



**Safripol (Pty) Ltd**

**Competition Compliance  
Policy**

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This report contains 27 pages  
Safripol Compliance Policy

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# 1 Introduction

## 1.1 Policy statement

It is our company policy to comply with the letter and the spirit of competition law. In South Africa, competition legislation establishes the rules by which we compete. These rules should not be looked upon as an impediment to our business, but as means to preserve an environment in which we can market our products on the basis of their merit.

Compliance with law in general is an important aspect of doing business. Over the years, Safripol (Pty) Ltd (“**Safripol**”) has grown significantly. We have succeeded because of newer and better products and the conscious effort of our employees. This is entirely consistent with competition law. Our success and growth, however, make it even more important for each of us to understand, and comply with, competition law. Competition law is intended to prevent and eliminate any agreements and individual conduct which would interfere unreasonably with the operation of the marketplace. This legislation protects the workability of the markets which Safripol services, and accordingly, constitutes a positive business oriented force.

Safripol, through its compliance, is contributing to the overall economic health of the market in which it participates. Moreover, through its compliance, Safripol avoids the substantial financial and other business risks associated with non-compliance.

## 1.2 Purpose of this document

Our company’s policy concerning competition law compliance is set out in this document. Competition policy is, of necessity, general in nature. The legislation provides the rules of the game for all companies of all types.

This manual is not intended to be a complete explanation of how these laws might apply in all cases, but it is intended to provide a sufficient framework for our employees to avoid questionable conduct, and to seek appropriate legal advice from the company’s competition law advisors where there is any doubt about what can or cannot be done.

**“I did not know it was illegal” is not an acceptable excuse to Safripol or to the competition authorities.**

## 1.3 Competition law in South Africa

The Competition Act (“**the Act**”), which became law in 1998, has a major influence on how we do business in South Africa. The Act ensures that the way that businesses compete with each other is as fair as possible. Furthermore, it creates a framework within which companies can compete against each other, both locally and internationally – something which will ultimately benefit us all through increased product choice and lower prices.

Competition law applies to all economic activity within, or having an effect within, the Republic of South Africa. The Competition Commission is an independent body responsible for the

investigation and evaluation of certain business activities. These activities include restrictive business practices; abuse of dominant positions in markets; and mergers and acquisitions.

**Be aware of competition laws and rules wherever and whenever you are doing business.**

#### **1.4 Consequences of competition law violations**

The seriousness of competition law contraventions cannot be over-emphasised. For certain violations such as price fixing, Safripol may be fined up to 10% of our annual turnover. Competition law violations may also subject Safripol to extremely costly litigation and civil damages. Safripol will take disciplinary action against any employee who intentionally violates or ignores the company's competition law policy. Disciplinary action will also be taken against any employee who directs or knowingly allows a subordinate to violate this policy.

**Violating competition laws result in severe consequences.**

#### **1.5 Your responsibilities**

Each employee has the responsibility to know, understand and follow this policy.

Every employee must consult with senior management and/or the competition law advisors when there is even the slightest doubt about the legality of an action. These responsibilities reflect Safripol's belief that there is no commercial objective which is more important than obeying the law.

**Compliance with competition law is your responsibility!**

## 2 Introduction

The application of competition law is fact-specific. Typically, the outcome of a competition law enquiry is determined by industry dynamics, the structure of the market and firm-specific commercial behaviour. In this light, we are unable to list and describe all possible forms of likely competition contraventions. Instead, we provide a competition compliance framework aimed at sensitising us for the lawful execution of our duties.

### 2.1 Some important concepts

In the interest of clarity, we distinguish between the meaning of “applicants” and “respondents”, as well as the broad functions of the Competition Commission, the Competition Tribunal and the Competition Appeal Court in the context of prohibited practices.

Applicants and respondents	
<b>Applicant</b>	An applicant is an individual or a company that files a complaint at the Competition Commission. The Competition Commission may also initiate complaints, and often constitutes the applicant in a matter.
<b>Respondent</b>	A respondent is a firm whose actions are being investigated.
The competition authorities	
<b>Competition Commission</b>	Where competition matters are concerned, the Competition Commission is our country’s primary investigative body. Among other functions, the Competition Commission investigates complaints raised against alleged contraveners of the Act. If a contravention of the Act has been found, the Competition Commission refers the matter to the Competition Tribunal. If the Competition Commission does not find a contravention of the Act, an applicant may, on its own, refer its case to the Competition Tribunal.
<b>Competition Tribunal</b>	Among others, the Competition Tribunal receives referrals from the Competition Commission or from applicants whose matters have not been referred by the Competition Commission. It then holds public hearings to adjudicate on the matter. Based on the Competition Tribunal’s findings, the respondent may be fined up to 10% of total relevant turnover.
<b>Competition Appeal Court</b>	The Competition Appeal Court is approached when an applicant or respondent feels that the Competition Tribunal has erred in its decision. The Competition Appeal Court has the authority to confirm, amend or set aside the ruling of the Competition Tribunal.

## 2.2 Categories of competition law contraventions

### 2.2.1 Horizontal, vertical and dominance contraventions

Chapter 2 of the Act categorises competition contraventions in terms of three practices:

- Restrictive horizontal practices, which arise from anti-competitive agreements between *competitors*;
- Restrictive vertical practices, which arise from anti-competitive agreements between *buyers and sellers*; and
- Practices prohibited for *dominant firms*.

It is not required that the agreements (between competitors or buyers and sellers) be in writing. Verbal arrangements or undertakings could suffice for the purpose of pursuing an allegation for a prohibited practice against a respondent.

**The form of an agreement is irrelevant for purposes of finding a competition law contravention.**

### 2.2.2 *Per se* and “rule of reason” contraventions

The Act consists of *per se* and “rule of reason” clauses. *Per se* clauses do not allow respondents the right to defend their alleged illegal acts on technological, efficiency or pro-competitive grounds. Literally, the competition authorities only have to prove that the respondent has engaged in the alleged illegal act. When found to have been contravening a *per se* clause – even for the first time – a respondent could be fined up to 10% of total relevant turnover.

“Rule of reason” clauses differ from *per se* clauses, because they are structured to allow the respondent to defend its alleged illegal actions, based on proof that significant pro-competitive side-effects occurred as a result of the act under consideration. The competition authorities would not impose a fine when these violations are committed for the first time. Both *per se* and “rule of reason” clauses prevail under all three categories of competition law contraventions.

### **3 Restrictive horizontal practices**

The purpose of competition legislation in South Africa is to foster a free and competitive market place for all suppliers of goods and services. In a free market economy, competitors must compete on merit. They should strive to unilaterally offer the best products, services and prices.

Sometimes, competitors fix trading conditions (e.g. prices, levels of output or quality standards) in order to eliminate some or all aspects of competition among them. These practices are called “collusion” and constitute one of the most serious competition law contraventions in the Act. Competitors that agree to work together deny customers the opportunity to realise the optimal value from the product or service which they purchase.

Restrictive horizontal practices can be prosecuted in terms of a “rule of reason” clause and various *per se* clauses. The *per se* contraventions include the following:

- Collusive fixing of prices or other terms and conditions;
- Collusive market sharing or market allocation; and
- Collusive tendering or bid rigging.

#### **3.1 The *per se* contraventions**

Let’s discuss the principles that underlie the above *per se* contraventions.

##### **3.1.1 Collusive fixing of prices or other terms and conditions**

Safripol must always establish its prices and trading conditions without any interference by competitors. We are not allowed to communicate our current or future prices with our competitors.

Although we aim to gather and analyse as much market information as possible, we confine ourselves to lawful means, e.g. customer surveys, marketing studies and economic forecasts. When we buy from or sell to a competitor, we only exchange transaction-specific price information (i.e. information pertaining to the actual items and quantities being bought or sold). We also independently establish other terms of sale, e.g. credit provided, delivery charges, delivery schedules, minimum quantities purchased or delivered, interest charges, or anything else which affects the economics of the transaction.

**Customers are entitled to negotiate for the most economical and beneficial transactions. Do not discuss any aspect of pricing or other business terms and conditions with competitors!**

**Do:**

- Compete vigorously and independently at all times;
- Make decisions about pricing and all trading conditions independently; and
- Conduct your business in an ethical way and always adhere to the principles of honesty and forthrightness in the sale of Safripol's products.

**Do not:**

- Determine prices and discounts with input or assistance from competitors; and
- Discuss, negotiate or enter into any agreement or exchange information with a competitor that has anything to do with pricing or other terms and conditions (including credit terms, profits, profit margins, costs, rebates or discounts).

### **3.1.2 Collusive market sharing or market allocation**

It is unlawful to assign certain classes of customers to certain providers of goods and services. For example, an arrangement in terms of which Safripol only supplies Customer A – while the competitor only supplies Customer B – would be illegal. Still, we are not obliged to sell to all classes of customers unless it makes business sense. It is therefore important to keep comprehensive track record of the business considerations that underpin our customer approval process.

**Customers in all classes are entitled to procure products and services from all available competitors.**

We may not agree with competitors to deliberately source product from different suppliers. We may, however, based on sound business grounds, unilaterally decide to only source from certain suppliers. Again, we should keep comprehensive track record of the business considerations that underpin our supplier approval process.

**All suppliers are entitled to provide products and services to all available customers.**

It would be illegal for Safripol to agree that, for example, Safripol only sells chemicals in certain provinces, and the competitor sells chemicals in the remaining provinces of the country.

**Customers operating in all territories are entitled to procure products and services from all available competitors.**

Safripol is obliged to independently determine the range and the quantity of the products and services it provides. It would be a violation of competition law to allocate product ranges between competitors.

**Customers are entitled to have the largest choice of goods and services available and to make their own decisions as to which goods and services to procure.**

**Do:**

- Maintain at all times Safripol's independence of judgement and action in designing, producing and selling its products. Avoid even the appearance of collusion with a competitor regarding these matters;
- Make decisions about territories, output and customers independently;
- Obtain as much information about competitors as you can through other channels and from published data; and
- Document the sources utilised to obtain information about competitors; i.e. write the name of the source and the date the information was published on the document.

**Do not:**

- Obtain information about competitors (particularly price information) directly from competitors; and
- Enter into an agreement, gentlemen's understanding, or discussion with any competitor concerning market shares, distribution practices, sales territories or production volumes.

**Do not arrange any market allocation with competitors!**

### **3.1.3 Collusive tendering or bid rigging**

The competitive bidding process is central to a free-market economy. Under no circumstances will we discuss our tender, or our intention to participate in a current and future tender process, with a competitor. Safripol may, however, after a tender has been awarded, follow conventional routes to establish why a tender has succeeded or failed.

#### **Do:**

- Make decisions to bid independently, and submit your application independently.

#### **However:**

- Sometimes it is possible to establish a bidding consortium. The bidding consortium must ensure that it does not act in contravention of competition legislation.

#### **Do not:**

- Enter into any agreement, gentlemen's understanding or discussion with any competitor concerning bids or the intent to bid; and
- Discuss with competitors the details of the bid.

## **3.2 Information sharing**

### **3.2.1 Price information**

Regular and systematic exchange of specific information, specifically related to pricing or price structures, will be deemed by the competition authorities as behaviour that will likely lead to coordinated conduct and therefore be in contravention of the competition legislation.

### **3.2.2 Information other than price information**

All business decisions, e.g. the decision as to how much of a product to produce, or what products to produce, must be made independently. It would be a violation of competition law to make these decisions in the context of an agreement with our competitors.

All companies are entitled to decide with whom they will do business. However, these decisions must be made independently, not through an agreement with competitors. For example, if we choose not to sell our products to a certain company, or to buy products from that company, those decisions are simply business judgements that all companies are entitled to make.

However, if we agree with other companies that, as a group, we would not buy from or sell to a certain company, that could be a violation of competition law.

### **3.2.3 Information gathering system**

The establishment of a trade association and the sharing of certain information may be lawful. However, you need to be selective in relation to what kind of Safripol-specific information you share and to whom it is submitted.

### **3.2.4 Marketing information**

Each company can independently distribute its price list or other marketing material to its customers.

#### **Do:**

- Inform Safripol's customers about our prices, terms and condition of sale and other trading conditions; and
- Be careful not to share information with competitors.

#### **However:**

- It may be possible to share historical information. However, such exchange should only be conducted after consultation with senior management or the competition law advisors.

#### **Do not:**

- Share sensitive market information with competitors, specifically in relation to price, output, discounts and market share.

### **3.2.5 Horizontal cooperation agreements**

Not all cooperation agreements between competitors are illegal. If these agreements fall outside the ambit of the *per se* contraventions, and result in efficiency gains that outweigh the negative effects of any restriction on competition, you may proceed to conclude the agreement. However, the competitive impact of such horizontal cooperation has to be assessed by the competition law advisors on a case-by-case basis.

**Do:**

- Consult with the competition law advisors should you wish to enter into a cooperation agreement with competitors in relation to:
  - ✓ Research and development;
  - ✓ Joint selling;
  - ✓ Joint bidding;
  - ✓ Joint purchasing;
  - ✓ Joint advertising;
  - ✓ Joint distribution and stockholding;
  - ✓ Technical standards; and
  - ✓ Supply or swap arrangements.

### 3.2.6 Trade associations

Trade associations could perform useful functions in areas such as technological development, consumer education and regulation. However, trade associations could also be a platform for coordination. The risk is that sensitive market information could be exchanged, e.g. information relating to prices, market share, customers, production capacity and business plans.

To minimise the competition law risk associated with belonging to trade associations, our competition law advisors should periodically review:

- The nature and operation of the trade associations to which we belong;
- The meeting agendas, with the purpose of identifying whether meetings are *bona fide*;
- All documents (such as minutes or speeches) distributed at the meetings; and
- All statistics and other information to be submitted to a trade association meeting.

If we become aware of formal or informal discussions at trade association meetings, including, but not limited to, discussions regarding prices, discounts, terms and conditions of sale, the exclusion of customers, refusal to deal with certain customers or standardisation of terms, the matter should be brought to the attention of senior management and the competition law advisors.

**Do:**

- Exchange industry experience;
- Carry out joint market research; and
- Agree on joint action in relation to government related issues and similar topics.

**Do not:**

- Attend trade association gatherings at which prices or any trading conditions are discussed; and
- Partake in a vote to exclude a certain individual or company from joining the association.

## 4 Restrictive vertical practices

### 4.1 Vertical arrangements

Recall that vertical agreements are agreements between buyers and sellers. Many times, vertical agreements could lead to significant efficiencies. However, they could also harm competition, which forms the basis for the Legislature's concern.

The Act prohibits anti-competitive vertical agreements if they cannot be justified on pro-competitive, efficiency or technological grounds. In other words, vertical agreements are only acceptable if the firm concerned is able to show that the vertical agreement is beneficial to the economy. Therefore, except for resale price maintenance (discussed below), all anti-competitive vertical agreements are "rule of reason" contraventions.

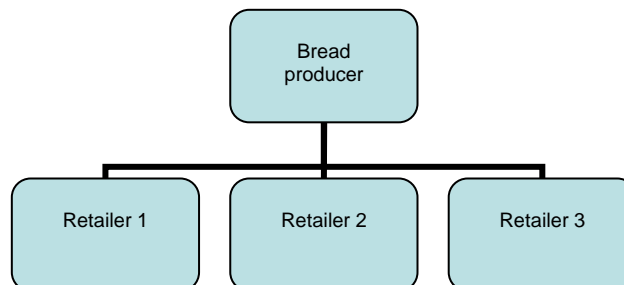
Typically, anti-competitive vertical agreements have four undesirable outcomes:

- Input or customer foreclosure;
- The raising of rivals' cost; and
- Coordinated conduct.

We explain each of these phenomena in turn.

#### 4.1.1 Input and customer foreclosure

Input foreclosure occurs when a customer is prevented from sourcing products ("inputs") from an upstream firm. Customer foreclosure is the opposite, and occurs when a supplier is prevented from selling its products to customers. Consider the diagram below.



Let's say the bread producer enters into an agreement to only supply the first retailer with bread. If the bread producer is the only producer of bread in the market, the remaining retailers will be foreclosed from an input, i.e., they will suffer from "input foreclosure". But let's say another bread producer enters the market, and enters into exclusive arrangements with all three bread retailers. Now, the original bread producer will not have a sales outlet any longer, and will be

foreclosed from customers. Thus, the original bread producer will suffer from “customer foreclosure”.

Any oral or written agreement or understanding with a customer that requires the customer to purchase all, or a substantial portion of its requirements for a certain product from Safripol, or which requires that the customer does not handle products of our competitors, is prohibited, if the effect of such an agreement is to deny a substantial portion of a market to Safripol’s competitors. Any arrangement of this nature should be utilised only after consulting with the competition law advisers.

#### **Do:**

- Aim for Safripol to be awarded “most-favoured” supplier status;
- Under certain circumstances, it may be lawful to forbid a distributor to sell or manufacture competing products. Consult with the competition law advisors before concluding such an agreement. Exclusivity provisions could in certain circumstances be in order.

#### **Do not:**

- Simply forbid or prohibit the selling or buying or manufacture of competing products without first taking proper advice.

#### **Remember that Safripol is not obliged to supply every customer. However, Safripol must make this decision independently.**

Of course, prohibiting a firm from declining a contract is a limitation of its liberty. You are not obliged to supply a customer if sound commercial rationale exists to not supply a customer. Some commercial justifications for refusing to supply include:

- That the customer is not able to pay for the goods or services, or has an unsatisfactory track-record of past payments to the company;
- Certain commercial considerations, e.g. obligations to supply other customers in terms of contractual agreements; and
- Efficiency considerations, i.e. that it is not cost-effective to supply certain customers due to the nature of their product or distribution requirements.

#### **4.1.2 Raising rivals' cost**

Foreclosure does not need to be absolute in order to pose competition concerns. A vertically integrated seller, i.e. a seller that operates upstream and downstream, could enter into discriminatory agreements with other downstream players, which would also be competitors of the seller, albeit in the downstream market. For example, the upstream division could charge the other downstream players higher prices for the input than for its in-house division. As a result, the players that are being discriminated against could have a higher costs structure than their rival, who is being favoured by the upstream division by paying lower prices for the product.

Let's look at the following example: A bread producer, which also owns its own retail outlet, charges its own division R2.00 per bread. However, it charges other retail outlets R3.00 per bread. The bread producer "raised its (downstream) rivals' cost" as the competitors of its downstream division pay R1.00 more for the same product bought from the bread producer.

#### **4.1.3 Coordinated conduct**

Sometimes, a vertical agreement could facilitate the exchange of pricing and other sensitive information between competitors. For example, a vertically integrated seller could utilise the commercial information of one of its independent customers to coordinate conduct with its own in-house downstream division.

For example, let's say that a bread producer owns its own retail outlet, outlet A. Only one other retail outlet, outlet B, exists in the small town. The bread producer decides to enter into a supply agreement with B, and gets to know some valuable commercial information of this retailer, e.g. B's cost structure, the quantities supplied to B, or the quality of the products supplied to B. Based on its knowledge of B's business, the supplier now proposes to B to alter its strategies in ways to benefit both A and B. For example, it proposes to B to only supply certain areas, while A supplies to other areas; or to price at a level equal to A. In the process, competition is harmed.

### **4.2 Resale Price Maintenance**

In terms of the Act, it is *per se* prohibited for a firm to engage in resale price maintenance ("RPM"). Simply, a supplier may not dictate to customers the price at which its product is resold. RPM is only allowed:

- If the supplier makes it clear that the price recommendation is not binding; and
- If the words "recommended price" appear next to the stated price.

Regarding RPM, some guidelines include:

- Do not deny a customer any benefits or support (whether price or non-price related) based on its non-compliance with recommended resale prices. Resale price agreements with dealers, distributors, wholesalers or retailers are prohibited, whether formal or informal, or direct or indirect; unless the prices are recommended only.

- In some instances, a customer could complain that the price of a competitor (which is one of our customers) is “too low”. Do not take action against the low-priced customer on the basis of such a complaint. The Competition Tribunal may find that you have conspired with the complaining customer to fix resale prices.

### **Do:**

- Treat all your customers honestly and equitably, and in a manner that respects their independence; and
- If needed, make a non-binding price recommendation for resale of products and mark all statements as “recommended resale prices”.

### **Do not:**

- Enter into any agreement, understanding or discussion with, or use any pressure or coercive tactics on, any customer that would restrict the prices at which, or the terms or conditions under which, a customer may resell;
- Encroach upon the customer’s independent decision-making in relation to prices, or coerce adherence to any price level or relationship;
- Obtain the customer’s adherence to suggested retail prices by denying or threatening not to supply product, or by increasing the price of the product; and
- React to a complaint by one or more customers that the final prices of another customer are too low, by taken action against the low-priced customer on the basis of that complaint.

## 5 Abuse of dominance

In terms of the Act, dominant firms must comply with an additional set of rules. As a result, dominant firms must be extra careful when conducting business in South Africa.

By their nature, dominant firms have the power to engage in exploitative and exclusionary behaviour. A firm acts exploitatively when it operates inefficiently or charges higher than competitive prices. It acts exclusionary when it strategically prevents or impedes other players from entering into, or expanding within, a market. Exploitative and exclusionary conduct could hamper competition in a market. As a result, the Act prohibits such behaviour.

It is important to note that only the *abuse* of dominance is prohibited; not dominance itself.

**The larger its market share, the more careful a company must be when conducting business in South Africa.**

### 5.1 The definition of dominance

Dominance could only exist within a context, which is the “relevant market”. Simply put, a relevant market consists of a firm and its viable competitors. The nature of the industry, as well as the nature of an allegation, determines how a market is defined. Among others, economists consider the nature of the product, the nature of business relationships and industry dynamics.

A firm could be regarded as dominant based on its market share or its ability to exert “market power”. In terms of section 1 of the Act, a firm has market power if it has the power to “control prices, exclude competition or behave to an appreciable extent independently of its competitors, customers or suppliers”. In terms of section 7 of the Act, a firm is deemed to be dominant in a relevant market if:

- It has at least 45% of that market;
- 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.

### 5.2 Prohibited practices by dominant firms

In terms of the Act, dominant firms should refrain from certain conduct. This includes:

- Charging an excessive price;
- Refusing a competitor access to an essential facility;
- Excluding competitors, e.g. by:

- Requiring or inducing a supplier to not deal with a competitor;
  - Refusing to supply scarce goods to a competitor when supplying these goods is economically feasible;
  - 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 the contract;
  - Selling goods or services below their marginal or average variable cost;
  - Buying up a scarce supply of intermediate goods or resources required by a competitor; and
- Discriminating on the basis of prices, rebates, allowances, rebates, credit given, the provision of services or the payment for the services.

We briefly discuss each of the above below.

### **5.2.1 Charging an excessive price**

Dominant firms are prohibited from charging excessive prices. In terms of the Act, an excessive price means “a price for a good or service which bears no reasonable relation to the economic value of that good or service”. In practice, a firm is presumed to have been engaged in excessive pricing if:

- The price bears no reasonable relation to the economic value of the product;
- The dominant firm has no effective competitors; and
- The dominant firm has engaged in ancillary exclusionary conduct aimed at keeping their prices at their current levels.

We are aware that the case precedent dealing with excessive pricing is extremely fluid at the moment. It would be prudent to engage with our competition law advisors should we doubt whether our prices are excessive, or should further developments arise in this arena.

### **5.2.2 Refusing access to an essential facility**

It is prohibited for a dominant firm to refuse a competitor access to an “essential facility”. In terms of section 1 of the Act, an essential facility means an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers. Simply put, an essential facility must be shared on fair terms.

It appears that the essential facilities argument could only apply in circumstances that meet certain strict requirements. Arguably, to establish liability under the essential facilities doctrine, an applicant must prove:

- That the facility is “essential”;
- That the monopolist controls the essential facility;
- That a competitor is unable to practically or reasonably duplicate the essential facility;
- That the monopolist has denied access to or the use of the facility to a competitor; and
- That it is feasible for the monopolist to provide the facility to its competitors.

The relevance of this *per se* clause would depend on a series of industry-specific and firm-specific factors. It would be prudent to engage with our competition law advisors should such a practice exist or has existed in the past.

### **5.2.3 Excluding customers**

It is prohibited for a dominant firm to engage in exclusionary acts, unless good business rationale exists. Exclusionary conduct is “rule of reason” conduct, as the respondent may show that the anti-competitive effects of its exclusionary act is outweighed by the technological, efficiency or other pro-competitive gains associated with the act.

A number of exclusionary acts are listed in the Act. We briefly look at the specific examples.

#### **5.2.3.1 *Incentivising customers or competitors to not deal with competitors***

Likelihood always exists that a dominant firm uses its position in the market to prevent its competitors from enjoying downstream opportunities (to sell their products) or upstream opportunities (to obtain inputs). Therefore, in terms of the Act, a dominant firm is not allowed to incentivise customers or suppliers to not deal with competitors.

Two general guidelines include:

- A dominant firm may not influence transaction decisions when it is not a party to that transaction; and
- A dominant firm may not reward customers or suppliers for not transacting with competitors.

#### **5.2.3.2 *Refusing to supply scarce goods***

In terms of the Act, a dominant firm must supply scarce goods to a competitor when it is economically feasible to do so. Sometimes, dominant firms operate at various levels in the

supply chain; thus, they are suppliers and users of a product. The prohibition is therefore based on the likelihood that a vertically integrated dominant firm will favour itself (or certain preferred customers) during instances of scarcity.

For example, let's say that the owner of a large forestry plantation also operates its own sawmill, sawmill A. In the downstream market, sawmill A competes with sawmill B. Normally, the owner of the plantation supplies half of its sawlogs to A, and half of its sawlogs to B. However, due to a fire in the plantation, a large portion of the sawlogs became damaged, i.e. they cannot be resold. The owner of the forestry plantation decides to channel all the remaining sawlogs to its own operation, i.e. sawmill A. Now, sawmills B is foreclosed from a scarce good, without which it cannot continue with its business.

Of course, prohibiting a dominant firm from declining a contract is a limitation of its liberty. Remember that exclusion constitutes "rule of reason" conduct and that the dominant firm may defend its actions on legitimate commercial grounds.

#### **Do not:**

- Refuse to supply scarce goods to a competitor when supplying those goods is economically feasible; and
- Refuse to deal with a competitor if the decision is not based on objective business criteria.

### **5.2.3.3 Tying Arrangements**

Sometimes, a firm sells one product on condition that a customer buys another product. This practice is called "bundling" or "tying". Dominant firms tie products, because it serves to extend their dominance to a second market. Customers usually suffer from illegal tying, because the effective price paid for the tied product has no regard to the demand and supply considerations associated with the tied product.

In some industries, tie-ins may lead to the evasion of price regulation, as it could lead to the avoidance of the statutory maximum prices stipulated for the primary product.

Still, tying constitutes a "rule of reason" contravention. Dominant firms could likely defend tying on the basis of cost-savings, quality and safety considerations. Promotions that include tying should be run by the competition law advisors.

The following guidelines exist:

- Generally, packaged offerings are lawful as long as the customer is free to buy the products separately; and
- Any decision to refuse to transact with a customer based on its refusal or inability to purchase a tied offering must first be reviewed by the competition law advisors.

**Do:**

- Enable customers to buy products separately even though they constitute complementary products.

**However:**

- Packaged discounts are normally lawful as long as the customer is free to buy the products separately. Nevertheless, packaged discounts should not be offered without prior consultation with the competition law advisors.

**Do not:**

- Make the supply of the product conditional upon the obligation to buy other products of another nature and/or to enter into a service agreement for any kind of service; and
- Refuse to do business with a customer on the basis of its refusal or inability to purchase more than one of our products.

#### **5.2.3.4 *Predatory pricing***

In terms of the Act, we are not allowed to sell our products below cost. Competitors could struggle to sustainably match the low prices and could therefore be eliminated as a result of the pricing practice. Prices at unprofitable, marginally profitable or discriminatory levels could be construed as evidence of predatory conduct.

#### **5.2.3.5 *Buying up a scarce supply of intermediate goods or resources***

It is prohibited for a dominant firm to buy up a scarce supply of intermediate goods or resources. A competitor could be harmed due to an escalation in its input costs. However, a dominant firm may show that the stock was required to meet its own needs (i.e., that it acted in terms of a commercially legitimate procurement policy) and that its actions weren't aimed at raising its rivals' costs.

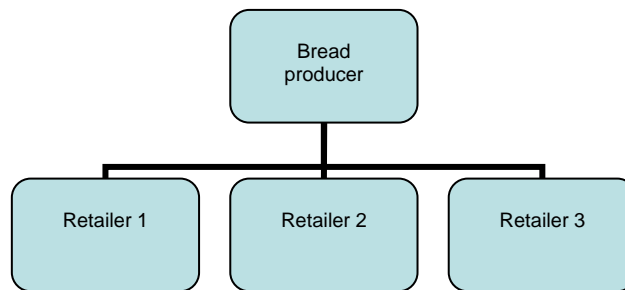
#### **5.2.4 *Price discrimination***

Dominant firms are not allowed to discriminate between customers.

Illegal discrimination occurs:

- When factual evidence prevails of a difference in price, discounts, allowances, rebates, services or payment for the services;
- When the differentials relate to equivalent transactions; and
- When the differentials lead to a significant lessening or prevention of competition in a market.

Let's explain by means of an example.



Typically, a bread producer price discriminates when it charges R3.00 per bread to Retailer 1, but R4.00 per bread to Retailer 2 and Retailer 3. Regardless of the above, a dominant firm may defend its differentials on the basis that the differentials relate to:

- Cost differences associated with the provision of the goods or services to the customers under consideration;
- An attempt to meet the price of a competitor in good faith; and
- A response by the dominant firm to changing conditions in the market, including the deterioration or obsolescence of goods, liquidation and sequestration procedures or the discontinuance of business.

This is a complex area of the law. It is therefore advisable that the competition law advisors be contacted should differential pricing practices be introduced, reviewed or amended. These practices could include:

- Rebate structures;
- Discount structures; and
- Payments or allowances to a customer for any services or facilities furnished by or for the customer, e.g.:
  - Merchandising allowances and prices;

- Free products; and
- Introductory allowances.

**Do:**

- Design rebate schemes that do not discriminate between similar customer groups; and
- Offer conditions of sale that do not discriminate between similar customer groups.

**Do not:**

- Calculate rebates per customer with reference to the aggregate performance of all customers.
- Discriminate between similar customer groups in respect of aspects such as rebates, discounts, delivery time and conditions of sale.

### **5.3 Intellectual property**

Intellectual property rights are exclusive in nature, and could contain certain permissible restrictions. For example, the owner of the intellectual property could distribute licenses in return for a fee and royalty, and could place restrictions on the licensee pertaining to, e.g., territory and volume.

In some instances, restrictions are not ancillary to the intellectual property rights. It is therefore imperative that all matters, arrangements or agreements involving intellectual property, be referred to the competition law advisors.

## 6 Documents

It is permissible to originate and maintain internal records, notes (e.g. about a telephone conversation) or other documents that, in future, may help to reconstruct developments and/or provide proof if needed. In general, internal files are a valuable source of information.

However, sometimes, internal documents can be misleading if they are not carefully drafted or if they are incomplete. Especially, if internal documents are interpreted out of context or isolated from other conclusive documents, a misunderstanding or misinterpretation of the particular document can occur. This is especially true with e-mail correspondence, which is sometimes written without the necessary care to the wording.

### **Apply the necessary care when originating letters, notes or e-mails.**

To avoid possible misunderstanding by outside parties (including the authorities) who, in some instances, may be inclined to read a particular interpretation into a document that was not intended, observe the following guidelines whenever you originate a business-related document:

#### **Do:**

- Speak to your legal counsel before documenting information on paper, disk or e-mail, if the issue you are about to address may involve a sensitive topic;
- Whenever you write something down, remember that it could be made public any day; and
- Clearly state the source of price information, so that the information does not portray an impression that it originated as a result of discussions with competitors.

#### **Do not:**

- Give the impression that a customer is getting special treatment without proper justification;
- Use power or domination vocabulary (e.g., “we will control the market”, or “we have now virtually eliminated the competition”), or use improper vocabulary (e.g. “please destroy/delete after reading”);
- Write down anything that could imply that prices are based on anything other than internal business judgment or publicly available information;
- Destroy a document before the date it would normally be destroyed in accordance with Safripol’s document retention program; and
- Destroy any documents when you become aware that the Competition Commission investigates any of Safripol’s practices.

