

A background image of a fencer in a teal overlay, holding a foil. The fencer is wearing a mask and a jacket. The image is partially obscured by a large teal triangle on the left side of the page.

# Competition Law

## ALERT

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INCORPORATING  
KIETI LAW LLP, KENYA

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### Trade associations: Viewed by the Competition Authorities as a “*breeding ground*” for prohibited practices

A number of industries have formed associations where competing firms meet to discuss their mutual interests. Such associations play a valuable role as forums for the discussion of important issues of common interest for industry players. However, trade associations also create a platform for the discussion of matters that may result in a restriction of competition or even collusion between members.



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## Trade associations: Viewed by the Competition Authorities as a "breeding ground" for prohibited practices

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In its recently published final Guidelines on the Exchange of Competitively Sensitive Information between Competitors (Guidelines), the Competition Commission (Commission) defines trade associations as *"bodies that are created by some or all participants in a particular industry or sector to promote the interests of that industry or sector."*

As a result of their participation in trade associations, members often share information either through the exchange of documentation, through seminars and trade association conferences where delegates present papers on various topics which are of interest to the association's members, or through social media platforms created by and for the members of such associations.

As competitors have contact with each other through trade associations, which has resulted in various instances of collusion, the competition authorities refer to

trade associations as *"platform[s] for collusion"* and they are viewed by competition authorities to be a *"breeding ground"* for competition law violations across various jurisdictions. The types of competition law risks that may arise from participation in trade associations include the exchange of competitively sensitive information, the fixing of prices or trading conditions, market allocation, collusive tendering, and bid-rigging practices, all of which are prohibited in South Africa by section 4 of the Competition Act 89 of 1998 (Competition Act).

### Competition Act

Section 4 of the Competition Act specifically states that a *"decision"* by an association of firms, is prohibited if it is between parties in a horizontal relationship and results in the prohibited practices mentioned above. Various consent orders have been entered by trade associations to settle such contraventions of the Competition Act.



Cliffe Dekker Hofmeyr

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## Trade associations: Viewed by the Competition Authorities as a "breeding ground" for prohibited practices

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In *Competition Commission v The Grain Silo Industry (Pty) Ltd and 16 Others* (CO031Jun11/SA118Nov11), the Tribunal approved a consent order, in terms of which the Grain Silo Industry (GSI) admitted that the facilitation of the joint determination of SAFEX tariffs could be interpreted as a decision by an association in terms of section 4(1) of the Competition Act.

The Commission found that GSI had provided a platform for its members to share detailed cost information relating to the costs of operating a silo and the storage of grain and that GSI had used this information to determine the tariffs that were recommended to SAFEX. GSI asked its shareholders, who were competitors in the market for grain storage,

to submit individual proposals, and these proposals were collated by GSI and, in some instances, they were then used by GSI's technical committee (which was made up of representatives from firms that were competitors in the same market) to determine appropriate SAFEX tariffs. These tariffs were accepted and applied by SAFEX.

The Commission found that the respondents had contravened the Competition Act through their participation in GSI, since they had fixed SAFEX tariffs. As part of the consent order, GSI agreed to pay an administrative penalty of R94,556,00, which amounted to 4% of its total member levies for the 2009 financial year.

### Other South African examples

In *Competition Commission and ATC Proprietary Limited* (CO137Nov14), the Tribunal approved a consent order in terms of which members of the Association of Electric Cable Manufacturers of South Africa (AECMSA), were found to have contravened section 4(1)(b)(i) of the Competition Act in that they had discussed and agreed, under the auspices of AECMSA, on a quotation basis that was used to escalate prices when bidding for short- and long-term tenders to supply electric cabling products.

In *Competition Commission And Chevron SA (Pty) Ltd; Engen Ltd; Shell SA (Pty) Ltd; Total SA (Pty) Ltd; BP SA Ltd; Sasol Ltd; South African Petroleum Industry Association* (CR098Oct12/SA245Nov17), the



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Commission referred a complaint to the Tribunal alleging that members of the South African Petroleum Industry Association (SAPIA) exchanged information relating to commercial diesel sales and volumes by disseminating monthly sales information to all its members about oil companies, per specific grade of petrol and per province and magisterial district where the sales were made. The referral resulted in a settlement agreement between the Commission and the respondents in terms of which the respondents did not admit to having contravened the Competition Act, but they agreed on certain standards for their future conduct in terms of information exchange.

### European case law

Although various consent orders have been entered into in South African in relation to prohibited conduct that flowed from trade associations, there have been very few contested cases. European competition case law, which is often cited in our Tribunal and courts (and which relies on similar principles to those contained in the South African Competition Act), provides examples of the competition law risks that arise through competitors' participation in trade associations.

In terms of Article 101 of the Treaty on The Functioning of The European Union (formerly Article 81 of the Treaty establishing the European Community (EC Treaty)), commercial arrangements consisting of agreements between undertakings, decisions of associations of undertakings, and concerted practices

which may affect intra-community trade and which have as their object or effect the prevention, restriction, or distortion of competition, are prohibited.

### Irish beef industry

In *Competition Authority v Beef Industry Development Society Ltd and Another (Case C-209/07)*, 10 processors in the beef industry in Ireland formed an association named Beef Industry Development Society (BIDS). Due to an overcapacity in the beef industry in Ireland, the Irish Government concluded that it was necessary to reduce the amount of beef processors. In reaction, BIDS devised a strategy to reduce processing capacity by 25% through the implementation of various agreements between processors which were to remain in the market (the 'stayers') and processors that were to exit the market (the 'goers').





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In terms of the agreements, the goers would not compete with the stayers in the beef and veal processing market for a period of two years, and in turn the stayers would compensate the goers because of the increased work they would receive. BIDS notified the European Competition Authority of that agreement, and the Competition Authority then informed BIDS that it considered the agreements to be contrary to Article 81(1) of the EC Treaty (now Article 101) and subsequently applied to the High Court for a restraining order preventing these agreements from being implemented.

The court in the BIDS case stated that, in deciding whether an agreement of an association is prohibited by Article 81(1) of the EC Treaty, there is no need to consider its actual effects once it appears that its object is to prevent, restrict or distort

competition within the common market. Furthermore, it stated that an agreement may be regarded as restricting competition in object even if it does not have the restriction as its sole aim but pursues other legitimate objects. The court highlighted that the information before it pointed to the notion that the object of the BIDS arrangements was to change the structure of the market through a mechanism intended to encourage the withdrawal of competitors.

### **Associations of wood pulp producers**

In *A. Ahlstrom Osaakeyhtio v Commission of the European Communities, Joined Cases 89, 104, 114, 116, 117 and 125-129/85*, the European Commission found that 40 wood pulp producers and three of their trade associations had infringed Article 85(1) of the EC Treaty

by issuing announcements at the beginning of each quarter in terms of which producers communicated to their customers and agents the prices that they wished to obtain in the quarter in question for each type of pulp. The definitive prices invoiced to customers were either identical to the announced prices or lower, if there were rebates or other payment concessions offered.

This hindered the independent conduct of firms within the market. The court stated that a concerted practice within the meaning of the article must be understood with reference to the principle that each economic operator must independently determine the policy it intends to adopt on the market, and it must not exchange information that results in the co-ordination of conduct.



## Trade associations: Viewed by the Competition Authorities as a *"breeding ground"* for prohibited practices

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### Conclusion

In order to mitigate the competition law risks that may arise from collusion through participation in trade associations, there are various measures and procedures that can be adopted. A careful analysis of the type and nature of the information exchanged is required; for instance, any information shared should not include prices, volumes or commercial strategies.

The Guidelines state that generally, if information is historical and aggregated nationally it will not be problematic, depending on the characteristics of the market. Disaggregation of competitively sensitive information is usually viewed as highly problematic and will be considered by the Commission as evidence of a likely contravention of section 4 of the Competition Act.

The advice of competition law experts should be taken regarding participation in a trade association, or the types of information shared through the trade association, to avoid contraventions of the Competition Act. It is also good practice to enroll the assistance of competition law experts to attend seminars or gatherings where information is intended to be shared between competitors, to ensure that the association and its members remain compliant with competition laws.

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