Competition Act Guidelines - SPF

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1. Introduction

It is expected of Sanlam Life personnel within SPF to at all times comply with all applicable legislation, industry codes and our internal rules. Of particular importance is compliance with the Competition Act (the Act). As SPF does not engage in anti-competitive behaviour the same is expected from all SPF personnel. This document is a summary of the most important aspects you should know about the Competition Act. It deals with:

- What may be classified as a contravention of the Act
- Procedures for mergers and acquisitions in the Sanlam Group
- Information exchange guidelines to ensure compliance with the Act
- Guidelines for SPF personnel attending ASISA Workgroup and other industry and professional meetings
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- Topics to avoid at meetings involving competitors
- What may not be classified as contravention of the Act
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Please note that the contents are for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation.

2. Summary of the most important aspects pertaining to the Act

2.1. What the Act regulates and what may be classified as a contravention of the Act

The Act regulates aspects relating to prohibited practices and merger control.

2.2. Prohibited practices

In order to monitor business activity, the Competition Act sets out rules for businesses such as Sanlam in relation to its competitors, suppliers and customers. There are certain activities, which would have a major negative effect on competition, and are therefore not allowed by the Act.

The activities which are not allowed include:

- illegal arrangements between competitors, for example an illegal arrangement between Sanlam and another insurer (restrictive horizontal practices)
- illegal arrangements between suppliers, producers and their customers, e.g. between Sanlam and a software supplier (restrictive vertical practices)
- illegal use of market power by large companies, e.g. should Sanlam abuse its dominant position in the marketplace (abuse of a dominant position) which has a negative effect on competition.

The Act also states that the Competition Commission must approve all mergers and acquisitions involving firms of a certain size. This will be covered later on.

2.2.1. So what does the Competition Act prohibit?

2.2.1.1. Restrictive horizontal practices

The Act forbids restrictive horizontal practices – horizontal simply means a relationship between competitors at the same level, e.g. a relationship between Sanlam and another insurer. The Act does not allow practices which substantially prevent or lessen competition in the market, unless these practices can be justified on the basis of technology, efficiency or other pro-competitive gains ("rule of reason" contravention). It is the responsibility of companies engaged in restrictive practices to prove that their relationship is beneficial to the economy in the broader sense, and that there are gains which outweigh the anti-competitive effects ("rule of reason" contraventions). This would constitute a defence against a horizontal restrictive practice charge.

Further to the above, there are three restrictive horizontal practices that are prohibited outright. There is absolutely no defence allowed for these unfair arrangements and the "rule of reason" defence will not be allowed under any circumstances. They are:

- The direct or indirect fixing of prices (e.g. agreeing to keep a price at a specific level, sometimes called price fixing, as well as other trading conditions such as discounts, credit terms, price differentials (or price increases)
- The agreed division of markets (e.g. splitting regions between companies or market sharing viz agreements between competitors to the effect that parties may not approach each others' clients in a particular area. It could also be a decision to allocate clients, suppliers, territories or specific types of services)
- Collusive tendering (also known as "bid rigging") is an illegal practise whereby competitors, when submitting tenders for a contract (e.g. making secret agreements to apply for government work), share inside information between themselves, with a view to manipulate the end result. The general rule is that competitors should always establish prices, pricing policies and trading conditions independently without any collusion or co-ordination with competitors. This will ensure that all interested persons compete vigorously and independently. A firm should not determine price or discounts with input or assistance from its competitors.

2.2.1.2. Restrictive vertical business practices

The Act also forbids restrictive vertical practices (e.g. the relationships between Sanlam and its suppliers and its clients or both. Vertical practices are considered to be restrictive and therefore prohibited where an agreement has the effect of substantially preventing or lessening competition in the market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect ("rule of reason" contravention).

An example of a prohibited vertical practice is an exclusivity arrangement. Exclusivity arrangements can take on numerous forms e.g. a supplier may agree to sell its products only to one company or a customer may agree to purchase a product from only one supplier. It may have the effect of excluding competitors from the relevant market. This may result into an investigation by the Competition Commission.

2.2.1.3. Abuse of dominance

The third thing the Act forbids is the abuse of dominant market power in any particular geographical market. Market power means the power of a company to control prices, to exclude competition or to behave independently of its competitors, clients and suppliers. The Act concerns itself with large companies who use their power in a way that hurts their customers or other businesses. Thus, if a company is dominant in any market in which it operates (e.g. financial services within South Africa), it is not allowed to abuse its position of strength e.g. a dominant firm is not allowed to:

- Charge excessive prices
- Refuse to give competitors access to an essential facility when economically possible to do so
- Persuade a supplier or client not to deal with a competitor
- Sell goods or services on condition that the buyer purchases other goods or services unrelated to the original purchase
- Sell goods or services below their marginal or average variable cost (predatory pricing)
- Enter into exclusivity arrangements as mentioned above which have the effect of excluding competitors from the market.

2.2.2. Mergers and acquisitions

- The Act distinguishes between three categories of mergers; namely small, intermediate and large mergers.
- Certain thresholds with regard to the combined asset and or turnover value of the parties will require notification of the merger to the Competition Commission for their approval.
- The Act applies not only to new mergers, acquisitions and disposals, but also to all subsequent changes in shareholding.

2.3. Procedures for mergers and acquisitions in the Sanlam Group

In order to assist with the execution of merger and acquisition transactions, details of these must be submitted and approved by the Corporate Finance Department: Jeanne Joubert (x5595). This department will comply with the notification requirements to the Competition Commission. This applies not only to new mergers, acquisitions and disposals, but also to all subsequent changes in shareholding.

2.4. Information exchange guidelines to ensure compliance with the Act

Information sharing between companies is an everyday commercial reality. However, companies should be extremely cautious when making information available as it may breach the Act. This is especially pertinent when the nature of the information exchanged between competitors makes it easier for them to predict each other's behaviour and adjust theirs accordingly. There is no specific rule as to what information can be exchanged between competitors. However, certain guidelines have developed in specific industries, although too much emphasis should not be placed on one factor.

In determining whether to share information a firm should consider:

- the value and commercial sensitivity of the information to be shared;

- whether the information is available to competitors in the normal course of business;
- whether knowledge of the information may give other firms a competitive advantage over those who did not receive the information;
- the frequency at which such information is exchanged between the firms;
- the adverse effect which the exchange of information may have on competition where such exchange reduces or removes the uncertainties inherent in the process of competition or otherwise facilitates co-ordinated behaviour; and
- the subject of the information being exchanged is of importance. The exchange of price information is particularly sensitive.

An agreement to exchange detailed price information makes it possible for firms to monitor the behaviour of their competitors, facilitating co-ordinated practices.

An information exchange made available to all buyers and sellers in the market on a historical and aggregated basis is less of a concern than that exchanged privately.

In particular, an individual should:

- not discuss price related information, trading conditions, methods of distribution or market sharing with competitors;
- not agree on a common behaviour which would have the effect of excluding other competitors;
- avoid recommendations and suggestions of future conduct.

2.5. Guidelines for SPF personnel attending ASISA Workgroup and other industry and professional meetings

In advance of a meeting, a notice of the meeting and an agenda should be sent to each member of the committee. The agenda should be as specific as possible and broad topics such as “pricing” or “customers” should be avoided.

As a general guideline subjects not included on the agenda should not be considered at the meeting. It is sometimes appropriate to declare up front that competition sensitive information will not be discussed. This should be included in the minutes.

If a member or invitee discusses a topic that may be competition-sensitive at a meeting, he or she should be told immediately that the subject will not be discussed any further. If the subjects of prices, costs, customer allocation, assigning tenders or any other competitive practice is raised at the meeting, the members/invitees representing SPF are advised to disassociate themselves from the discussion.

Communications between ASISA members outside of committee meetings must not contain any price sensitive or other proprietary company information.

Detailed and precise minutes should be kept as a record of what was discussed and may be used in a firm’s defence if there is ever an accusation of anti-competitive practices. The confidentiality of the minutes must be respected.

It should be noted that these rules also apply to meetings of other industry and professional bodies.

2.6. ASISA Codes, standards and guidelines

ASISA has had the various ASISA codes, standards and guidelines vetted and approved by their Competition Law attorneys to ensure compliance with the Competition Act.

2.7. Topics to avoid at meetings involving competitors

2.7.1. Pricing

- Current or future prices of competitors;
- Matters related to prices, such as composition of the price, discounts, premiums, surcharges, credit terms, profit or margin levels, volumes of production or service (especially where this information is generally not freely available);
- Possible increases, decreases or stabilisations in prices and any other information that will signal pricing behaviour; and
- Any costs that form an element of the price and with reference to which the actual price can be calculated, for example, detailed costs of individual companies and risk information.

2.7.2. Markets

Topics relating to dividing up markets.

2.7.3. Other

Sharing of information on current and future operating and business plans should be avoided.

2.8. What may not be classified as contravention of the Act

- Reporting on general industry trends;
- Discussions on experiences/problems in relation to relevant technology;
- Sharing anonymous, historical and aggregated research relevant to the industry;
- Education about management skills;
- Considering the regulatory environment;
- Environmental issues; and
- Legal knowledge/training/updates.

2.9. Personal criminal liability

With effect from 1st May 2016 directors and managers who cause the company to be involved in illegal price fixing, market allocation or collusive tendering, or who knowingly allow such conduct to take place can be held criminally liable. If found guilty the penalty will be a fine of up to R500 000, a 10 year term of imprisonment or both the fine and imprisonment. Companies will be prohibited from paying any fine imposed on a director or manager who is convicted of the offence, or from indemnifying them for fines of this nature. Companies may only pay such director or manager's legal costs if the prosecution is abandoned or if the director or manager is acquitted. The aforesaid prohibition of a company paying the fine or indemnification amendment is not yet effective. Sanlam Life: Law Service will inform management as soon as this amendment becomes effective.

2.10. Penalties

An administrative penalty of up to 10% of a firm's annual turnover may be imposed on a firm found to have contravened the Act.

2.11. Communication and queries from the Competition Commission

All communication and queries from the Competition Commission should be submitted to the Group Compliance Office: Jacques Marnewicke.

SPF Exco members and senior managers will be requested to biannually confirm that they comply with the requirements of the Competition Act. Senior managers must ensure that the relevant people reporting to them are aware of the issues and comply with the requirements.

The Group Compliance Office will perform an annual review of the compliance status in the Sanlam group of companies.

2.12. Legal queries and support

Legal queries and support regarding the Competition Act should be submitted to Sanlam Life: Law Service (Louis Venter, x3522).