

SABS



competition commission
south africa

JOINT COMPETITION LAW GUIDE

**by the Competition Commission and
the South African Bureau of Standard**

for Participants when Developing South African National Standards
under the Competition Act No.89 of 1998
(as amended)

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1 | INTRODUCTION

- 1.1. This Joint Competition Law Guide ("Guide") has been prepared jointly by the Competition Commission ("Commission") and the South African Bureau of Standards ("SABS"). This document merely serves as a guide to stakeholders.
 - 1.2. The Guide has been prepared in terms of section 21(1)(b) of the Competition Act No. 89 of 1998, as amended ("Competition Act") to develop public awareness of the provisions of the Competition Act. The Guide is not binding but may be taken into account by any person during the standards setting process.
 - 1.3. The purpose of the Guide is to raise awareness and to provide broad guidance on competition law issues to participants in the South African national standards development process. The Guide applies to all participants such as Chairpersons, representatives of Participating and Observer members and Secretaries of Technical Committees and Sub Committees as well as Experts and Convenors of the SABS Working Groups within the South African national standard development process.
 - 1.4. While there are significant pro-competitive benefits from the development of standards through industry-wide collaboration, the potential anti-competitive risks that could arise from communication and deliberations amongst competitors both inside and outside the SABS Technical Committee meetings cannot be ignored. The sort of influence that can be exerted from within and outside the standard setting process to skew its outcomes is so subtle that broad general rules of participation invariably fall short of addressing the likely anti-competitive behaviours that could emanate from this process.
 - 1.5. There is therefore a need for both the Commission and the SABS to raise awareness and to provide guidance to all relevant stakeholders on the competition harm that may emanate or arise from the networks that are often created by competitors, through a collaborative process of the development of standards. The Guide presents general approach that the Commission and the SABS will follow in determining whether industry and other stakeholders have collaborated their responses towards the standards developed, modified or altered through the processes administered by the by the SABS. The Commission will consider whether such actions by industry players have the effect of substantially preventing or lessening competition in the market in possible contravention of the Act.
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2 | OBJECTIVES

- 2.1. The primary objective of this Guide is to provide some measure of transparency and objectivity with respect to the factors which the Commission will consider when determining whether a particular standard is anti-competitive and contravenes any provisions of the Act.
 - 2.2. The Guide is intended to assist participants, including companies, industry associations, chairpersons, administrators, standard writers and other relevant stakeholders serving on various standard-setting committees to be vigilant and to take necessary steps to identify and report any anti-competitive conduct that surfaces during the standard-setting processes.
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3 | BACKGROUND TO STANDARD SETTING

- 3.1. In a globalised economy, the setting of standards is key to both local and international trade. The primary objective of setting standards is to define technical and quality product requirements. The development of standards facilitates easy access to markets through the establishment of a common set of characteristics of products, that allow producers and/or suppliers to supply products and deliver services that are acceptable both at local and international level. Standard setting also presents significant welfare and efficiency gains in that they provide a wider variety of products to consumers, ensure uniformity in terms of different products supplied in markets, as well as protecting consumers against substandard products from suppliers. Standard setting also ensures that consumers benefit from competition amongst suppliers. Standards are not regulations and should not be reflected or interpreted as such. Policy makers and regulators are encouraged to reference standards in order to support the attainment of a policy or regulatory objective.
- 3.2. In addition to welfare and efficiency gains, the socio-economic effects of standardisation include:
 - (i) **Compatibility/Interoperability:** standard setting ensures compatibility or interoperability of different products. This enables consumers to use comparable products or equipment supplied by different suppliers for the same application, which usage encourages inter-brand competition between different firms.

(i) **Quality and Safety:** standard setting ensures that products meet certain minimum quality and safety requirements to the benefit of consumers. This ensures that consumers are not subjected to substandard products.

(i) **Variety Reduction:** standard setting establishes basic specifications for a set of commonly used characteristics of size, shape and performance for products. The process of standardization leads to simplification and variety reduction.

3.3. Despite the aforementioned benefits, the core of standard setting involves coordinated action between many interested parties, including competitors (or potential competitors), the very condition

which competition law prohibits. In application, standard setting has an impact on market entry and may be used by firms in dominant positions or with market power to exclude smaller (or new) firms from expanding and/or entering in the market. The potential anti-competitive effect of standard setting may arise particularly when industry players coordinate their responses in respect to their submissions to SABS Technical Committees.

3.4. Standard setting platforms may also facilitate collusion in situations where industry players exchange sensitive business information outside the SABS Technical Committees. Collusive conduct results in limited competition, lack of consumer choice and ultimately high prices to the detriment of consumers.

4 | LEGAL FRAMEWORK

4.1. The Guide describes anti-competitive effects that might emanate from industry players who participate in the standard setting processes that are prohibited by the Act. Such conduct may be subject to investigation by the Commission because the intended effect is to limit competition, which impacts other players in the market as well as consumers.

4.2. Section 4(1)(a) of the Act prohibits an agreement, concerted practice or decision between competitors that has the effect of substantially preventing or lessening competition,

unless a party to the agreement, concerted practice or decision can prove that the efficiency benefits that arise from such an agreement, concerted practice or decision outweigh the potential negative effect.

4.3. Section 4(1)(b) of the Act prohibits outright agreements, concerted practices or decisions that involve (i) the direct or indirect fixing of a purchase or selling price or any other trading condition; (ii) the dividing of markets by allocating customers, suppliers, territories, or specific

types of goods or services and (iii) collusive tendering. An example of conduct that may fall foul of section 4 of the Act is an exchange of sensitive business information amongst competitors outside the SABS Technical Committees.¹ This may emanate from coordinated responses by competing firms in respect of their submissions to SABS Technical Committees.

4.4. Lastly, section 8 of the Act prohibits the abuse of dominance by dominant firms. This occurs when large firms who form part of the standard setting process insist on the inclusion of certain requirements on SABS standards that are exclusionary and/or raises barriers to entry to smaller firms.

5 | ASSESING THE ANTI-COMPETITIVE EFFECTS OF STANDARD SETTING

5.1. The nature of setting standards may result in a collaborative process where some competing firms who participate in the standard setting process may coordinate their responses and submissions to SABS Technical Committees. By coordinating their responses or submissions, participants are not only limiting the effects of competition, but they are also placing the SABS Technical Committees at disadvantaged position since they will not benefit from independent views that would ordinarily be provided by participants.

5.2. Coordination of submissions by participating firms creates an opportunity for competitors to abuse the system and to ensure that competitors (market incumbents) maintain their share of the market by advocating for the development of standards and specifications which

have the likely effect of preventing entry and expansion of new and small market participants.

5.3. There are two broad anti-competitive effects that may emanate from the standard setting process, namely, **(i) collusive outcomes, and (ii) exclusionary effects.**

(i) **Collusive Outcomes**

5.4. The process of standard setting may lead to collusive outcomes if such process is abused by firms intending to limit competition in markets. The ability of firms to collude stems from either the market power obtained from their relative size, their influence in the industry or their ability to coordinate.

5.5. The process of standards setting requires collaboration of various market participants and other

¹ The Commission issued guidelines on the exchange of information among competitors that can be accessed through this link: [Guidelines on the exchange of information.](#)

stakeholders possessing relevant expertise on particular subjects (i.e., products). This composition of market participants also includes competitors - both actual and potential. The process of standard setting requires extensive dialogue, consultations and collaboration between various stakeholders. The process places participants and more specifically, competitors in a position where they may evaluate competing products against existing standards. It is evident that such processes can be vulnerable to abuse by a group of firms.

- 5.6. The collaborative process of standard setting may present a platform to facilitate collusion and to monitor adherence to collusive arrangements, particularly when competing firms decide to coordinate their responses and submissions both within and outside the SABS Technical Committees. It is well understood that collusion is more susceptible in markets where products are homogeneous. The standard setting process can minimise product differentiation or result in product specifications or characteristics that are more observable across competitors thereby making it easier for competitors to co-ordinate their conduct in terms of prices and monitoring behaviour and deviations.

(ii) **Exclusionary Effects**

- 5.7. Exclusionary effects can arise in situations where standards are set in a manner that confers market power onto a specific firm/organisation/entity with the intention that such firm exercises the power conferred onto it to the detriment of other competitors. Standards therefore may have the effect of (i) creating entry barrier for smaller firms that have potential to enter and compete in a market, (ii) suppressing expansion of firms that are already active in markets and (iii) conferring market power onto specific firm(s) to the detriment of competitors.
- 5.8. Ultimately, firms can abuse the standard setting process by coordinating their responses and/or submissions with the intention to maintain and expand their footprint in the market. By so doing, these incumbent firms are able to exclude potential competitors from participating in markets and to suppress the growth potential or expansion of actual and existing competitors.

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ASSESSMENT OF THE ANTI-COMPETITIVE EFFECTS IN STANDARD SETTING

- 6.1. Standard setting has been identified as another platform used by competitors to facilitate anti-competitive behaviours. This can be achieved when competitors who are also participants in the standard setting process coordinate their responses and/or submissions to relevant SABS Technical Committees.
- 6.2. In this section, we consider some general guidelines for participants involved in the standard setting processes.
- (i) **Market Power**
- 6.3. Standard setting process in South Africa is the responsibility of SABS through its Technical Committees, Subcommittees and Working Groups through stakeholder representatives. Stakeholder representatives serving in these committees include, amongst others, academics, researchers, representatives of government entities, regulators, consumers, and industry participants. Ideally, such standards when set by the SABS committees should be widely represented and should not pose any risk to competition as the interest of all stakeholders are well considered. But if firms decide to coordinate their responses and/or submissions to these committees, this may result in outcomes that are skewed in favour of particular firms in markets.
- 6.4. Standards in their nature deal with product specifications and characteristics. Manufacturers and suppliers of such products are therefore prone to have broader interests (commercial interest) and seek to protect these interests at the expense of competitors. Certain firms or even industry associations may represent a large portion of the market and possess so much power that their actions may influence the functioning of an industry and the standard setting process.
- 6.5. As a rule, the Commission advises participants to be vigilant about anti-competitive conduct that may directly or indirectly arise during the discussions and/or submissions to SABS Technical Committees. The Commission also advises that participants must also report on any suspicious discussions and/or submissions towards the development of standards.
- (ii) **Important processes in standard setting**
- 6.6. Competitors have an inherent commercial interest to protect their own products and maintain their share of the market. As a result, competitors may enter into collusive agreements in order to limit competition in the market and to protect their commercial status. It is important to note that such collusive agreements can be concluded either tacitly or explicitly. When reaching a tacit agreement, competitors do

so without direct communication with one another. In such instances, competitors would resort to using indirect forms of communication in order to reduce the probability of their conduct being detected. Competitors may also conclude explicit collusive agreements that tend to coordinate their behaviours through more direct means of communication such as face to face meetings, written exchanges etc. Such arrangements are more easily identifiable than the former

- 6.7. As a general guide, it is important to be always vigilant of the conduct of competitors and the inherent interest that is not always easily observable.
- 6.8. The public participation process undertaken by SABS is also vital in ensuring that standard setting is as inclusive as possible. This ensures that standard setting does not have the effect of excluding certain firms from entering, participating or expanding in the market. The inherent interest of business is to protect their profits and maintain their market share may result in conduct that seeks to undermine competition in markets.

7 | THE DO'S AND DON'TS BY PARTICIPANTS IN STANDARD SETTING PROCESS

The following are the do's and don'ts for participants in the standard setting processes:

DO



- **Do** remember that one of the purposes of standardization is to support competition worldwide and in particular the South African economy, for the benefit of industry, consumers and society in general.
- **Do** remember that it is essential for and required of each participant to make early disclosure of those intellectual property rights which are essential for the implementation of a standard.
- **Do** ensure that you and other participants that attend meetings have the necessary technical expertise.
- **Do** follow SABS rules and procedures including the SABS Code of Conduct.
- **Do** follow the SABS Patent rights as stated in clause 11 of SABS National Norm, *National Norm for the development of South African National Standards The*.

- **Do** review and clear agendas of meetings in advance, to ensure that the subjects to be discussed are consistent with Competition Law, and strictly adhere to the agenda during the meetings.
- **Do** ensure a transparent and open standards setting process, including participation and the exchange of information that is strictly in accordance with the latest edition of SABS National Norm - National Norm for the Development of South African National Standards.
- **Do** limit the discussions, or exchange of information, during the standards development process solely to technical standardization issues and **only share information that is necessary to meet the objectives of standardization.**
- **Do** consider carefully if a potential (or actual) exchange of information has any value in predicting the future commercial behaviour of a participating competitor, and refrain from sharing any information that might have this effect.
- **Do** feel free to use and share information from the public domain, including historical and aggregated industry information (which doesn't allow an individual business's pricing or commercial strategy to be identified), but do be careful that it doesn't lead to discussions on future strategy.
- **Do** always state that you cannot discuss any matters that might arise which you think could contravene Competition Law; **do** immediately terminate such conversations; **do** keep a record of such conversation; and **do** report this to your company or organization and to the Commission and/or the SABS's legal team, as soon as possible.
- **Do** take immediate action if the anti-competitive behaviour continues, including suspending the meeting to remove the misbehaving participant(s) and cautioning remaining participants that such behaviour cannot be permitted and, if, necessary, adjourning the meeting.
- **Do** ensure that any notes of meetings accurately reflect the discussion.

DON'T



- **Don't** discuss any competitively sensitive information which the competition authorities might suspect could lead to anti-competitive behaviour.
- **Don't** exchange, or discuss with competitors, commercially sensitive or strategic information, including, but not limited to:
 - data relating to prices;
 - conditions of licenses (for example with distributors);
 - discounts;
 - timing of pricing changes;
 - profits; profit margins;
 - cost data;

- market share;
 - customer lists;
 - supply or marketing schedules;
 - bidding behaviour;
 - any future developments, trends or market conditions in your industry which might have an impact on competition; or
 - any other information that might allow competitors to adapt their business strategies accordingly.
- **Don't** fix **any** prices or price-related conditions with competitors.
 - **Don't** arrange any market sharing with competitors including allocation of territories, **customers**, distributors, or suppliers.
 - **Don't** include **elements** in standards that exclude suppliers or competitors from the marketplace for any reason other than technical considerations.
 - **Don't** use the excuse of **achieving** the objectives for standardization to ask competitors to reveal sensitive information on market, strategy and business.

FOR MORE INFORMATION IN THIS REGARD

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