
PRACTICE NOTE ON THE PROMOTION OF COMPETITION AND INCLUSION IN SUPPLIER PANELS OF BANKS AND INSURERS

1. PREFACE

In terms of section 21 of the Competition Act No. 89 of 1998, as amended (“Act”), the Competition Commission (“Commission”) may implement measures to increase market transparency and develop public awareness of the provisions of the Act. As such, the Commission may prepare, amend, replace and issue guidelines or practice notes to indicate the Commission’s policy approach to any matter within its jurisdiction.

This Practice Note (Note) sets out the Commission’s policy approach to anti-competitive conduct pertaining to Supplier Panels of Banks and Insurers, and does not apply to other financial institutions not covered in the Note. This Note is not binding on the Commission, the Competition Tribunal, or the Competition Appeal Court in the exercise of their respective mandates or their interpretations of the Act. The Commission may update the Note from time to time to account for future developments.

2. DEFINITIONS

In this Note, unless the context indicates otherwise, the following definitions shall apply:

“**Act**” means the Competition Act No. 89 of 1998, as amended;

“**Bank**” means a public company registered as a bank in terms of the Banks Act No. 94 of 1990;

“**Commission**” means the Competition Commission of South Africa;

“**Competitively Sensitive Information**” means trade, business, industrial information and data stored electronically or in the cloud that has economic value to a firm and its business strategy and that is generally not available to or known by others;

“**Historically Disadvantaged Individual**” or “**HDI**” means one of a category of individuals who, before the Constitution of the Republic of South Africa, Act No. 200 of 1993, came into operation, were disadvantaged by unfair discrimination on the basis of race;

“**Insurer**” means a legal person licensed as an insurer in terms of the Insurance Act, No.18 of 2017, and any person acting on their behalf including brokers, intermediaries, underwriters and assessors;

“**Small and Medium Enterprise**” or “**SME**” means a small business as defined in the National Small Enterprise Act No. 102 of 1996;

“**Service Level Agreement**” or “**SLA**” means an agreement entered into between a supplier and Bank or Insurer which stipulates the services to be provided by the supplier and the service standard the supplier is obliged to meet;

“**Supplier Panel**” means a list of pre-approved suppliers, appointed by a Bank or Insurer to provide goods and/or services to their customers.

3. LEGAL FRAMEWORK

The Commission has received and investigated complaints alleging unfair appointments and allocation of work to suppliers on panels of Banks and Insurers. The cases investigated by the Commission relate to the provision of services to customers of Banks and Insurers ranging from the appointment of attorneys to various household repairs and product suppliers. From these complaints the Commission found that certain aspects of these supplier panels raise competition concerns to the detriment of consumers, such as long-term exclusive agreements as well as barriers preventing the entry and participation of SME and companies owned by HDIs.

Section 8(1)(c) of the Act provides that it is prohibited for a dominant firm to engage in an exclusionary act, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anticompetitive effect of its actions.

The Commission considers that the exclusionary standards and specifications set by firms to be met by prospective suppliers that seek to join their panels, and unfair allocation of work to suppliers, can give rise to a contravention of section 8(1)(c) of the Act. It is recommended that the policies and procedures of Banks and Insurers should cover the need to treat suppliers fairly, removing barriers to entry that prevent new suppliers from accessing markets in South Africa and maintain a competitive supplier base.

Further, Section 8(1)(d)(i) of the Act provides that it is prohibited for a dominant firm to require or induce a supplier or a customer to not deal with a competitor, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anticompetitive effect of its actions. The SLAs entered into between Banks and Insurers with suppliers are generally long-term exclusive agreements that are renewed automatically, which restricts the ability of suppliers to deal with the competitors of the Banks and Insurers under the existing SLAs. The Commission recommends that Banks and Insurers do not enter into fixed term SLAs that are renewed automatically without a competitive process.

Section 5(1) of the Act prohibits agreements between parties in a vertical relationship, if the agreement has the effect of substantially preventing or lessening competition in a market, unless a party can prove that technological, efficiency or other pro-competitive gains resulting from the agreement outweigh the effects. The long-term exclusive agreements concluded by Banks and Insurers and their suppliers which also require them not to deal with other competitors, may give rise to a potential contravention of section 5(1) of the Act. Some of the SLAs entered into between Banks and Insurers with suppliers, tend to be perpetual in nature; as such, they need to be reviewed to ensure that potential suppliers that meet the set criteria are given fair opportunity to apply and compete for panel appointments.

Section 4(1)(b)(ii) of the Act provides that an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship, and if it involves dividing markets by allocating customers, suppliers, territories, or specific types of goods or services. The Commission considers that the practice by Banks and/or Insurers, of outsourcing the management of supplier panels and/or allocation of work by Insurers to service providers (primary service providers) who in turn may sub-contract some of the required service or goods to other service providers (secondary service providers), may in certain instances create hubs which facilitate market allocation cartels. In such instances, all parties (primary and secondary service providers) are typically competitors in a horizontal relationship. As such, Banks and Insurers must ensure that their subcontracting arrangements are in line with the provisions of the Act. Further, Banks and Insurers must ensure that their subcontracting

arrangements are supported by a framework which ensures that the Bank and/or Insurer has oversight over the practices of the subcontracted services providers, and that those practices are in line with the principles of this practice note.

4. THE COMMISSION'S APPROACH

This Note provides guidance to Banks and Insurers on pro-competitive principles that can be applied when appointing suppliers onto panels or any register of prequalified suppliers and allocate contract opportunities in a manner that increases consumer choice, the inclusion of SMEs, HDIs and market competition. The Note does not impose the mandatory use of supplier panels or measures that should be adopted by Banks and Insurers, rather it promotes best practice and voluntary participation by Banks and Insurers to commit to reform in response to the principles set out in the Note. This Note encourages the firms to engage with the Commission on suggested solutions or measures based on their business models and operational needs.

While the Commission has opted to engage with the industry through advocacy, it retains its rights to scope for enforcement action in this area and to exercise its prosecutorial discretionary power under section 49B of the Act in relation to Banks and Insurers that are not willing to reform their practices.

5. WHAT IS A SUPPLIER PANEL?

Banks and Insurers that offer services with similar characteristics over a long period to customers who are insured or financed by them, may want to establish a panel of suppliers to procure the required goods and services for their own consumption or on behalf of their customers. The terms and conditions of the supply from their suppliers will be captured in a Service Level Agreement (SLA).

Once the panel has been established, the Bank or Insurer can select an appropriate supplier from the panel each time a project needs to be delivered. It does not need to openly advertise individual contract opportunities. It may purchase directly from members of the panel based on the best fit for purpose or location.

For suppliers, making it onto the panel does not guarantee gaining any new business. They may never be awarded work, or they may be drawn on consistently, depending on the market demand and volume of work available. It does mean for suppliers, however, that they will gain a business relationship with the procuring firm.

EXAMPLE OF A SUPPLIER PANEL

A Bank seeks lawyers to assist with processing conveyancing transactions for registration of property financed by the Bank. It can decide to establish a supplier panel to streamline the process of selecting and engaging law firms to provide the service. The Bank will issue an open request for quotations inviting potential law firms to indicate their interest in the supplier panel and to submit offers to undertake the work.

Following the assessment of the suppliers' responses against the evaluation criteria, the Bank would select several law firms that provided best value for money responses and meet their scorecard. The Bank will enter into Service Level Agreements (SLAs) with the selected law firms. These agreements detail the terms of engagement and nominated rates for each supplier. The SLA can also provide for an assessment of the law firms' performance at the conclusion of each transaction.

Banks and Insurers set up various panels in this manner for extending work to suppliers who in turn provide goods and services to consumers, such as vehicle insurance, property insurance and to receive professional services, such as legal advice, information technology advice, financial and accounting advice, and specialist consultancy services. The competition principles outlined in this practice note can apply equally to these panels of suppliers and should be applied to any panel set up by Banks and Insurers, regardless of whether the goods or services are being procured for the Bank or Insurer's consumption or on behalf of its customers.

6. THE USE OF SUPPLIER PANELS

The main reason that Banks and Insurers choose to set up panels of suppliers is that it facilitates the purchase of goods or services more quickly than implementing a full procurement process. Suppliers have already been assessed for their ability to provide goods or services, cancelling out the need for the firm to advertise in the open market each time. This means much fewer resources, time and effort are involved.

Supplier panels also provide a simplified and streamlined route for Banks and Insurers to access suppliers with skills and expertise in a wide range of areas of work. They benefit from knowing that all suppliers on the panel can provide their services on the same terms and conditions and that they all meet certain standards. Supplier panels also provide competitive rates if they are established through a competitive process that enables new suppliers to participate and join the panel.

A PANEL OF SUPPLIERS CAN BE A GOOD PROCUREMENT OPTION FOR A BANK OR INSURER WHEN:

1. there is on-going demand for a specific type of good or service;
2. the procuring firm wants to verify which suppliers can deliver specific goods and services;
3. the firm requires specialised skills or knowledge and there is a limited number of qualified suppliers;
4. the firm wants to develop strategic relationships or partnerships with suppliers to encourage employment and industry investment in skills and training;
5. the work cannot be handled by one supplier alone;
6. the goods or services do not all need to be provided by the same supplier;
7. standardisation or compatibility with existing equipment or services is necessary;
8. the firm requires a structure to measure and improve supplier performance during a project;
9. the firm supports social and economic benefits and public value that a panel of suppliers can bring.

7. COMPETITION ISSUES RELATING TO SUPPLIER PANELS

A potential risk or caution for making use of supplier panels is that it can lead to reduced competition if competition principles are not maintained in the appointment of suppliers and allocation of work. Reduced competition can manifest in the instances outlined below.

7.1. Panel membership requirements that raise barriers to entry for suppliers

Prospective suppliers are required to meet the standards and evaluation criteria set by the Banks and Insurers to join their panels. Each Bank and Insurer in South Africa applies its own criteria for panel appointments. The standards and evaluation criteria can be used to restrict the entry and participation of prospective new suppliers. Prospective suppliers are in some cases required to make large financial, infrastructure or operational investments. In conveyancing transactions, for example, the Commission has found that Banks require varying ranges of capital requirements from R5 million to R100 million from suppliers as part of their scorecard or points system for panel appointments and contract awards. Investment requirements of this nature raise barriers to entry

for small suppliers. Banks and Insurers should not engage in conduct that leads to the exclusion of SMEs and HDIs.

7.2. Unfair allocation of work in supplier panels

Some suppliers face challenges to receive work, despite being on a panel. This may indicate an unfair work distribution among all the approved suppliers that warrant improvements in panel management. It may also be attributed to market saturation or insufficient demand for services or the volume of work in a particular market.

7.3. Long-term exclusive agreements raise barriers to entry for suppliers

The determination of whether a contract's term is long is dependent on the specifics of the case. However, in general, the Commission considers agreements that endure for a period exceeding five (5) years as long-term agreements. If Banks and Insurers enter into exclusive and long-term SLAs with suppliers it can inhibit the entry and participation of new suppliers, including SMEs and firms owned or operated by HDIs. Therefore, long-term exclusive SLAs that tend to endure for a period exceeding 5 years and require the parties to the SLAs to deal exclusively with each other and not other competitors can raise barriers to entry. For example, Banks and Insurers may enter into SLAs where the initial period is 10 years, however, the SLA may allow for continuous renewal without an end date, therefore making it perpetual and also restrict the supplier to offer its services to a competing Bank or Insurer while the agreement is in place. Banks and Insurers that enforce legacy or evergreen arrangements with a select few suppliers do not promote an environment for inclusion and increased competition. This is because the opportunity for suppliers to compete comes around less frequently. Banks and Insurers may also not benefit from this arrangement, as the quality of goods and services supplied could change throughout a long-term panel. Exclusive long-term SLAs may stifle innovation, and reduce competition.

7.4. Lack of transparency on the requirements suppliers need to meet

The application and selection process for the appointment of suppliers onto panels of Banks and Insurers should be transparent. Suppliers are provided limited information on selection criteria and when contract opportunities arise. In most cases, suppliers tend to receive rejections of their applications to join the panels, without the reasons for the decision, which could help guide them on improvements to be made to meet the criteria. There is also limited information available to

consumers in the public domain about the approved suppliers they can select from to source goods and services.

7.5. Limited consumer choice to select suppliers from the approved list

Banks and Insurers typically select a supplier from the panel to provide the required goods or services to the consumer. For example, where banks have appointed suppliers to a panel for the provision of repairs or replacement of defective geysers in consumers' homes, banks will typically select the supplier from its panel, even in circumstances where consumers are dissatisfied with the service provided or seek a supplier in their geographic area. Banks typically do not give consumers the choice to select the supplier from the approved list. Consumer choice is limited when consumers are not able to freely select cost-effective and capable suppliers from the approved supplier list.

7.6. Supplier panel subcontracting arrangements

Certain Banks and Insurers outsource the establishment and management of their supplier panels to service providers that compete with firms that ultimately provide the required services or goods to the Bank or Insurer's customers (i.e. independent service providers or secondary service providers). The Commission considers that these types of arrangements may create hubs that allocate markets (i.e., customers, territories or work) between competitors. Further, these types of arrangements may also exacerbate exclusionary practices where the primary service provider allocates work at their own discretion and implements rules and regulations that raise barriers for secondary service providers or independent service providers to join the Bank or Insurer's panel. This is likely to arise where the Bank or Insurer does not have oversight of the practices of the subcontracted service provider.

8. COMPETITION PRINCIPLES FOR THE ESTABLISHMENT AND MANAGEMENT OF A SUPPLIER PANEL

The Commission proposes the following **competition principles** for Banks and Insurers to consider when setting up or reviewing an existing panel of suppliers. It also proposes principles for Suppliers to consider when participating in the supplier panel processes of Banks and Insurers. Complying with these principles can help firms to achieve efficiencies and support principles of accountability, transparency, fairness, and equal treatment of suppliers.

8.1. Evaluation criteria for appointments to supplier panels should be fair and inclusive

When establishing or reviewing a panel of suppliers, a Bank or Insurer should consider whether their standards and evaluation criteria for panel appointments do not create unnecessary barriers to entry for new suppliers. The criteria or standards for selecting potential suppliers should be based on objective criteria that are suited to the scale and complexity of the type of work involved. Banks and Insurers should introduce criteria that are fair and inclusive.

Banks and Insurers should, subject to prevailing market conditions, approve any supplier that meets their standards or evaluation criteria, to join their panel. Panel membership standards and evaluation criteria can take into account the market demand and the volume of work available to justify on-boarding new suppliers. It is understood that there can be a low volume of claims or insufficient volume of work to sustain fair distribution to all approved suppliers in a certain geographic area. Banks and Insurers should therefore make their own assessment on a case-by-case basis as to the size or the number of suppliers that can be appointed to their panels. The selection process should cater for as much entry as possible for SMEs and HDIs to participate.

8.1.1. Principles for Suppliers to comply with panel standards and criteria

Suppliers who seek to join panels of Banks and Insurers should comply to panel requirements, following the prescribed criteria and standards.

BEST PRACTICE FOR SUPPLIERS IN THEIR APPLICATION FOR APPOINTMENT TO SUPPLIER PANELS:

1. Suppliers should familiarise themselves with the standards and evaluation criteria of the Bank and/or Insurer when they apply for appointment to their panels;
2. Suppliers should ensure that they meet the standards and evaluation criteria prior to applying for approval;
3. Suppliers should request reasons from the Bank and/or Insurer when their applications are rejected to support continuous improvement;
4. Suppliers should make enquiries with the Bank and/or Insurer about rotating contract opportunities.

8.2. Ensuring a fair allocation of work to suppliers on panels

Banks and Insurers should ensure a fair allocation of work (both in claims and rand value) to suppliers on their panels. When establishing or reviewing a panel of suppliers, the Bank or Insurer should have a good understanding of the anticipated demand for the goods or services and the range of panel suppliers (including SMEs and HDIs) that are required. When selecting who to procure from on the panel, and how many suppliers, Banks and Insurers should consider (a) competition, (b) size and scope of the procurement, (c) supplier performance and skills with the specific type of work and (d) providing an opportunity to new suppliers.

There should be a fair evaluation of all panel suppliers. Whenever possible, Banks and Insurers should approach more than one supplier on a panel for a quote. This will allow the firm to be able to justify the decision to use the panel and increase competition. Banks and Insurers that are unclear about the volume and frequency of projects may not attract the best suppliers or run the risk of complaints from suppliers and intervention by the Commission.

BEST PRACTICE FOR IMPLEMENTING A FAIR ALLOCATION SYSTEM:

1. When planning to set up or review a panel of suppliers, a Bank or Insurer should decide the method it will use to divide the work between the panel suppliers before it invites new suppliers to participate in the application process;
2. Consider awarding opportunities to suppliers on a rotation basis. Panel rotations should not only apply to non-performing suppliers but also aim to increase new entry on the panel;
3. Consider fixing an upper limit for the amount of work that can be awarded to each supplier. When a supplier reaches the upper limit, the procuring firm should choose the next supplier from the panel;
4. Implement a scorecard or points system which can be used to appoint and allocate work to suppliers and enable allocation to SMEs and HDIs. The measurement pillars of the scorecard could include (a) FICA and credit conditions, (b) quality of work, (c) turnaround times, (d) business relationship requirements and (e) transformation (based on B-BBEE level status and ownership).

8.2.1. Principles for Suppliers to support a fair allocation of work

Suppliers who are already part of Banks and/or Insurer panels and those seeking to join such panels, should put measures in place to ensure the competitiveness of their businesses and deliver high quality of goods and services when appointed, to support the measures adopted by Banks and Insurers that ensure a fair allocation of work.

BEST PRACTICE FOR SUPPLIERS TO SUPPORT A FAIR ALLOCATION OF WORK:

1. Suppliers should familiarize themselves with the work allocation processes of Banks and Insurers;
2. Suppliers should ensure that they provide quality services and meet deadlines when work is allocated to them;
3. When suppliers are unable to provide the required service or meet deadlines, they should communicate this to Banks, Insurers and consumers;
4. Suppliers should communicate capacity constraints to Banks and Insurers when work is allocated to them.

8.3. Eliminate exclusive long-term agreements and reduce contract periods to 5 years or less to enable entry and participation of suppliers

Panels should have a set period of operation, after which they should be reviewed. Banks and Insurers should not enter into exclusive long-term contracts or SLAs with suppliers. Generally, contract periods of 5 years or less allow for a rotation of work that will open opportunities to potential suppliers within a shorter period. Should a longer period be considered, this should be justified by opportunities created for supporting SMEs and HDIs. Contracts should not be automatically renewed after the 5 years without a competitive process. Once the contracts come to an end, all suppliers should be re-assessed if they meet the standards and evaluation criteria to retain their approval status, and give new entrants a fair opportunity to join the panel. Existing contracts can be amended to include a fixed-term clause if all parties consent. These suggested measures can ensure that new suppliers are considered and appointed and avoid entrenched relationships which may foreclose new suppliers.

8.4. Increase the participation of SMEs and HDIs on supplier panels

Banks and Insurers should appoint a greater number of SMEs and firms owned or operated by HDIs to their panels. Banks and Insurers should implement a competitive assessment for the review of appointments to their panels, and ensure that they cater for appointments of SMEs and HDIs.

8.5. Implement measures to increase transparency in the application and selection process

Banks and Insurers should be transparent on their application processes and selection criteria. Suppliers should understand the application processes and be able to comply with it easily. This transparency does not extend to competitively sensitive information and considerations relating to data privacy for suppliers. The Commission recommends the following methods for promoting transparency in the application and selection process.

BEST PRACTICE FOR PROMOTING TRANSPARENCY IN THE APPLICATION AND SELECTION PROCESS:

1. Publish the standards and selection criteria required for suppliers to join panels on websites;
2. Publish a list of approved suppliers for consumers to access on websites;
3. Disclose reasons to applicants when their applications to join the panel are rejected;
4. Consider implementing a supplier review forum for reconsideration of rejected applicants;
5. Banks and Insurers should refer to their database with details of prospective suppliers who were previously rejected; and
6. Implement a system to notify applicants previously rejected if new opportunities arise.

8.5.1. Principles for Suppliers to support increased transparency in the application and selection process

Suppliers who seek to join panels of Banks and Insurers should support measures adopted by Banks and Insurers that increase transparency in the application and selection process.

BEST PRACTICE FOR SUPPLIERS TO PROMOTE TRANSPARENCY IN THE APPLICATION AND SELECTION PROCESS:

1. Suppliers should notify Banks and Insurers when facing challenges of accessing information about application processes, standards and selection criteria;
2. Suppliers should be transparent with the procuring Bank and/or Insurer on the quality, price components of its goods and services, specialist certification or accreditations on skills, and capacity to execute the work.

8.6. Promote consumer choice to select suppliers from the approved list

Banks and Insurers should increase consumer choice by recognising a consumer's right to select approved suppliers from the panel. Consumer choice to select approved suppliers should be promoted when it is in the best interests of the consumer and balanced against the fair allocation of

work or instructions to suppliers. This can be achieved by providing a list of approved suppliers for consumers to access on the firm's website and implementing an electronic system that allocates work to suppliers who have indicated their availability on the system. Should a supplier choose not to be considered for work (including based on capacity), it can indicate as such on the system.

8.6.1. Principles for suppliers to promote consumer choice

Suppliers who are already part of Banks and/or Insurer panels and those seeking to join such panels, should support measures that promote consumer choice.

BEST PRACTICE FOR SUPPLIERS TO PROMOTE CONSUMER CHOICE:

1. Suppliers should not unduly influence consumers to not deal with competing suppliers;
2. Suppliers may decline work that is allocated to them by Banks and/or Insurers based on capacity constraints, however suppliers should not unreasonably decline work based on factors such as the value of the work.

8.7. Monitor performance of a supplier panel to enable entry of SMEs and HDIs and fair allocation of work to suppliers

How well a panel performs will depend, to some extent, on how well the selected suppliers perform. Monitoring supplier performance can help Banks and Insurers to identify and address problems quickly, and it can help to understand which suppliers are providing better value. Monitoring can also support fairness and transparency. When a supplier is not performing well, feedback can help improve performance, and if that fails it offers scope for the procuring firm to source the goods and services from new suppliers. Performance evaluation could also help show whether some suppliers are getting a disproportionate share of work through the panel.

BEST PRACTICE FOR MONITORING SUPPLIER PANELS:

1. SLAs should include a provision that enables the procuring firm to review membership and remove suppliers from the panel if required;
2. routinely monitor the performance of individual suppliers on the panel on a periodic basis;
3. routinely monitor allocation of work, ensuring a proportionate distribution of work among panel suppliers;
4. conduct a review outside the regular cycle when the firm takes over another business or when subject to an investigation by the Commission;
5. consider what can be done to get more value from the supplier panel and enable the entry and participation of SMEs and HDIs.

Performance evaluation of suppliers should not be administered arbitrarily or in an unduly onerous manner, such that it creates unfairness or amounts to exclusionary conduct. The terms and conditions for performance evaluation should be communicated at the point of contracting with a Supplier and should be applied in an equitable manner.

8.7.1. Participation of Suppliers in performance monitoring

Suppliers should support measures adopted by Banks and Insurers that promote effective performance monitoring and improve the efficiency of suppliers.

BEST PRACTICE FOR SUPPLIERS TO SUPPORT PERFORMANCE MONITORING:

1. Suppliers should furnish Banks and Insurers with the relevant information for monitoring their performance within a reasonable period of time;
2. Suppliers should comply with the processes of Banks and Insurers that are aimed at effective monitoring of suppliers panels.

8.8. Supplier panel subcontracting arrangements must comply with the Act and this practice note

Banks and Insurers that outsource the establishment and/or management of their supplier panels should ensure that the subcontracted service provider's contractual obligations and practices are in line with the Act and the principles of this practice note. Further, Banks and Insurers must always consider whether their outsourcing/subcontracting arrangements could create a hub which facilitates cartel conduct.

In addition, Banks and Insurers that enter into supplier panel subcontracting agreements, must consider putting in place a framework which ensures that the subcontracted service provider's practices (i.e. allocation of work, creating of sub-panels and rules and regulations for selecting secondary service providers) are aligned with the Act and this practice note. As such, Banks and Insurers should continue to play an active oversight role when outsourcing their supplier panel management responsibilities.

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