# ENERGY COUNCIL OF SOUTH AFRICA

# COMPETITION COMPLIANCE MANUAL

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## STATEMENT OF ENERGY COUNCIL POLICY

We are committed to the principles of fair and open competition. It is the Energy Council of South Africa's policy to comply with the competition (also known as antitrust) laws.

Infringements of competition laws can lead to very serious consequences both for the Energy Council and for you as an individual. This could include very significant fines for both the Energy Council and its members, severe reputational damage and, for the individuals involved, termination of employment and in some cases imprisonment.

This manual should be complied with by all Energy Council members and participants. It is intended to guide you practically so that you can identify competition law issues and act appropriately. It is your responsibility to familiarise yourself with the material and to ensure that it is also understood and applied by those reporting to you at all times.

If you suspect that an infringement of competition law has occurred or if you are in any doubt about whether a proposed course of action is permitted, then you must call competition legal counsel nominated by the Energy Council from time to time. Initial communication should be by telephone rather than e-mail. Please remember that speed is of the essence – if there is a problem then it must be identified quickly so that appropriate action can be taken to put it right.

## 1. OVERVIEW

1.1. This Manual focuses on compliance with competition law as it relates to the Energy Council's activities.

1.2. To the extent that the Energy Council's members are considered to be competitors or potential competitors in any relevant market, the Energy Council must ensure that it does not provide a potential forum for, or in some other way facilitate, anti-competitive/collusive activity between its members.

## 2. INTRODUCTION TO COMPETITION LAW RULES

2.1. There are two broad areas of focus for competition law:

2.1.1. Anti-competitive agreements (between two or more undertakings or firms), particularly in relation to agreements, arrangements or concerted practices between competitors; and

2.1.2. The abuse of a "dominant position"

**Dealing with Competitors**

2.2. It is a fundamental rule of competition law that actual or potential competitors must take business decisions independently – without any coordination with their rivals. Contact between competitors is inherently risky and should normally be kept to the minimum. Anti- competitive behaviour can occur directly between competitors but also indirectly via third parties.

2.3. In particular, agreements or understandings (whether oral or written and including "gentlemen's agreements" or other non-binding arrangements) between competitors violate competition law if they restrict competition by, for example:

2.3.1. fixing prices (including discounts, margins, credit terms, trading terms and price lists);

2.3.2. fixing production or capacity;

2.3.3. allocating markets or customers or suppliers;

2.3.4. refusing to supply or entering into group boycotts;

2.3.5. rigging bids / collusive tendering (i.e., agreeing not to submit offers for new business); and / or

2.3.6. sharing competitively sensitive information.

2.4. In some jurisdictions, such as South Africa, some conduct is prohibited outright, without having regard to the anti-competitive effect of that conduct. In South Africa, fixing of prices or trading conditions, the allocation of markets, and the rigging of bids are prohibited outright in this way.

2.5. The consequences of infringement are as follows:

2.5.1. parties may be ordered to cease operating the agreement;

2.5.2. very significant fines may be imposed (for instance, up to 10% of worldwide turnover in the case of the European Union (“EU”) regime; and up to 10% of turnover in South Africa and from exports from South Africa in the case of the South African regime and up to 25% of turnover for repeat offenders);

2.5.3. the restrictions (and sometimes the agreement itself) may be unenforceable;

2.5.4. third parties may bring an action for damages or an injunction (if appropriate); and

2.5.5. in certain circumstances sanctions may be imposed on individuals personally. In the UK for instance, individuals involved in cartels risk criminal prosecution. A director of an infringing company can also be disqualified from acting as a director for up to 15 years.

2.6. In several jurisdictions, including South Africa and the EU, a decision by an association of firms can be found to contravene competition laws. To the extent that Energy Council's members are considered to be competitors or potential competitors in any relevant market, it is very important to minimise the risk of the Energy Council being viewed as a forum for the exchange of competitively sensitive information or any other form of coordinated activity between its members. Further guidance and specific protocols in relation to information exchange and price signaling are in sections 2.10 and 3.9.3.

**Abuse of a Dominant Position**

2.7. "Dominance" is generally defined with reference to market shares and market power. For example, in South Africa, a firm is dominant if it has (a) at least 45% of the market, (b) at least 35%, but less than 45% unless it can show it has no market power and (c), less than 35% of the market but has market power. Market power refers to a company's ability to control prices, exclude competition or behave almost independently from competitors, customers and consumers. The relevant market is described/determined on both a product and geographic basis and essentially consists of all the products/services which customers find substitutable.

2.8. While being dominant is not itself prohibited, the abuse of a dominant position is strictly prohibited and, if found, can result in serious consequences (in many circumstances, similar to those which are set out above in relation to anti-competitive agreements/understandings).

2.9. "Abuse" refers to exclusionary conduct which impairs effective competition by "foreclosing" rivals in an anticompetitive way. Abuse can also consist of exploitative conduct, by which the dominant firm or undertaking takes advantage of its position of power. Common examples of "abuse" include:

2.9.1. excessive pricing – charging prices which are unfairly high;

2.9.2. predatory pricing – charging prices which are below some measure of cost and are aimed at excluding rivals from the market;

2.9.3. discriminatory pricing – charging different prices to similarly placed customers, or the same prices to differently placed customers;

2.9.4. refusals to supply – refusing to supply goods or services (or refusing to supply them except on clearly unacceptable terms) or refusing to supply a competitor with access to an essential facility or scarce goods when it is economically feasible to do so;

2.9.5. exclusivity (exclusive dealing) – requiring a buyer to only buy goods from the seller;

2.9.6. fidelity pricing (or rebates/discounting) – making the prices of goods or services or the availability of discounts dependent on retaining all or part of a customer's business; and

2.9.7. tying – making the purchase of one product or service which the buyer wants conditional on the purchase of another unconnected product or service.

2.10. In South Africa, most abuses of dominance can be justified with reference to any technological, efficiency or pro-competitive gains which outweigh the anti-competitive effect of the conduct. However excessive pricing and refusals to grant access to an essential facility are prohibited outright if such conduct is found to have been engaged in by a dominant firm.

## 3. PROTOCOLS – COLLECTING AND DISSEMINATING MARKET INFORMATION

3.1. The direct exchange by competing companies of non-public, competitively sensitive information (such as pricing or pricing policies, details of costs and margins, customer arrangements, capacity or capacity utilisation levels or strategic plans) is prohibited under competition law since it could have an adverse effect on competition by providing a basis for firms to coordinate their behaviour.

3.2. Competition law also prohibits competitors from exchanging business secrets indirectly, i.e. via an intermediary. For this reason, to the extent that Energy Council's members are considered to be competitors or potential competitors in any relevant market, it is crucial that the Energy Council must not be used (and must avoid any suggestion that it is being used) as a forum for the discussion of information that could influence any such member's pricing, production or other strategic decisions.

3.3. Therefore, the Energy Council must ensure that appropriate safeguards are in place to prevent its members from using the Energy Council as a forum to exchange information on non-public, competitively sensitive matters (or coordinate their activity in breach of competition law), such as:

3.3.1. any aspect of pricing or pricing policy;

3.3.2. other terms and conditions of sale;

3.3.3. production levels or costs;

3.3.4. plans (including projected capacity levels); or

3.3.5. strategy,

in a market in which Energy Council's members are considered to be competitors or potential competitors.

3.4. Competitively sensitive information can be "current" or "future" and can cover general as well as specific indications of future actions (i.e., general intentions regarding future pricing without specific references to amounts or timing). For competition law purposes, it is irrelevant whether or not either the disclosing party or the receiving party acts on the information, and the disclosure of such information need not be reciprocated (i.e. it can be one-way only).

3.5. The following structural measures and procedures can help mitigate the risk of illegal information exchange occurring as a part of the day-to-day operations of the Energy Council:

3.5.1. information confidential to a particular member should not be disclosed to other members through Energy Council board meetings or other Energy Council fora unless it has first been appropriately protected (see paragraph 3.8.6 below);

3.5.2. separate file and document storage facilities from those of any members should be strictly maintained; and

3.5.3. all Energy Council personnel should ensure that they adhere to the terms of any written confidentiality policies forbidding the disclosure of sensitive information either developed by the Energy Council or collected by the Energy Council from members.

3.6. The following guidelines should be followed in relation to Energy Council board meetings or other formal meetings of two or more Energy Council members who are considered to be competitors or potential competitors in any relevant market:

3.6.1. all meetings should be scheduled; impromptu meetings without clear agendas should be avoided;

3.6.2. agendas of all meetings must be compiled for prior review;

3.6.3. discussion of competitively sensitive information relating to any member should not occur unless it has first been appropriately protected (see paragraph 3.8.6 below); and

3.6.4. the Chairman of all meetings of the Energy Council and its structures should commence meetings with language indicating competition law compliance – for example:

1. The purpose of this meeting is X
2. This meeting will be minuted.

3. All parties participating in this meeting shall at all times comply with and be mindful of their responsibilities under competition law.
4. Specifically, all parties acknowledge and agree that they must not discuss or disclose any commercially sensitive information (including details of sales volumes, strategy, internal business policies and processes, clients lists and details, information on input or supply costs or any other competitively sensitive matter) in violation of the competition rules.
5. It is the responsibility of each attendee at this meeting to ensure that at all times they understand and comply fully with their legal responsibilities.
6. If any attendee believes that commercially sensitive information is being discussed in violation of the competition rules, he/she should verbally object to the discussion and recuse him/herself from the meeting. His/her objection and departure will be noted in the minutes.

3.7. In the event that any attendee at an Energy Council meeting believes that improper discussions are taking place, they should:

3.7.1. ask the meeting to stop;

3.7.2. if the meeting is not ended, leave, and ensure this is minuted;

3.7.3. make their own notes; and

3.7.4. report the incident through appropriate channels to the nominated legal counsel.

3.8. To the extent that its members are considered to be competitors or potential competitors in any relevant market, the Energy Council **may not** circulate to its members any individualised, non-public information of any member relating to:

3.8.1. current/recent costs or anticipated future costs in that relevant market;

3.8.2. current/recent output or anticipated future output in that relevant market;

3.8.3. current/recent or anticipated future product pricing or margins in that relevant market;

3.8.4. marketing or advertising plans, or other strategic planning information in that relevant market;

3.8.5. plans to import or export product in that relevant market; and

3.8.6. customer-specific information, including pricing or contractual terms in that relevant market.

3.9. To the extent the Energy Council collects competitively sensitive information from members and wishes to disseminate that information to its members, it may only do so subject to the following:

3.9.1. the exchange is conducted through the Energy Council;

3.9.2. the information provided is based on data that is greater than 12 months old unless current information is collated by an independent third party contractor of the Energy Council in accordance with agreed protocols; and

3.9.3. the information is sufficiently aggregated that no individual participant or participant's information can be identified.

## 4. PROTOCOLS – INITIATIVES REQUIRING JOINT COLLABORATION

4.1. The members of the Energy Council may in certain instances wish to engage in joint initiatives which envisage providing information regarding future projects and potentially engaging in joint projects between members of the Energy Council, thereby requiring close collaboration. These types of collaborations may involve the exchange of potentially competitively sensitive information and engagement on issues that could raise competition concerns. In these circumstances, stakeholders must avoid any risk of their discussions or exchanges of information being viewed as facilitating collusive conduct between competitors, more specifically, anticompetitive agreements to fix a purchase or selling price, fix any trading conditions, or dividing markets by allocating customers, suppliers, or territories in contravention of the Competition Act.

4.2. In order to alleviate any of the abovementioned potential contraventions of the Competition Act, it is necessary that stakeholders observe the precautionary measures set out below –

4.2.1. **Information that must not be exchanged between members, in addition to the information set out in paragraph 3.8 above**

| **Do not discuss, make any agreement on, or take a decision with a competitor, in relation to:** | |
|---|---|
| 1. | A sale or purchase price, formula, guideline etc. (even if the agreement is not to increase prices) |
| 2. | Discounts or other incentives |
| 3. | Sale or purchase terms |
| 4. | Timing of price increases or decreases |
| 5. | Signaling of price increases or decreases |

| | |
|---|---|
| 6. | Refraining from supplying a product or service |
| 7. | Blacklisting or boycotting of customers or suppliers |
| 8. | Capacity, output or inventory restrictions or expansions |
| 9. | Production methods, costs, innovations |
| 10. | Market or customer division |
| 11. | The exclusion of competitors from a market |
| 12. | Future business plans or strategies |
| 13. | Employee compensation, benefits |
| 14. | Non-poaching arrangements involving employees |
| **Do not:** | |
| 15. | Analyse or discuss the results of industry studies as a group of competitors |
| 16. | Agree with competitors to use third parties (e.g. common suppliers or customers) as conduits to facilitate the sharing of strategic information e.g. prices and volumes between competitors |

### 4.2.2. Information that must be exchanged in a restricted manner

| **Exchange of restricted information** | |
|---|---|
| 1. | Firm-specific information must be submitted to the participants of the relevant initiative subject to strict confidentiality so that the information is not shared with other members |
| 2. | An independent third party must process that information and disseminate a sanitised version of this information to members |
| 3. | The independent third party must have a fixed mandate to ensure proper governance in relation to the items and outputs being shared |

4.2.3. **Information that may be exchanged by association members**

| Information type | |
|---|---|
| 1. | Historical information (usually more than one year old per paragraph 3.9.2 above) – the older the information, the less impact it is likely to have on competition |
| 2. | Anonymous or aggregated information – (particularly if compiled by independent third parties) which does not allow for information (e.g. market shares or prices) belonging to individual members to be identified |
| 3. | Non-confidential information – information that is already fully in the public domain |
| 4. | Not competitively sensitive information – information that does not equip a competitor to alter its competitive strategy going forward e.g. information related to methods of accounting, bookkeeping, stock control, standard-form contracts and benchmarking to determine best practices |
| 5. | General industry issues |
| 6. | Regulatory changes and compliance |
| 7. | Government policy |
| 8 | Industry lobbying / Promotion |
| 9. | Health and safety |
| 10 | Research |

## 5. PROTOCOLS – REPORTING AND COMMENTING ON MARKET INFORMATION

### Price signaling

5.1. As noted above, an actual "exchange" of information is not required to fall foul of competition law. Unilateral (one way) disclosures can be sufficient to give rise to a potential infringement of competition law.

5.2. As a general rule, where a company makes a unilateral announcement relating to prices or output, this will not constitute an infringement of the prohibition on

anti-competitive agreements. However, where such an announcement is followed by similar public announcements or coordinated behaviour by other competitors, the possibility of an infringement finding cannot be excluded.

5.3. Regular and uniform price announcements as well as public statements about a company's strategy or market aspirations made on an informal and ad hoc basis carry the risk of being characterised as anti-competitive signaling. The consequences of such a finding are as serious as having participated in a cartel.

5.4. Although the Energy Council would not usually report forecasted prices for various input and output products in the various markets in which it operates, to the extent the Energy Council wishes to report such forecasts to members who are considered to be competitors or potential competitors in any relevant market, the Energy Council should minimise the risk of Energy Council appearing to be signaling intended future prices in that relevant market.

5.5. The Energy Council may report publicly available information, such as information compiled independently by third party market research entities.

5.6. Information may also be disclosed as necessary for an objectively justifiable and legitimate purpose (e.g. to ensure compliance with a legal obligation) and with the prior authorisation of legal counsel. (In such circumstances care must be taken to ensure that the information is held securely and is only used for such legitimate purpose.)

5.7. To the extent that the Energy Council wishes to use publicly available/third party information as the basis for adding additional commentary/predictions regarding future prices or output in a relevant market, such statements need to be carefully considered in consultation with legal counsel so as to avoid suggestions of price signaling. In particular, Energy Council should:

5.7.1. avoid making statements such as "We predict that prices will stabilise around RX" or "We see pricing at Y point in the future being at the RX level" without substantiation for such statements;

5.7.2. provide clear analysis and reference all publicly available evidence to support any non- factual statement made; and

5.7.3. ensure that the need for making an announcement is clearly justified and documented.

## 6. PROTOCOLS – EFFECTIVE COMMUNICATION

6.1. Careless language in business communications can cause problems. No wording of letters and documents will ever convert an illegal activity into a legal one. However, incorrect or careless wording can easily give an impression of incorrect conduct.

6.2. The following guidelines will help to avoid giving such false impressions and to achieve effective written communications:

**Do**

6.2.1. Where agreements might involve the coordination of the pricing or production strategies of members, use standard forms and contracts (that have been approved by Energy Council's legal counsel if possible).

6.2.2. Think before you put pen to paper or prepare an e-mail. Stick to factual, succinct communication without unnecessary descriptions or gratuitous observations.

6.2.3. Assume that all written communication may be made public or reviewed by regulators, however unlikely that may seem.

6.2.4. Use the rule of thumb: If you are suspicious of your email enough not to want it disclosed to a competition authority or published on the front page of a financial newspaper, then do not send it.

6.2.5. Emphasise the competitive nature of the industry in all communications.

6.2.6. Make a file note of anything which might be viewed as suspicious.

6.2.7. Ensure that the source of the information appears clearly on the face of the document, including where the source is estimates or modelling done on the basis of public information.

6.2.8. Consider whether the best way of conveying a message (or seeking advice) is with a telephone call.

**Do not**

6.2.9. Use ambiguous language or language which suggests improper or unlawful behaviour (e.g."destroy after reading" or "for your eyes only").

6.2.10. Use aggressive language or power words (e.g. "we will destroy non-South African producers").

6.2.11. Speculate in a document whether particular conduct is legal - obtain legal advice instead.

6.2.12. Write anything in an e-mail that you could not later justify to management.

6.2.13. Think that oral communication or agreements are "safe" just because they are not written down.

**Communication with Lawyers**

6.3. Circumstances will arise when it is appropriate to seek legal advice on competition points. Generally, it is best in the first instance to raise such queries by telephone rather than communicating in writing (including by email). Where it is necessary to communicate in writing, in order to ensure that your communications have the benefit of legal advice privilege, it is important that the communication is marked "Privileged and Confidential Request for Legal Advice." Responses to requests for information from lawyers should be marked "Privileged and Confidential Prepared at the Request of Legal Adviser."

6.4. Note that, in investigations into alleged anticompetitive conduct by the European Commission, it is only written advice from external EU lawyers (i.e. not communications with an in-house legal counsel or non-EU lawyers) that will be protected by legal privilege. In some other jurisdictions, like South Africa, communication with in-house legal counsel is also protected by legal privilege.

**Enquiries and Investigations**

6.5. Competition authorities (including for instance the South African Competition Commission) have wide powers of investigation including, for example, the power to enter premises and to examine and copy business records. A Commission investigation may begin with a complaint by an aggrieved customer or competitor or an enquiry may be instituted on the authority's own initiative.

6.6. Any communication received from a competition authority or complaint from a third party alleging a breach of competition law must be reported immediately to legal counsel.

**Site Visits and Dawn Raids**

6.7. The competition authority may make a site visit (or "dawn raid"), with or without notice and sometimes even without a warrant. Failure to allow access to premises, once the authority to enter has been verified, may lead to the imposition of fines on the company and individuals may potentially face criminal sanctions if they do not comply with the authority's investigatory powers.

**Key points to remember:**

- Stay calm and be polite.
- Immediately contact legal counsel.
- Try to delay searches until the arrival of legal counsel.
- Check inspection details (i.e., authority, authorisation and purpose of visit).
- Shadow each inspector and take a copy of all documents seized by the authority.
- Assert legal privilege where appropriate.
- Try to identify likely follow-up or outstanding questions.
- Take detailed notes of the day.