DIABETES ALLIANCE

DIABETES ALLIANCE COMPETITION LAW BRIEF

Diabetes Alliance Competition Law Brief/Statement

This statement must be read-out loud by a chairperson or anyone leading any Diabetes Alliance meeting or event or gathering, whether formal or not, and regardless of the number or attendees, including in instances where a meeting is postponed due to a lack of quorum.

The Statement and policy are applicable to Diabetes Alliance Members as per the Diabetes Alliance Constitution and anyone engaged in and/or supporting the Diabetes Alliance in any capacity, be it a contractor, service provider, speaker, volunteer, and 'Member' applies any to such person, for purposes of this Statement.

1. Background

The Diabetes Alliance is a non-profit organisation committed to improving the health and wellness of people living with diabetes in South Africa. The Diabetes Alliance membership comprises various entities, some of whom are competitors in the diabetes field, and other members are organisations whose members are competitors.

2. The South African Competition Law

The Competition Act 89 of 1998, ("the Act"), prohibits anti-competitive behavior. It was enacted to address, among others inadequate restraints against anticompetitive trade practices. Some of the anti-competitive practices prohibited by the Act include abuse of dominance, price fixing, dividing markets and collusive tendering which are strictly prohibited. Some of **these Prohibited practices are :**

2.1. **The Act prohibits any agreement between parties in a vertical relationship** should the agreements result in the substantial prevention or lessening of competition in the market. The prohibition includes practices such as:

- minimum resale price maintenance.

However, the Act does not prevent a recommended minimum resale price by a supplier or producer, if such supplier or producer makes the following clear:

- that the recommendation is not binding; and
- if the product has its price stated on it, the words "recommended price" appears next to the stated price.

2.2. Abuse of dominance.

In terms of the Act, a firm is dominant if it has at least 45% of market or it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or it has less than 35% of that market, but has market power.

2.2.1. A dominant firm may not, among other things:

a) charge an excessive price to the detriment of consumers or customers;
b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;
c) engage in an exclusionary act, other than an act listed in paragraph d) if the anticompetitive effect of that act outweighs its technological, efficiency or other procompetitive gain; or
d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other procompetitive gains which outweigh the anticompetitive effect of its act:
    (i) requiring or inducing a supplier or customer to not deal with a competitor;
    (ii) refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible;
    (iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
    (iv) selling goods or services at predatory prices;
    (v) buying up a scarce supply of intermediate goods or resources required by a competitor; or
    (vi) engaging in a margin squeeze.

2.2.2. Additional dominant party responsibilities

Dominant firms have an added responsibility to behave in a way which does not exploit consumers or prevent or impede competitors from entering into or expanding within the market.
Members should be aware of the market in which they operate because the smaller the market, the easier it is for a firm to exercise market power and therefore be classified as dominant.

In the medical sector, certain areas / markets tend to be highly concentrated (only a few, relatively big competitors). It is concentrated markets such as this where competition concerns are greatest.
As soon as a dominant firm's behavior has an anti-competitive object or effect, unless it can be justified on efficiency, technological or other pro-competitive grounds, it may result in fines and civil liability. There is no need to demonstrate the existence of an agreement or collusion. Examples of abuse of dominance which are specifically prohibited by the Competition Act include:

- Charging an excessive price to the detriment of consumers;
- Refusing to give a competitor access to an essential infrastructure or resource when it is economically feasible to do so;
- Engaging in any act which impedes or prevents a firm entering into or expanding within the market;
- Requiring or inducing a supplier or customer not to deal with a competitor;
- Refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
- Selling goods or services on condition that the buyer purchase separate, unrelated goods or services;
- Forcing a buyer to accept a condition unrelated to the object of a contract;
- Selling goods or services below cost in order to drive a competitor out of the market;
- Buying up a scarce supply of intermediate goods or resources required by a competitor;
- Charging different prices to different customers when the difference in price cannot be justified by cost considerations.

3. Diabetes Alliance Competition Policy

The Diabetes Alliance policy is to comply with the Act and all applicable laws in letter and spirit.

This policy/statement applies to all Members. The Act and applicable laws do not only apply to them in their capacity as members of the Diabetes Alliance but also apply to their business activities and actions including the actions and activities which take place under the auspices of trade associations such as the IPASA, Marketing Code and the SAMED Code.

This policy/statement is by design general in nature and can therefore not anticipate every legal issue or fact pattern that might be faced by the Diabetes Alliance its

Members, or its staff. Therefore, it is important that individuals consult the Diabetes Alliance's Chairperson or Vice Chairperson, who shall in appropriate cases seek legal advice, when questions arise as to the application of this policy.

As a result:

3.1. Diabetes Alliance Member, event organisers, volunteers, work-stream leaders, facilitators, speakers or anyone participating in or engaged providing support or service including in the organising any meetings of Summit/Conferences, should never discuss or be involved in any of the following anti-competitive activities or agreements:

- 3.1.1. price-fixing, including the co-ordination of prices, discounts or any other element of pricing, and even discussing prices with competitors;
- 3.1.2. market division such as the allocation of customer groups or territories between competitors;
- 3.1.3. agreements on investment levels or production quotas;
- 3.1.4. the exchange of competitively sensitive information, for instance, on business plans, customer relations or ongoing or planned bids or tenders;
- 3.1.5. agreed restrictions on trade such as export bans, or prohibitions on sales to certain customers;
- 3.1.6. joint negotiations, selling or buying with competitors, except after obtaining legal advice;
- 3.1.7. any other agreement restricting competition such as, a collective boycott, any arrangement to avoid direct competition, or joint action to exclude competitors or new entrants;
- 3.1.8. resale price maintenance arrangements.

And according to the Act and agreement includes "a contract, arrangement or understanding, whether or not legally enforceable".

Therefore an anti-competitive agreement does not be written down or binding. The same is true of the decision of an association of undertakings. A verbal information exchange or an informal agreement can be an infringement even if it is a mere understanding or "gentleman's agreement".

3.2. Exchange of Information

Members are also prohibited for exchanging any information. Any discussions where information is exchanged between competitors, whether in a formal or informal context, can constitute an anti-competitive agreement or practice.

DIABETES ALLIANCE

Exchanging certain types of sensitive information may be more anti-competitive than is the case with other forms of information. E.g. Exchange of disaggregated and current data and information may serve to chill competition by increasing transparency in the market thereby either facilitating or stabilising collusion.

The Competition Commission views some exchanges as facilitation collusive behaviours. Some information exchange will be seen as part of collusion i.e. coordination or monitoring.

3.2.1. Members must not exchange the following information:

- regarding price,
- volume,
- commercial strategy,
- business secrets or
- any other competitively sensitive information.

3.2.2. Members should take particular care in discussions with fellow-Members who are or who may become competitors, whether the discussions are formal or informal. Subjects to avoid are:

- Prices and discounts, or price-related contractual terms, save that Members may discuss matters that impact of the industry as a whole, for example legislation or government-imposed pricing principles and reimbursement policies as they impact on the industry as a whole, however, Members should always consult their legal counsel prior to these discussions;
- Client relations, ongoing bids or plans to bid for business;
- Business plans or commercial strategy;
- Competitive strengths/weaknesses in particular areas;
- Production planning or output levels;
- Product development or investment in research programs which is not yet widely known;
- Individualised market share data.
- Benchmarking is allowed, provided the entity collecting and processing the data is bound by a confidentiality undertaking, and the data is not and cannot be linked to specific competitors. Market surveys are allowed provided results are presented in statistical form, individual price information is excluded and competitively sensitive information such as market share and export volumes remain anonymous.

It is acceptable to discuss public policy, educational and scientific developments, regulatory matters of general interest (including Government-imposed prices or

reimbursement policies), demographic trends, publicly available information and historical information that has no impact on future business. Members may display or demonstrate new or existing products, but not discuss non-public R&D or production plans.

4. To Do

Members must:

- Always read this Statement.
- Always review agendas for meetings prior to attendance to ensure that no items on the agenda raise competition law concerns. If ever in doubt you should seek legal advice.
- Object immediately and inform Diabetes Alliance if you are in disagreement with the Organisations' decision and or discussions and place your position on record.
- Seek legal advice immediately if you are concerned that the activities of the Diabetes Alliance raise competition law concerns.
- return commercially sensitive information you receive, without keeping copies, and explain in writing that you do not wish to obtain such information.
- Discuss public policy, education, scientific developments, regulatory matters of general interest, general industry trends, **non-individualized (statistical) market surveys or benchmarking projects,** publicly available information and historical information, but be prepared to terminate the discussion and record your disagreement if anyone mentions any of the subjects listed in the "Don't" list herein.
- Be cautious in the presence of competitors even in informal e.g. corridors, or social situations. Even informal discussions or throw-away comments can lead to problems if, for example, there is subsequent significant uniformity in action by competitors afterwards.
- Allow open and equal participation of members in Organisation or committee meetings and do not exclude a specific member or group of members from particular meetings.
- Ensure that you receive and carefully review the minutes and presentations of all meetings. If the minutes are inaccurate or incomplete or raise any questions, insist on rectification.
- Consider taking summary written notes of all discussions and presentations relating to the Diabetes Alliance. Assume that any notes you take will be discoverable in the event of any investigation or other litigation.
- Keep in mind that activities relating to standard setting, lobbying activities, benchmarking and statistics dissemination can bring along competition law risks, especially when presented as a collective decision of Diabetes Alliance to which members should not deviate.
- Seek legal advice before discussing potentially sensitive competition issues.
- Ask you legal counsel to attend the Organisation meetings

- Record any steps you take to ensure compliance with competition rules.

Remember that codes of conduct do not justify any anticompetitive conduct or agreement. Furthermore, remember that just being present when illegal discussions are taking place may be sufficient to implicate you and your company in a competition law infringement, even if you do not actively participate in the discussions.

5. Do Not

- Do not go to meetings with competitors or potential competitors without a stated bona fide agenda or purpose and object in advance if the agenda is not bona fide
- Do not discuss matters that are not on the agenda.
- Do not discuss or agree with competitor(s) or potential competitor(s)in any setting or forum, whether at a Diabetes Alliance meeting or event, or outside of that, in corridors or other events on any commercially sensitive topics such as prices, credit terms and billing practices (including discounts, rebates, surcharges, allowances, concessions, price mark-ups, and the like), production, inventory, supply volumes, sales, costs, future business plans, or matters relating to individual suppliers or customers.
- Do not discuss or agree on terms and conditions on which you supply goods or services to your customers.
- Do not discuss or agree on Information relating to individual customers, suppliers, or competitors.
- Do not discuss or agree on allocation of services, customers, markets, territories, or sales.
- Do not discuss, bids, bidding terms, tactics, strategies or practices.
- Refusals to purchase from, or modification of purchase arrangements with, suppliers.
- Do not discuss strategic plans, business plans, intentions, promotional activities and marketing strategies, investment plans or profits, margins and costs.
- Do not accept written non-public information or agree to the exchange of oral non-public information with Members who market competing products.
- Do not participate in information exchanges, market surveys, or benchmarking exercises that allow access to individualized competitive information.
- Do not engage in joint negotiations, joint sales or joint buying without legal advice.
- Do not agree to exclude competitors or engage in collective boycotts.

6. Anti- Competitive practices

Mere presence at meetings where anti-competitive conduct is discussed can be enough to incur liability under the Competition Act. Check the agenda, object in advance to impermissible discussion items and stay away if the agenda is not changed. As soon as you become aware of an infringement, contact your legal

counsel, express your disagreement and ensure that a record is kept of your disagreement. If you miss a meeting, check the minutes upon receipt, and warn your legal counsel if these suggest an infringement. If there is a possibility that sensitive matters are discussed, consider having legal counsel present at meetings.

Diabetes Alliance does not tolerate anti-competitive practices and encourages anyone who has information concerning an allegation of a breach of a prohibited practice to the Competition commission on: https://www.compcom.co.za/lodge-a-complaint/

7. Competition Commission Advisory Opinion

Advisory Opinion is a written opinion of the Commission's position in respect of a set of facts submitted by external parties. Its aim is to assist in interpreting provisions of the Act and to provide business with guidance on the position that the Commission is likely to take in respect of certain transactions, agreements or practices. An Advisory Opinion is not binding on the Commission. The Commission may at any time review its position vis-à-vis the facts presented. Furthermore, the Commission will only formulate an opinion on the basis of a disclosed set of facts. Should the facts change in any way, the Commission may revise its position.

For a party to obtain an advisory opinion a letter outlining the facts on the matter in question must be sent to the Competition Commission's Registry on fax number (012) 394 0166 or post it to Private bag x 23, Lynwood Ridge, 0040 or email ccsa@compcom.co.za

Fees

For the Conduct of Proceeding in the Competition Commission, a fee of two thousand five hundred rand only R2500 is payable by the party requesting an advisory opinion.