to protect the confidentiality of communications with external lawyers, the following guidelines must be adhered to:

9.6.3.1 make sure that each request for legal advice clearly displays the name of in-house or external lawyers, and that the words “Privileged and confidential request for legal advice” appear at the beginning of the communication;

9.6.3.2 do not send copies of your communications with in-house or external lawyers to anyone else;

9.6.3.3 do not, in the same communication, also seek the legal department's views on non-legal matters, even if they are related to the original request for legal advice;

9.6.3.4 if you are replying to a request for information from external lawyers, ensure that the words "Privileged and confidential, Prepared at the request of the Legal Department" appear at the beginning of your reply;

9.6.3.5 do not refer to communications between non-lawyers as being "privileged and confidential", even where Sabita's legal department receives a copy of such communication;

9.6.3.6 all communications passing between you and in-house or external lawyers should be kept separately in files marked "Privileged and confidential";

9.6.3.7 when dealing with third parties, members should not refer to legal advice received by Sabita without the prior consent of Sabita's appointed lawyers;

9.6.3.8 in cases where it may be appropriate to refer to legal advice when dealing with third parties, the best course is to refer to a separate record of the advice which has been prepared by Sabita's appointed lawyers.

10 Dealing with enquiries

10.1 Telephone Enquiries

10.1.1 Any enquiry received from an external lawyer should be transferred to the in-house or appointed lawyer immediately. Do not answer any questions;

10.1.2 Any enquiry received from an inspector or other government official should be transferred to the in-house lawyer or compliance officer immediately. If counsel is not available, do not put it through to another person but note down the name of the caller, the purpose of the call, the name and number of the inspector and his/her contact telephone number. Record any other information he/she gives you, such as the date and time of a potential inspection. All of this information should be passed on to the legal or compliance department as soon as possible;

10.1.3 Caution should be exercised when telephonic enquiries are received about who does what within your business. Do not answer enquiries unless you are certain that they are *bona fide,* that you know who the caller is, and the reason the information is being requested.

10.2 Visitors

10.2.1 If one or more inspectors arrive in person, ask to see their identity cards (and write down their names, the name of their organisation and the time they arrived). Contact your legal or compliance department immediately or, in their absence one of your senior managers designated to deal with this situation. Keep the inspectors in the reception area where you can see them until the in-house/appointed lawyer, compliance officer or manager arrives;

10.2.2 Do not allow the inspectors to wander round the building, or to enter a room containing official files or records.

11 General

Members should note that because compliance with competition laws are so important and the consequences of violation so serious, this Competition Policy and guideline must be strictly observed at all times.

Notes