openASSA Project

# **Working Party 3 – Legal**

# Discussion document: Antitrust

## Introduction

According to its Terms of Reference, openASSA aims to develop open source solutions for actuaries working in the life insurance field. The detailed aims of openASSA are:

* To investigate the need for open source actuarial modelling solutions in the South African insurance environment;
* To design and develop a suitable open source modelling environment (including governance, architecture, documentation, database management, and user interface); and
* To develop open source libraries specific to life insurance modelling requirements (such as cashflow modelling, stochastic modelling, SCR calculations, and IFRS17 calculations).

In order to achieve this, openASSA aims to use the contributions of volunteers from around the world. However, the most active contributors are expected to be members of ASSA currently working in the South African life insurance environment.

Naturally, whenever there is collaboration across an industry, concerns might be raised about anticompetitive behaviour. This document seeks to assess whether openASSA would fall foul of South African antitrust legislation, and how anti-competitive behaviour can be avoided in the course of openASSA’s activities.

## South African Antitrust Environment

### Legislation

South Africa’s antitrust legislation deals primarily with:

* The prohibition of certain practices;
* The control of certain mergers and acquisitions;
* The establishment of relevant antitrust bodies (such as the Competition Commission); and
* Various sections to do with enforcement, investigation, and offences.

For the purposes of this discussion, it is the prohibition of certain practices that is most relevant. In particular, the Competition Act outlaws an agreement between parties if it has the effect of substantially preventing or lessening competition in a market. The exception to this rule occurs when such an agreement brings technological, efficiency, or pro-competitive gains which outweigh the anti-competitive effect.

In addition, the Act specifically bans any agreement or practice between competitors, or an association of competitors, which leads to the fixing of prices, the allocation of markets, or collusive tendering.

The Competition Act also bans firms that are dominant in a market from abusing their dominance.

### Insurance Context

In general, local antitrust legislation is concerned with coordinated behaviours, including the sharing of competitively sensitive information between competitors. Thus, in an insurance context, South Africa’s antitrust legislation would require insurers to behave independently in the market and not know what their competitors are doing so that they do their best when it comes to products and pricing. Legislation strictly prohibits the sharing of competitively sensitive information such as:

* Pricing information (e.g. pricing bases) or any other data which has a bearing on price (e.g. profits, margins, cost, markups, discounts and allowances);
* Detailed information on ongoing tenders/bids;
* Policy terms and conditions (including exclusions etc.);
* Customer information;
* Business strategy (e.g. plans concerning the design, characteristics marketing or introduction dates of products); and
* Cost structures.

In addition, and as mentioned in Section 2.1, local insurers are also be prohibited from the fixing of prices, allocating markets between one another, or collusive tendering.

## Assessment of openASSA’s Activities

In assessing the potential for anti-competitiveness, we have asked whether any of openASSA’s activities would be detrimental to the quality of products in the market, the competitiveness of pricing, or the end consumer. We have also considered whether these activities reduce the extent to which insurers act independently in the market.

With this in mind, openASSA does not appear to be an anti-competitive initiative because it does not coordinate behaviours in the market and it does not stop (or discourage) insurers from pricing or developing products independently. In addition, it is difficult to see how it could be detrimental to the quality of products, the competitiveness of pricing, or the end consumer. On the contrary, if openASSA is successful, it may even increase competition in the insurance sector by allowing smaller insurers to perform complex actuarial modelling without the need for expensive proprietary software solutions.

After all, even if every insurer makes use of the modelling environment or any of the open source libraries, they would still need to develop their own models and use their own assumptions for various parameter values. As such, the development and use of the modelling environment and libraries does not prescribe how insurers go about their modelling activities, nor does it prescribe the results participants would obtain from various modelling activities. This is due to the fact that libraries would use standard non-company-specific actuarial modelling techniques or methodologies prescribed by legislation, accounting standards, or professional guidance.

A successful openASSA project would simply mean that insurers have access to a set of open source tools to be used as they see fit, if at all. In effect, this is no different from the existing situation where insurers use third-party proprietary software with standard libraries and adapt the code as required for their specific modelling requirements.

However, there is a risk that insurers (knowingly or unknowingly) behave anti-competitively by sharing competitively sensitive information with one another. In order to mitigate this risk, openASSA could include a clause in the Contributor License Agreement which indicates the types of information that contributors should not share. In addition, before proceeding with any new software builds, we should assess and record whether the build in question could negatively influence behaviour to the detriment of policyholders. Finally, in order to ensure transparency at all stages, we should keep clear records of meeting agendas and minutes of meetings.

## Working Group Recommendation

This working group is of the view that openASSA is not, at face value, an anti-competitive initiative. However, we recommend that this conclusion is reviewed and validated by ASSA’s lawyers.

This working group also recognises the risk that participants may knowingly or unknowingly act anti-competitively by sharing competitively sensitive information. In order to mitigate this risk, we recommend the following:

* The Contributor License Agreement or the openASSA code of conduct specifically indicates that, where applicable, contributors should not share competitively sensitive information to do with their respective employer's pricing, policy terms and conditions, customer information, business strategy, cost structures, and product design.
* Records should be kept of the minutes of all meetings (including the accompanying agendas).
* All new software builds should be assessed as to whether they could negatively influence market behaviour to the detriment of customers, and records of these assessments should be kept.

## Privileged legal advice fromWebber Wentzel:

Based on the descriptions contained in this document, Webber Wentzel is of the opinion that the objectives of openASSA are compliant with South Africa's antitrust legislation.  Importantly, they understand that the actuarial modelling solutions being developed and the open source libraries will not include or rely on any competitively sensitive information.

Webber Wentzel agree that as specific software builds are initiated and openASSA's activities advance, openASSA should consider the possible impact which each project may have on competition in the market. openASSA should keep records of these assessments and seek external legal advice where necessary. Contributors/users should not treat the recommendations or decisions of openASSA, or the software developed by openASSA as an arrangement among them to restrict their incentive or ability to compete independently. Contributors/users must at all times maintain their independence in respect of developing their own models and determining their own assumptions for various parameter values.

Recognising the risks inherent in initiatives which involve contact between competitors and in order to ensure that openASSA's activities are not used to facilitate any anticompetitive conduct by its contributors/users, best practices for compliance with the Competition Act should be adopted. Webber Wentzel would recommend that oppenASSA adopt a formal compliance policy which:

* records the commitment of openASSA to fair competition, including that:
  + contributors/users should not use openASSA meetings, platforms or initiatives to reach an anti-competitive agreement (formal or informal, oral or in writing) or other arrangements relating to competitive strategy, product design, cost structures, pricing, sharing markets or customers, restricting output or bid-rigging; and
  + openASSA will not support or assist any such conduct and aims to ensure that no meetings or initiatives supported by openASSA are used by its members to discuss or coordinate behaviour which would result in a restriction of competition;
* records that openASSA is not legally responsible for any infringements committed by contributors/users and that it is the responsibility of each contributor/user to obtain their own legal advice;
* commits to ongoing monitoring of compliance;
* makes provision for training of relevant representatives and key steakeholders;
* requires signed undertakings of compliance;
* prohibits the exchange of competitively sensitive information;
* sets out protocols for meetings involving competitors, namely:
  + preparation of draft agendas;
  + reading of a compliance statement;
  + circulating minutes to participants for confirmation;
* records that failure to comply with competition amounts to a violation to terms of use.