COMPETITION LAW COMPLAINCE POLICY AND GUIDELINES

Updated October 2021

A. ASISA COMPETITION POLICY

Introduction

1. Competition laws prohibit, among other things, agreements, understandings, or other arrangements between firms that restrict competition.

2. The Association for Savings and Investment South Africa ("**ASISA**") is a non-profit company which represents the majority of South Africa's asset managers, collective investment scheme management companies, linked investment service providers, multi-managers and life insurance companies, some of which are competitors of one another. In this document, any reference to "ASISA" is a reference to the company and not to those entities that it represents.

3. It is widely recognised that industry associations perform functions which are legitimate, which benefit consumers and which promote the competitiveness and efficiency of the industry as a whole. However, given the nature of industry associations, participation within an industry association may provide a platform for members meeting under its auspices to co-ordinate their actions. ASISA recognises that some of its members are in a horizontal relationship (i.e. competitors) and/or in a vertical relationship (i.e. firms and their suppliers, customers or both).

4. Accordingly, care must be exercised to ensure that ASISA is not used as a platform for collusion and all activities must be carefully measured against the prevailing competition law in South Africa. ASISA recognises the need to exercise extreme care to avoid any violation of competition law and to immediately raise the suspicion of a possible violation of competition law.

5. It is thus the policy of ASISA to comply strictly with South African competition laws. ASISA expects its employees, directors and other representatives, as well as representatives of members who participate in ASISA committees and working group structures ("**Participating Members**"), to the extent of such participation, to comply with competition laws.

6. This Policy does not purport to apply in respect of employees, directors and other representatives of Participating Members in respect of any business that falls outside the scope of ASISA activities.

ASISA competition policy statement

7. ASISA is committed to ethical, fair and vigorous competition and to compliance with the Competition Act, No. 89 of 1998, as amended (the "**Competition Act**").

8. ASISA will endeavour not to facilitate improper co-operation or co-ordination of activities between its members who are competitors of one another.

Purpose and use of the Competition Law Compliance Policy, Guidelines and Procedures

9. The Competition Law Compliance Policy, Guidelines and Procedures ("**these Guidelines**") provide a basic outline of competition law compliance and risks. They are intended to help ASISA employees, directors, other representatives and Participating Members to recognise sensitive situations, problem areas, and behaviour that is or might be considered to be anti-competitive, so that relevant steps can be taken to avoid any concerns.

10. These Guidelines should not be used as an alternative to seeking specific legal advice. If you have any queries or are uncertain about whether competition laws may apply to specific activities or specific jurisdictions, you must report the concern to the ASISA Chief Operating Officer or take advice from your own attorneys before proceeding.

Scope

11. These Guidelines are applicable to all ASISA employees, directors, other representatives and Participating Members.

Responsibility

12. It is the responsibility of each ASISA employee, director, other representative and Participating Member to know and understand the content of these Guidelines. All ASISA employees, directors, other representatives and Participating Members have the responsibility to ensure that their behaviour complies with the provisions of the Competition Act.

13. The Chief Operating Officer of ASISA shall ensure that all ASISA employees, directors, other representatives and Participating Members are made aware of these Guidelines and that they are implemented effectively.

14. Any employee, director, other representative or Participating Member of ASISA who becomes aware of behaviour by an ASISA employee, director, other representative or Participating Member that gives rise to risk of non-compliance with the Competition Act must immediately inform the ASISA Chief Operating Officer.

15. Any employee, director, committee member, other representative or Participating Member who intentionally or negligently contravenes any competition laws or regulations, and / or does not alert the Chief Operating Officer of ASISA when they become aware of any potential contravention of the Competition Act by any employee, director, committee member and other representative of ASISA may -

15.1. In the case of an employee or director of ASISA be subject to disciplinary action, in accordance with ASISA's relevant policies; and/or

15.2. be subject to remedial action, which could include –

15.2.1. compulsory attendance of a competition law training programme; and/or

15.2.2. in the case of a Participating Member, reporting that participating member to the member that appointed him/her.

The Chief Operating Officer

16. The Chief Operating Officer of ASISA will

16.1. inform all employees, directors, other representatives and Participating Members of these Guidelines as amended from time to time;

16.2. consider any instances of alleged non-adherence to these Guidelines as disclosed by ASISA employees, directors, other representatives and Participating Members; and

16.3. ensure that these Guidelines are made available to all ASISA employees, directors, other representatives and Participating Members, and where any additional information is required, provide this information timeously.

B. ASISA COMPETITION GUIDELINES

Introduction

1. What is competition law and policy?

Competition law (also known as antitrust law) is a government policy that aims to regulate the behaviour of market participants to ensure and maintain effective competition in markets. Competitive markets provide consumers (businesses and individuals) with competitive prices and choices, and also enhance the efficiency and development of economies. Competition policy attempts to regulate for those market imperfections that may lead to anti-competitive outcomes (higher prices, lower quality, inefficiency, lower output, etc.).

2. Competition law in South Africa

2.1. The Competition Act governs competition law in South Africa. The Competition Act applies to all economic activity occurring within, or having an effect within, South Africa.

2.2. Chapter 2 of the Competition Act contains provisions aimed at regulating firms' behaviour to ensure that market participants do not engage in "prohibited practices". Prohibited practices comprise conduct that have the effect of substantially preventing or lessening competition or are likely to have that effect, and comprise restrictive horizontal practices, restrictive vertical practices and abuses of dominance.

2.3. Chapter 3 of the Competition Act contains provisions aimed at preventing anti-competitive market structures arising through mergers and acquisitions. These Guidelines do not deal in any detail with the merger control provisions of the Competition Act.

2.4. The Competition Act is enforced by the Competition Authorities, comprising:

2.4.1. the Competition Commission (the "**Commission**"), the principal investigative body;

2.4.2. the Competition Tribunal (the "**Tribunal**"), the adjudicative body; and

2.4.3. the Competition Appeal Court (the "**CAC**"), is the appellant body.

3. Importance of compliance with the Competition Act

3.1. Compliance with the Competition Act facilitates effective competition in markets, leads to lower prices and greater consumer choice, lowers barriers to entry for new market participants, increases participation in the South African economy, increases efficiency, leads to economic growth and development, and ultimately benefits South Africa's economy and South African society. Compliance with the Competition Act is therefore the right thing to do.

3.2. Non-compliance with the Competition Act can expose a firm to various negative outcomes, such as-

3.2.1. Administrative penalties

If a firm is found guilty of contravening certain sections of the Competition Act, it may be liable to pay a fine of up to 10% of its annual turnover.

3.2.2. Civil damages claims

Any person who has suffered loss or damages as a result of a prohibited practice may institute civil proceedings against the firm found to have engaged in the prohibited practice and attempt to recover such loss or damages.

3.2.3. Reputational damage

An offending firm suffers reputational damage that can affect the willingness of customers to do business with it.

3.2.4. Possible criminal liability

It is a criminal offence for a director or manager of a firm to engage in cartel behaviour. The penalty for cartel conduct is a fine of up to **R500 000** or **imprisonment** of up to **10 years**, or both.

3.2.5. Other direct and indirect costs

A firm under investigation can incur significant legal costs. Involvement in competition proceedings generally place significant pressures on senior management and relevant employees' time and resources.

Provisions of the Competition Act

4. Prohibited practices

4.1. The Competition Act prohibits anti-competitive conduct that occurs between competitors, suppliers, distributors and customers, and by dominant firms. Prohibited practices can be divided into three broad types:

4.1.1. when dealing with competitors ("**horizontal relationships**");

4.1.2. when dealing with suppliers, distributors and customers ("**vertical relationships**"); and

4.1.3. when a company has a dominant position or substantial market power in a particular market ("**abuse of dominance**").

4.2. The provisions of the Competition Act regulating vertical and horizontal relationships apply without qualification to all businesses active in South Africa. In contrast, the provisions pertaining to abuse of dominance only apply to those firms which have met the statutory thresholds for dominance.

5. Restrictive horizontal practices

5.1. Restrictive horizontal practices are practices engaged in by firms that are in a horizontal relationship with one another. Firms are in a horizontal relationship when they are competitors, potential competitors, operate at the same level of the industry or are "in the same line of business".

5.2. Agreements or interactions between firms in a horizontal relationship may undermine competition / the competitive process and may erode the benefits of vigorous competition.

5.3. The Competition Act prohibits certain agreements or concerted practices between competitors as well as certain decisions taken by industry associations or other types of associations between competitors (as these effectively agreements between competitors) –

5.3.1. an "agreement" includes a contract, arrangement or understanding, whether or not legally enforceable. Generally an agreement is said to exist when there is a "meeting of the mind" between two or more entities;

5.3.2. a “concerted practice” means co-operative, or coordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement;

5.3.3. a ‘decision by an association’ includes the rules of the association, decisions binding upon the members and recommendations, and in fact anything which accurately reflects the association’s desire to co-ordinate its members’ conduct in accordance with its statutes. Agreements implemented within the framework of the association concerned may be analysed either as ‘decisions’ of that association or ‘agreements’ between the members.

5.4. Restrictive horizontal practices can be divided into the so-called “rule of reason” offences and the “hard core cartel” offences –

5.4.1. Hard core cartel offences are considered the most egregious form of anti-competitive conduct. Even if the conduct does not have an actual anti-competitive effect or even if competitors had no intention of restricting competition, this conduct is still a contravention of the Competition Act. Firms that engage in hard core cartel conduct are also not able to justify their conduct on the basis of efficiency, technological or other pro-competitive gains. Hard core cartel conduct can attract an administrative penalty of up to 10% of a firm’s turnover, and individuals that engage in hard core cartel conduct may face criminal prosecution. Hard core cartel conduct comprises price fixing, market allocation and collusive tendering.

5.4.2. Other types of agreements between competitors are assessed on a “rule of reason” basis and will fall foul of the Competition Act only if there is an anti-competitive effect (or a substantial prevention or lessening of competition). Even if such conduct does have an anti-competitive effect, such conduct can possibly be justified by efficiency, technological or other pro-competitive gains arising from that conduct. This is not a simple assessment, and it is a factual query in each circumstance whether or not the conduct has (i) an anti-competitive effect; and (ii) whether this anti-competitive effect can be justified (and counterbalanced) by the benefits arising from efficiency, technology or other pro-competitive gains. In short, however, co-operation between competitors that interferes with free competition, diminishes social welfare and which transfers wealth from consumers to the participants in the co-operation will be problematic. Types of

agreements that are assessed under the "rule of reason" can be joint ventures (if they seek to pool resources and share financial risk in order to launch a new, better and more innovative product that they would be unable to do on their own), industry standard setting (for example, they can protect consumers from inferior or dangerous products, or to increase compatibility between complementary and substitute products) and the like (if these do not give rise to conduct that is caught under the hard core cartel provisions).

5.5. Cartel conduct is a *per se* offence, which means that the consequences of the conduct is considered to be so severe that the anti-competitive effects are assumed to exist and cannot be justified or defended based on any alleged pro-competitive gains that may flow from the conduct concerned. The three forms of named hard core cartel conduct identified in the Competition Act are listed below:

5.5.1. Price fixing

5.5.1.1. Price fixing is an agreement between competitors not to compete as regards any aspect of their respective selling or purchase prices, or trading terms. Competitors are not permitted to co-ordinate conduct (or even share information/signal) about any aspect of their price/quantity/quality value proposition. The essence of competition is that rivalry in pursuit of a customers' business drives efficiency and pro-competitive outcomes.

5.5.1.2. Please note that this is not limited to prices alone. This can relate to aspects of price, or even other trading conditions that have an impact on price (such as output limitation).

5.5.1.3. **In engagements with competitors, <u>do not</u>**:

5.5.1.3.1. discuss pricing policies or philosophies;

5.5.1.3.2. discuss or agree on prices at which products or services will be sold;

5.5.1.3.3. agree to increase or decrease prices;

5.5.1.3.4. agree on pricing formulas;

5.5.1.3.5. discuss or agree on prices at which input products will be procured;

5.5.1.3.6. discuss or agree the level of price increases;

5.5.1.3.7. discuss or agree to simultaneously increase or decrease prices; and/or

5.5.1.3.8. signal price increases or decreases.

5.5.2. Market allocation

5.5.2.1. Market allocation refers to agreements or concerted practices between competitors that they will not compete with one another in respect of –

5.5.2.1.1. the provision of certain goods or services;

5.5.2.1.2. for certain customers of customer groups; and/or

5.5.2.1.3. in certain geographic territories.

5.5.2.2. In engagements with competitors, <u>do not</u>:

5.5.2.2.1. allocate customers, suppliers or territories;

5.5.2.2.2. agree to discontinue supplying any products or services;

5.5.2.2.3. agree to refrain from supplying products or services in any geographic region or territory;

5.5.2.2.4. undertake not to supply to certain customers or source from certain suppliers

5.5.2.2.5. discuss or agree on the volume of product produced and/or supplied into the market; and/or

5.5.2.2.6. agree to refrain from entering any market

5.5.3. Collusive tendering

5.5.3.1. Collusive tendering or bid rigging occurs when two or more competitors agree that they will not independently compete against one another on a particular tender or bid. Generally, bidders will co-ordinate their respective bids such that one of the participants in the agreement will win the tender. The customer perceives the bidding as a competitive process, but no real competition occurs.

5.5.3.2. In engagements with competitors, <u>do not</u>:

5.5.3.2.1. discuss or agree on the price, terms or any condition of a bid;

5.5.3.2.2. agree not to submit a tender;

5.5.3.2.3. discuss or agree the submission of a bid at a particular price or price range;

5.5.3.2.4. discuss or agree the submission of a cover bid at a price higher than a competitor's bid;

5.5.3.2.5. agree to take turns in being the lowest or highest bidder for contracts; and/or

5.5.3.2.6. discuss or agree cover pricing or loser's fee arrangements.

5.6. Other Horizontal Issues

5.6.1. Exclusion of Competitors

5.6.1.1. Competitors should not take any joint action that would disadvantage another participant in the industry.

5.6.1.2. In certain circumstances, exclusion of certain members or non-members from a program or activity could result in competitive disadvantage. Consequently, when planning programmes or activities that could have a significant commercial impact on others, the proposed action should be reviewed by the Chief Operating

Officer to ensure that it does not violate competition laws.

5.6.2. Exclusion of Customers

5.6.2.1. Agreements among competitors not to deal with a supplier or service provider, or to deal only on certain terms, may be unlawful under competition laws.

5.6.2.2. For example, a discussion of the "best provider" or "worst provider" of a particular product or service may be considered to be such an agreement. Each ASISA member independently must, generally, determine with whom it will deal and on what terms.

6. Restrictive vertical practices

6.1. Restrictive vertical practices regulate agreements and practices between firms in a vertical relationship (customers and supplier).

6.2. The Competition Act *per se* prohibits minimum resale price maintenance. Other agreements between parties in a vertical relationship are assessed on a "rule of reason" basis.

6.3. Minimum Resale Price Maintenance

6.3.1. Minimum resale price maintenance occurs when a supplier of products or services dictates to the downstream market, the re-seller, the minimum price at which the products or services have to be on-sold. Each firm on each level of the industry should determine its own prices. If there is any impediment on firms to determine their own prices, it could erode the incentive between firms to compete on price.

6.3.2. Although minimum resale price maintenance is prohibited outright, it is permissible for a supplier to recommend a minimum resale price to the re-seller. However, it must be made clear that the recommendation is not binding on the re-seller, and the supplier may not punish the re-seller in any way should the re-seller not comply with the supplier's recommendation.

6.3.3. In engagements with customers <u>do not</u>:

6.3.3.1. prescribe a minimum resale price that customers are forced to comply with; and/or

6.3.3.2. punish a customer that elects not to implement the recommended resale price.

6.4. Other vertical agreements

6.4.1. Any type of agreement between firms in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition, which cannot be justified based on any pro-competitive, technological or efficiency gains.

6.4.2. Examples of the types of vertical agreements which may give rise to possible competition concerns include *inter alia* exclusive purchasing and exclusive distribution agreements. Generally, vertical agreements will raise substantial competition concerns only where one or both parties have a significant share of their market(s).

7. Abuse of dominance

7.1. The Competition Act prohibits a dominant firm from abusing its position of dominance. It is important to note that it is not an offence simply to be dominant - the offence is when a firm abuses its dominant position.

7.2. In terms of the Competition Act –

7.2.1. A firm with a share of a particular market of more than 45% is regarded as dominant;

7.2.2. a firm could be considered to be dominant if it has a share of below 45% and it is able to exercise market power (being that it can act independently of its customers and competitors).

7.3. The Competition Act prohibits the following specific conduct by a dominant firm:

7.3.1. Charging an excessive price to the detriment of consumers (also known as "excessive pricing")

Excessive pricing occurs when a dominant firm charges a price for a product or service that is unreasonably higher than the economic value of the product or service.

7.3.2. Refusing to give a competitor access to an "essential facility"

7.3.2.1. An essential facility is defined in the Competition Act as "infrastructure or resource that cannot reasonably be duplicated and without access to which competitors could not reasonably supply their customers". An example of an essential facility is a deep water port facility or an import terminal.

7.3.2.2. In order to ground a claim under section 8(b) of the Competition Act, it is necessary to prove the following –

7.3.2.2.1. a refusal to give access;

7.3.2.2.2. the dominant firm and the firm seeking access to the essential facility must be competitors;

7.3.2.2.3. the firm seeking access must not be able to compete without such access; and

7.3.2.2.4. it must be economically feasible to supply such access.

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

7.3.3.1. It is prohibited for a dominant firm to induce a supplier or customer to not deal with a competitor. Such conduct will be in contravention of the Competition Act only if the conduct has an anti-competitive effect, including –

7.3.3.1.1. actual harm to consumer welfare; or

7.3.3.1.2. significantly / substantially foreclosing the market to rivals.

7.3.3.2. The inducement of the supplier or customer may occur by way of express contractual requirement; by express inducement; by a pricing inducement; or by other practical inducements. This may condemn exclusive supply or purchase agreements; certain pricing, rebate or discount agreements or schemes; as well as inducements of suppliers or customers not to deal with the dominant firm's rivals.

7.3.4. Refusal to deal

7.3.4.1. A refusal to deal contravention occurs when a dominant firm refuses to supply scarce goods to a competitor when supplying those goods is economically feasible. Again, such conduct must have an anti-competitive effect (as outlined in paragraph 7.3.3.1).

7.3.4.2. The most likely harm arising from such conduct is raising rivals' costs (by excluding them from efficient distributors or suppliers of inputs) or reducing rivals' income (by restricting their access to customers).

7.3.4.3. Such conduct could include exclusive supply and/or purchase agreements; certain pricing, rebate or discount agreements; or other inducements to customers and/or suppliers to not deal with competitors.

7.3.5. Tying or bundling of goods or services

7.3.5.1. Tying or bundling occurs when goods or services are sold on condition that the buyer purchases separate goods or services unrelated to the object of the original contract, or forcing a buyer to accept a condition unrelated to the object of the original contract.

7.3.5.2. The rationale behind this prohibition is that, by tying, the dominant firm will be able to leverage market power in one market into another, creating anti-competitive effects in the second market.

7.3.5.3. Again, such conduct must have an anti-competitive effect (as outlined in paragraph 7.3.3.1).

7.3.6. Predatory pricing

7.3.6.1. Predatory pricing occurs when a firm sells its goods or services below their marginal or average variable cost.

7.3.6.2. Whilst lower prices are generally a sign of healthy competition, section 8(d)(iv) of the Competition Act reflects the view that, in some circumstances, prices can be so low as to be detrimental to competition. In particular, a firm's pricing may be so low that it either

induces other firms to exit the market or deters new firms from entering.

7.3.6.3. Again, such conduct must have an anti-competitive effect (as outlined in paragraph 7.3.3.1).

7.3.7. Buying up scarce goods or resources required by a competitor

The Competition Act prohibits a dominant firm from buying-up a scarce supply of intermediate goods or services required by a competitor. The objective of the dominant firm in engaging in this type of conduct is to prevent competitors from accessing scarce input products (even though the firm acquiring the input products does not itself require the procured volumes of the scarce input product).

7.3.8. Price discrimination

The Competition Act prohibits a dominant firm from engaging in price discrimination if such price discrimination is likely to have the effect of substantially preventing or lessening competition (as outlined in paragraph 7.3.3.1). Price discrimination occurs when a firm charges different customers different prices for the same products. Prohibited price discrimination relates only to equivalent transactions of goods or services of like grade and quality and involves discriminating between purchasers in terms of price, discounts, rebates, allowances or payment terms. A firm would only be held liable if it can be shown that the price discrimination is likely to have the effect of substantially preventing or lessening competition.

8. Statistics gathering / Information exchanges

8.1. The exchange of information between competitors, either directly or through a third party, will attract competition scrutiny.

8.2. The exchange of information between competitors is not in itself unlawful. However, the exchange of commercially sensitive information relating to, for example, current or future price levels, customers, production capacity etc. will generally raise concerns for *inter alia* the following reasons:

8.2.1. information exchanges could facilitate collusion and concerted practices by removing competitors' independent action and could lead to contraventions such as price fixing, market allocation, collective boycotts or output limitation agreements.

8.2.2. competition authorities tend to view information exchanges between competitors with suspicion, as it may point to the existence of a cartel. Cartel arrangements often require members to exchange and disclose sales statistics and pricing information as a way of monitoring compliance with the cartel arrangement.

8.3. Please see **Annexure A** hereto for high-level guidelines on information exchanges through the auspices of ASISA.

8.4. In considering the competitive effects of information exchanges, competition authorities will generally have regard to the following:

8.4.1. <u>The reasons for the exchange</u>

If information is exchanged for a legitimate purpose and not aimed at, or able to, impede competition, the competition risk will be lower.

8.4.2. <u>The nature and type of the information exchanged</u>

8.4.2.1. The potential anti-competitive effects that may flow from the exchange depend on the nature and type of information that is exchanged.

8.4.2.2. If the type of information is such that it could facilitate or maintain co-ordination amongst competitors on aspects such as prices, customers, capacity and volumes, the risk will be higher.

8.4.2.3. The exchange of public information, in the absence of a cartel or other evidence of collusion, will usually not raise a concern.

8.4.3. <u>Whether the information is aggregated or company specific</u>

8.4.3.1. The exchanges of aggregated market data will not usually raise a concern, as it provides firms with only a picture of the overall market and does not enable firms to identify competitors or to monitor their actions or market positioning.

8.4.3.2. Aggregated data should be processed and circulated in such a way that it would not be possible for the recipients to calculate or infer the company specific data. The competition concerns inherent in information exchanges between competitors will not be alleviated if recipients of collated information are in any event able to calculate

and/or infer company specific data.

8.4.3.3. The information should be received and collated by an independent third party who should be subject to strict confidentiality undertakings in terms of which the independent third party undertakes not to share or disclose any company specific information with any other firm or individual.

8.4.4. Whether information is current, forward-looking or historic

8.4.4.1. There is a distinction between current and historic data. The fact that the information is historic does not automatically make the exchange lawful and free from risk. The general rule, however, is that the older the data, the lower the risk; provided that no future conduct or current market information can in any way be inferred or deduced from the historic data.

8.4.4.2. In general, exchanging information that is a year old or older will not raise a concern; provided that no future conduct or current market information can in any way be inferred or deduced from the historic data.

8.4.5. The frequency of the exchange and accuracy of the data

The more frequent the exchange and more accurate the data, the higher the likelihood that the exchange could have an effect on competition.

9. Dawn raids

9.1. A dawn raid is a surprise visit to, and inspection at, a firm's offices or some other location where papers may be kept. The Commission may enter and search any premises with or without a search warrant if they have reasonable grounds to believe that a prohibited practice has occurred, is occurring or is likely to occur on or in those premises.

9.2. The objectives of a dawn raid are to obtain and secure documents and evidence relevant to an ongoing investigation in order to successfully prosecute the alleged offenders.

9.3. The Commission will usually execute a dawn raid only after having obtained a warrant. It is important to note that a search warrant is, however, not a requirement if the Commission has reasonable grounds to believe that a warrant would be issued if it applied for one and that the delay occasioned in applying for a warrant would defeat the purpose of the search.

9.4. In a dawn raid without the authority of a warrant, the inspector conducting the search must, immediately before entering and searching the premises, provide identification to the owner or person in control of the premises and explain to that person the authority by which the search is conducted and must get permission from that person to enter and search the premises.

9.5. During a dawn raid do not:

9.5.1. answer questions without a lawyer present

9.5.2. destroy, delete or alter any documents

9.5.3. remove any relevant materials from the premises

9.6. During a dawn raid you must:

9.6.1. stay calm;

9.6.2. co-operate with Commission's investigators;

9.6.3. contact the Chief Operating Officer;

9.6.4. request a copy of the warrant and make this available to the Chief Operating Officer ;

9.6.5. request that the Commission delays the search, to allow external legal representatives to arrive;

9.6.6. confirm the identity of the investigators forming part of the Commission's team;

9.6.7. assign a person to "shadow" each Commissioner investigator during the search;

9.6.8. ensure that only documents that fall within the scope of the warrant are perused, copied or removed;

9.6.9. ensure that no privileged information/documents are perused, copied or removed; and

9.6.10. ensure that you receive a receipt for each document that is removed.

C. ASISA COMPETITION PROCEDURES

1. Review of Agenda, Minutes, and Other Documents

Every memorandum, letter, handwritten note, or other document relating to ASISA's activities should be written with the assumption that it may one day be examined for competition law implications. Significant writings relating to ASISA's activities—such as agendas, minutes, reports, testimony, speeches, and submissions to agencies or other organizations—should be cleared (preferably in draft form) by the Chief Operating Officer or their designee before distribution.

2. Procedures for Committee Meetings

2.1. The following general guidelines should be followed for all committee meetings.

2.1.1. An agenda will be prepared in advance of each meeting. Meeting participants should adhere to the agenda (i.e., subjects not included on the agenda generally should not be considered at the meeting).

2.1.2. The disclaimer attached hereto as **Annexure B** shall form part of the agenda of each ASISA meeting, and will be taken as understood and agreed to by each attendee.

2.1.3. When appropriate, as determined by ASISA's staff, minutes will be kept of meetings. The minutes will accurately and completely report what actions, if any, were taken. The Chief Operating Officer or their designee will review the minutes in draft form before they are distributed, to ensure that they accurately reflect the proceedings.

2.1.4. If there is any concern about an ASISA programme or subject of discussion, the Chief Operating Officer should be consulted. Participating Members may also wish to consult with their respective company's counsel. Any participant who feels a discussion is improper should distance him or herself from that discussion. Distancing oneself from such discussions requires the participant to publicly voice opposition to the discussion and, if necessary, to leave the meeting. The participant should request that, if applicable, the minutes of the meeting capture the participant's distancing and time of departure.

3. Social Gatherings

These Guidelines apply equally to formal ASISA meetings, sanctioned ASISA social events, and informal gatherings that occur in connection with ASISA's activities.

4. Competition Aspects of Particular ASISA Activities

4.1. Government-Related Activities

4.1.1. Efforts of a trade association and/or its members to persuade legislators or government officials to take (or not take) legislative, administrative, or regulatory action generally raise few (if any) competition concerns. This applies also to participation in judicial and administrative proceedings, so long as there is a sound legal basis for the positions asserted by the trade association in such proceedings.

4.1.2. It is important to recognize, however, that the mere fact that a government official is present at a meeting or suggests that the industry engage in collective action provides no shield for illegal activity. Moreover, activities that are not genuinely intended to influence government action may be considered a sham and vulnerable to competition law allegations.

4.1.3. Care must, however, be taken in relation to the exchange of commercially sensitive information, even in the context of a legitimate government-related activities. Please see **Annexure A** hereto for guidelines on the exchange of information through the auspices of ASISA.

4.1.4. As a general rule –

4.1.4.1. Industry engagements in an endeavour to assist a Government Department / regulator to regulate is likely to be permissible (provided that the information shared between competitors to arrive at an industry position, if any, does not itself blunt competition between these participants);

4.1.4.2. However, where the engagements go beyond making submissions to Government / regulators and stray into areas of competition between the participants (even at the request of the Government department / regulator), these engagements could be problematic unless exempt from the provisions of the Competition Act by the Competition Commission.

4.1.5. By way of example, ASISA can participate in a regulator driven initiative to draft new regulations, on the basis that this will simply to be to discuss and present the industry position to the regulator to inform its regulation, but the final decision on the regulations will always be that of the regulator. ASISA and its members must, however, take care not to share competitively sensitive information with one another during the course of discussions which would blunt competition between them.

4.1.6. Thus, for example, if the FSCA wants to consider the impact of a proposed regulatory change on the pricing of financial products, and seeks industry input to enable it to arrive at a considered position, ASISA and its members can participate in this initiative in the following way:

4.1.6.1. ASISA can appoint an independent third party to assist with the process (to ensure that there is not sharing of disaggregated confidential information);

4.1.6.2. ASISA and its members can jointly brief the independent third party on the issue, and its expected impact on the industry (provided that this does not require the disclosure of competitively sensitive / strategic information relating to each industry participant's own position);

4.1.6.3. The independent third party can then design an information request for the industry participants, who can then provide their responses directly to that independent third party;

4.1.6.4. The independent third party can then prepare a report, which can be discussed within ASISA structures to determine an industry response to the FSCA (again, provided that this does not require the disclosure of competitively sensitive / strategic information relating to each industry participant's own position);

4.1.6.5. ASISA can then prepare a submission to the FSCA setting out the industry response, upon which the FSCA will then base its decision to regulate.

4.1.7. As indicated above, the mere fact that co-ordination is sought by an industry regulator does not itself mean that the co-ordination is immune from competition

scrutiny. For example, a regulator may wish industry participants to devise a plan to make their products more accessible. Even if this has a significant social benefit, this does not mean that it will pass competition scrutiny, nor that it will fall within the very narrow grounds for exemption set out in the Competition Act. Thus, care must still be taken to avoid contraventions of the Competition Act, even when apparently sanctioned by a regulator.

4.2. Collection of Industry Data

4.2.1. The collection and dissemination of data by an industry association can raise competition concerns because of the possibility that such data can be used (or, equally important, can be viewed as being used) for anticompetitive purposes.

4.2.2. Information exchanges are not in themselves unlawful. Depending on why the data are collected and how they are disseminated, an exchange may adversely affect competition (e.g., raise prices) and may also be considered as circumstantial evidence of an unlawful attempt or agreement to coordinate, for example, pricing, marketing or customer allocations, or vendor selection. ASISA and its members therefore take a conservative approach and seek advice from the Chief Operating Officer regarding information exchanges.

4.2.3. Please also refer to paragraph B 8 above.

4.2.4. In light of the above competition concerns, the following guidelines should be followed in any information-gathering activities.

4.2.4.1. The Chief Operating Officer should be consulted before the initiation of any project that may involve the exchange of commercially sensitive information (e.g., new survey, data collection, or statistical programme).

4.2.4.2. In general, participation in all information-gathering programmes is voluntary and open to all ASISA members who have such information. In some instances, the Chief Operating Officer may determine that it is appropriate to offer participation to non-member industry participants as well.

4.2.4.3. Collection of data should be performed by either ASISA staff or an independent third party. ASISA members should not be given access to competitively sensitive raw data.

4.2.4.4. An individual member's data should be kept strictly confidential and should not be disclosed or discussed. The Chief Operating Officer will be consulted before sharing any statistical data. To the extent that the data are historic and aggregated, the competition risks may be lower.

4.2.4.5. The documentation regarding each data collection programme should include a clear statement of the programme's pro-competitive objective. Where applicable, this statement should include the justification for providing disaggregated data.

4.2.4.6. Data collected from ASISA's members generally should relate to historic transactions or activities. Where data relating to current and/or future transactions or activities are to be collected, the Chief Operating Officer must be consulted.

4.2.4.7. ASISA reports should avoid statements or analyses that could be interpreted to suggest what products, pricing, terms, shareholder costs or services, or the like should be or will be in the future. Any interpretation of data must avoid the appearance of predicting, encouraging, or facilitating a concerted industry position or response. Recipients should be advised that each individual company should continue to make independent decisions based on the data.

4.3. Standard-Setting Activities

4.3.1. Standard setting can have highly significant welfare and efficiency enhancing benefits. Appropriate product standards and standardization programmes could promote competition within an industry, for example where ASISA participates with its members and other industry participants in standardising market infrastructure protocols.

4.3.2. There is, however, a range of competition concerns associated with trade association undertakings in the standards-setting area. Economic literature outlines the following possible anti-competitive effects which may arise from the setting of standards:

4.3.2.1. It can facilitate collusion between competitors by reducing product differentiation or making product specifications more readily observable;

4.3.2.2. It may enable exclusion of new entrants or other firms from the market; and

4.3.2.3. It may confer upon a firm market power which, absent the standard, it may not have possessed.

4.3.3. The assessment of whether standards contravene competition law is not necessarily a simple one as it requires assessing the efficiency and consumer benefits of the standards against its potential anti-competitive effects. It needs to be borne in mind that –

4.3.3.1. anti-competitive effects are more likely when competitors are involved in developing the standard.

4.3.3.2. where the standard setting organisation has a significant standing or influence in the market or the firms comprising such an organisation have significant market share, then the standard set by these organisations are more likely to lead to exclusion of competitors.

4.3.4. The standards set by ASISA members are recognized as good practice in the industry and there is an expectation that as far as reasonably possible, ASISA members will adhere to them.

4.3.5. Standards should not be designed to disadvantage any particular competitor or supplier.

4.4. Informational, Marketing, and Advertising Activities

Trade association programmes designed to promote the use of an industry's product generally are not objectionable if structured appropriately. Such programmes should not affect prices or price competition within the industry, nor should they affect competitive relationships within the industry, or produce uneven commercial benefits among the members of ASISA or their customers. The Chief Operating Officer will provide appropriate review and assistance in connection with such activities.

ANNEXURE A

THE COMPETITION COMMISSION SOUTH AFRICA: DRAFT GUIDELINES ON THE EXCHANGE OF INFORMATION BETWEEN COMPETITORS UNDER THE COMPETITION ACT – 14 JULY 2017

1. On 14 July 2017, the Commission released its draft Guidelines on the Exchange of Information between Competitors (the "**Proposed Guidelines**").

2. Below is a summary of the Proposed Guidelines and the impact of them on ASISA's information gathering activities.

3. Information exchange between competitors has always been a risk from a competition law perspective. The Proposed Guidelines are merely an attempt by the competition authorities to clarify what types of information exchange, either past, present or future, may be pro-competitive and which may be considered anticompetitive.

4. Importantly, the Proposed Guidelines reiterate that industry bodies/trade associations generally facilitate the exchange of information between competitors and, as such, may be platforms for collusion. It is on this basis that the conduct of ASISA members must be carefully regulated and monitored.

5. In this regard, we understand that one of the main activities of ASISA is to facilitate stakeholder engagement on various issues and to represent its members' interests on industry concerns to the government (including various regulators).

6. At the outset, it is important to note that the Proposed Guidelines do recognise, particularly in paragraph 7.3.1.2 thereof, that information exchanges of this nature (which do not constitute competitively sensitive information) are generally permissible.

7. Where some concerns may arise, however, is where competitors, through ASISA (or otherwise), exchange other types of information which are not ordinarily shared between competitors. In this regard, for ease of reference, we set out below some high-level principles with which competitor members of ASISA should abide –

    7.1. an evaluation of information exchange with regards to anti-competitive behaviour will depend on the type of information that is shared, how it is shared, and the market conditions under which it is shared;

7.2. confidential information includes trade, business or industrial information which has a particular economic value to a firm and its business strategy and is generally not available to, or known by, others;

7.3. as a general principle, competitively sensitive information includes all current, recent (how recent depends on the nature of the information shared, and the use to which it could be put) and future strategic and competitive information relating to, *inter alia*, pricing or pricing strategies, costs, revenues, profits, margins, business or strategic plans, customer lists and marketing;

7.4. competitively sensitive information or confidential information which is not legitimately in the public domain which is collated from ASISA members who are competitors of one another may only be shared on an aggregated basis;

7.5. disaggregation of competitively sensitive competitor information by district, customer name, individual firm or sub-category will generally be considered problematic from a competition law perspective;

7.6. to the extent that ASISA and/or its members wish to publish disaggregated information sourced from members, it will thus be necessary to first establish whether the information is competitively sensitive and/or legitimately in the public domain. It is suggested that this exercise be conducted by external competition law advisors. Following this determination –

7.6.1. if the information is found to be competitively sensitive, ASISA will share the information only on an aggregated basis (unless ASISA's external competition lawyers provide a written opinion that the sharing of such information is permissible under and in terms of the Competition Act);

7.6.2. if the information is found not to be competitively sensitive, ASISA may share the information on a disaggregated basis.

7.7. the collation of data from competing market participants must be performed by an independent third party and not by the participants/industry association itself. Where information collation is performed by the employees of ASISA (who are not employees of any ASISA members) and, as such, this conduct should be permissible from a competition law perspective. Where the third party independence may be "lost", however, is if employees of individual ASISA members have access to disaggregated information which is competitively sensitive in nature or is not legitimately in the public domain;

7.8. as a general rule, the exchange of information between competitors relating to future conduct

(such as future prices, quantities or other elements of a business plan) or what it anticipates or expects regarding competitors' future conduct, will be considered anti-competitive as it facilitates reaching a collusive understanding among firms;

7.9. insofar as participation by ASISA with Government in relation to Government initiatives, please note that –

7.9.1. all information shared by competitors must be relevant and necessary to achieve the object of the initiative;

7.9.2. all information shared by competitors must be aggregated unless, prior to the sharing of the information, ASISA's external competition lawyers provide a written opinion that the sharing of such information is permissible under and in terms of the Competition Act);

7.9.3. competitors must not share and discuss individualised data on pricing, margins and costs;

7.9.4. competitors can, however, discuss aggregated market trends (for example, aggregated national annual industry demand or supplier information, which do not identify individual company data);

7.9.5. information relating to budgets, business plans and investment plans should not be exchanged by competitors;

7.9.6. competitors may not discuss individualised data on capacity, production volumes and sales figures;

7.9.7. competitors can discuss aggregated total annual national figures (which must at all times include data of not less than five companies) which should be prepared by an independent third party. We understand that information collation is performed by the employees of ASISA (who are not employees of any ASISA members) and, as such, this conduct should be permissible from a competition law perspective.

7.9.8. customer information and marketing strategies cannot be discussed by competitors either in an individualised or aggregated format; and

7.9.9. Government is entitled to obtain disaggregated information from firms as long as Government itself collates the information or appoints an independent party to collate the information. In addition, once the information has been collated, there

needs to be steps taken to ensure that the disaggregated information remains confidential in circumstances where the information is competitively sensitive or not legitimately in the public domain. Market participants may only view this type of information in an aggregated format.

7.10. In the context of the above, ASISA records that it has, during the course of 2020 and 2021, carefully considered certain aspects of its statistics programme (the "**statistics programme**") in order to ensure that the statistics programme remains complaint with the prevailing competition law of South Africa.

7.11. In this regard, the ASISA Board of Directors has duly considered the relevant aspects of the statistics programme and has resolved that it shall continue to proceed to implement the statistics programme on the following basis –

7.11.1. the statistics programme shall continue to include the publication of both: Collective Investment Schemes data ("**CIS data**") and Linked Investment Service Provider data ("**LISP data**");

7.11.2. the statistics programme shall continue to be conducted in accordance with the approach adopted at present as it relates to CIS data;

7.11.3. going forward, LISP data shall be published by ASISA on an aggregated and disaggregated basis, as an aspect of the statistics programme; and

7.11.4. in accordance with the approach adopted at present, all aspects of any ASISA member's participation in the statistics programme shall continue to be voluntary.

ANNEXURE B

ASISA COMPETITION LAW ALERT

The paragraphs below must be included in the Agenda of every relevant ASISA meeting. Where no Agenda is distributed, these paragraphs are to be circulated to the attendees.

1. ASISA and its members recognise that all South African consumers have the right to the benefits of free and open competition.

2. It is widely recognised that industry associations perform functions which are legitimate, which benefit consumers and which promote the competitiveness and efficiency of the industry as a whole. However, given the nature of industry associations, participation within an industry association may provide a platform for members meeting under its auspices to co-ordinate their actions. ASISA recognises that some of its members are in a horizontal relationship (i.e. competitors) and/or in a vertical relationship (i.e. firms and their suppliers, customers or both).

3. Accordingly, care must be exercised to ensure that ASISA is not used as a platform for collusion and all activities must be carefully measured against the prevailing competition law in South Africa. ASISA and its members recognise the need to exercise extreme care to avoid any violation of competition law and to immediately raise the suspicion of a possible violation of competition law.

4. Members are referred to the ASISA Competition Law Compliance Policy, Guidelines and Procedures, which is available on www.asisa.org.za.