



# STS Association

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Edition 1

## **Competition Law Policy**

## 1 **Reason for Policy**

- 1.1 Whilst the STSA does not operate in any market *per sé*, it is an association of traders (members) who do operate in various markets, in some cases as competitors or potential competitors. Its members acquire, through the STSA, a platform to interact, albeit primarily in relation to the adoption of norms and standards for the metering of utilities.
- 1.2 Insofar as the members interact as aforesaid, the STSA must ensure that it creates an environment which precludes anti-competitive behaviour and encourages interaction which meets the pro-competitive purpose of the STSA.
- 1.3 If the STSA does not regulate its activities in accordance with a robust policy of the nature set forth herein, then the forum which it creates could be used (or be seen to be used) for anti-competitive behaviour by or between its members. This could in turn result in breaches of law and good practice pertaining to competition, and sanction by competition regulators against the STSA and offending members.
- 1.4 Accordingly, the STSA's intention is to implement a policy which encourages pro-competitive behaviour, and which minimizes the risks of breaches of law and good practice pertaining to competition.

## 2 **Scope of Policy**

- 2.1 This policy has been accepted by the STSA because the STSA adheres to the principles of fair competition and compliance with laws pertaining to competition.
- 2.2 The STSA wishes to create a transparent recordal of its position in relation to competition and related laws so that it can manage its own affairs consistently with that position, and so that its members are aware of and can manage their own affairs (insofar as they overlap with those of the STSA and its members) consistently with that position.
- 2.3 The members of the STSA are based in different jurisdictions internationally and are subject to different norms, standards and laws applicable to competition, and members employ their own individualised methods in competing for custom. This policy is accordingly not intended to constitute a guide or operating procedure for the ways in which the members of STSA conduct themselves in their own geographic markets. Rather, it is to highlight the principles to which the STSA adheres and what will be expected of members insofar as they interface with the STSA or with other role players in the market through their membership of the STSA.
- 2.4 Because the STSA is an association of traders as aforesaid, who may potentially be in a horizontal relationship (also known as competitors), the focus of this policy is upon that part of competition jurisprudence which deals with horizontal relationships and practices. This is

because for the most part, the STSA's very mandate is to provide services for persons who are or may potentially be in a horizontal relationship.

- 2.5 Notwithstanding the focus of this policy upon horizontal relationships and parties, the STSA does encourage behaviour by its members which does not offend against any principles of all competition jurisprudence, including restrictive vertical and unilateral conduct.

### 3 **Understanding the Principles**

- 3.1 Competition jurisprudence concerns itself in general terms with regulating fair play in markets. Three broad categories of conduct usually require consideration. They are:

- horizontal agreements or practices between competitors or potential competitors which have the effect of distorting markets – as aforesaid, this is the focus of this policy;
- vertical agreements or practices between customers and suppliers which have the effect of distorting markets;
- conduct by dominant players in a market which has the effect of distorting that market.

- 3.2 The following are generally considered to be universally limited or restricted types of horizontal agreements or practices:

- competitors or potential competitors fixing or homogenizing prices, output or other terms of doing business;
- competitors or potential competitors allocating markets (geographic or product markets) between each other;
- competitors or potential competitors engaging in collective boycotts, for example in respect of products or customers.

- 3.3 A horizontal agreement or practice is not necessarily characterised by any particular formality. A “nod”, “wink” or “understanding” is sufficient. Even the disclosure of information by one competitor to another can lead to or constitute a horizontal agreement. Competition laws can accordingly be breached inadvertently where the anti-competitive effects are an unintended consequence of an innocent action.

### 4 **The STSA position**

- 4.1 The STSA seeks through this policy to minimize the risk of the forum which it creates being used for anti-competitive effect, whether advertently or inadvertently.

4.2 The STSA will not countenance any intended or overt acts by its members *inter sé*, through or under the guise of the STSA which would constitute anti-competitive behaviour.

4.3 Likewise, the STSA will use its best commercial endeavours to provide and manage its various fora (as described further below) such that the chances of advertent or inadvertent breaches of competition law are precluded.

## 5 **Disallowed Conduct**

Instances of anti-competitive conduct are infinite and cannot all be listed in this policy. However, the following types of activities could be construed as or result in anti-competitive outcomes and they should be avoided:

5.1 the exchange between competitors of sensitive information (especially concerning prices, pricing, volumes, market shares, rebates, discounts, cost of production, strategic plans, prices of components, trading conditions);

5.2 spontaneous or frivolous remarks or suggestions at meetings or in correspondence regarding anti-competitive matters (because no party can predict whether such will be tacitly accepted or implemented);

5.3 suggestions by one competitor to the other to adhere to specified output levels, to allocate customers or territories, or to boycott certain customers or customer types;

5.4 the disclosure to a competitor of any information which the discloser would not ordinarily want the competitor to know if the discloser genuinely wanted to compete vigorously against the competitor;

5.5 the facilitation by the STSA of any of the anti-competitive activities mentioned above;

5.6 the requirement by the STSA that its members must adhere to specified pricing, trading terms or conditions, or that they are compelled (as a condition of membership) to use the STSA's specifications, contractual documentation and the like;

5.7 the disclosure by the STSA to one member of sensitive information of another member;

5.8 the suggestion by the STSA or by a member that another member or a supplier to or customer of a member has a weakness, lapse in business continuity, insufficiently robust financial resources, inappropriate health and safety policy etc;

- 5.9 the suggestion or subsequent practice to the effect that certain suppliers, resellers, customers should be avoided, treated differently or boycotted;
- 5.10 the exchange of information about “problem firms” in the market.

## 6 Qualified Allowances

Whilst, from the practical examples above, it may appear that all exchanges between competitors are precluded, and that all exchanges of information to do with competitors are similarly precluded, certain types of exchanges are, in specific circumstances, not contrary to law. A common sense approach must be adopted and the principle of fair play should always be the compass. The following are instances of activities between competitors which are not per sé anti-competitive:

- 6.1 the exchange of statistical, cost and other information may be permissible if it does not allow rivals to extrapolate specific data or identify trends that could be used to predict each other’s individual competitive actions (if an exchange is necessary, it ought to relate to historical data that is at least 12 months old and which is sufficiently aggregated to prevent identification of information on individual firms);
- 6.2 insofar as sensitive information must be exchanged, it should be handled in circumstances where all participants are clear as to the kind of information to be exchanged (and its use) and is accumulated and managed by an independent party who only disseminates that information amongst the sharing competitors in a sufficiently historical and aggregated manner;
- 6.3 insofar as sensitive information must be exchanged, that exchange must, in addition to being handled as aforesaid, be exchanged as infrequently as is reasonably practicable;
- 6.4 competitors may exchange general legal and economic information such as legal opinions and experiences, provided the information is generic and does not disclose sensitive information about any particular participant in the market;

- 6.5 discussions on joint statistics/market studies are generally not prohibited, provided no sensitive information is exchanged and the members do not draw “joint conclusions” on future market conduct;
- 6.6 standardised specifications and documentation can be agreed upon provided there is a pro-competitive gain (there is a reasonable and balanced justification) and provided that it is not understood that such standardised specifications and documentation are compulsory or cannot be deviated from;
- 6.7 competitors may engage in joint advocacy or lobbying, for example, to cause legal bills to be promoted or legislation challenged, provided that in doing so, they do not exchange sensitive information and do not tend to or embark upon homogenised business actions which they would not otherwise have embarked upon, but for the advocacy and lobbying in question.

## **7 The STSA Internal Organisational Measures**

In order to meet prevailing competition law principles, the STSA subscribes to the following organizational and management measures:

- 7.1 membership of the STSA will be voluntary;
- 7.2 membership of the STSA will be open to all qualifying candidates;
- 7.3 qualifying criteria will impose the minimum objectively justifiable requirements;
- 7.4 members in each membership category will be treated equally and be given equal opportunity;
- 7.5 members’ voting rights (insofar as it is applicable) will be equal and will not be weighted in favour of larger members or dominant members;
- 7.6 insofar as it is practicable, standards proposed by the STSA will be technologically neutral so that all like members can achieve the standards

- 7.7 where different standards are feasible, the final choice will insofar as it is practicable, follow an open discussion across the industry and will be rational (eg, that there are significant inefficiencies arising from alternative technology).
- 7.8 the scope of any agreement or specification which the STSA might suggest or subscribe to will not exceed what is necessary to ensure the purpose of the standardization (eg technological compatibility, levels of quality and/or security etc);
- 7.9 any specimen or standardised documents (not including technical standards or specifications) proposed or prepared by the STSA for use by members in their operations will be labelled as not being compulsory, and the use thereof will in fact not be compulsory;
- 7.10 non-members will have access to any specimen or standardised documents as referred to in 7.9 above;
- 7.11 the STSA will never impose or become involved with determining mandatory prices, terms or other requirements in relation to its members' products and services;
- 7.12 the STSA will appoint from its ranks a compliance officer who will be familiar with the tenets of competition jurisprudence insofar as it relates to achieving the principles in this policy;
- 7.13 the STSA will ensure that those from its ranks who convene meetings of members or participants (who are members) for group discussions understand the principles in this policy;
- 7.14 the STSA will ensure that meetings of members and group discussions are accurately minuted, without fear or favour;
- 7.15 the STSA will redirect or cancel proceedings at meetings (insofar as those from its ranks are present at such meetings) if it becomes apparent that the potential for a restricted or prohibited horizontal practice exists;
- 7.16 the STSA will caution members against restricted or prohibited horizontal practices, where their conduct at a meeting convened under the auspices of the STSA constitutes or might potentially constitute such a practice;

- 7.17 the STSA will, where it produces or supervises the production of agendas for meetings, ensure that no topics for discussion constitute, *ex facie*, a potential for a restricted or prohibited horizontal practice;
- 7.18 the STSA will, where it is responsible for the convening and supervision of a meeting involving its members, manage such meeting in accordance with the agenda in question insofar as that is practicable and dissuade the straying of topics into potentially anti-competitive areas;
- 7.19 agendas for meetings will not include open-ended items such as “miscellaneous” or “any other business”;
- 7.20 members will be encouraged to object and ask for a recess in order to consult with the chairman if there are discussions which are of an anti-competitive nature;
- 7.21 the STSA will manage the process it might embark on for gathering market-related information such that such processes are only embarked upon when absolutely necessary, and when doing so, shall ensure that its procedures in compiling, analysing and communicating information are sufficiently robust to avoid facilitating collusion amongst members or the exchange of sensitive information;
- 7.22 insofar as it is practicable, the STSA will use independent third parties to conduct any processes of gathering market-related information and will disseminate only aggregated, historical information to members;
- 7.23 the STSA will from time to time take legal advice from appropriately qualified legal practitioners and will keep abreast in relation to evolving principles of competition jurisprudence;
- 7.24 the STSA will, where appropriate, update and amend this policy to address prevailing competition jurisprudence and the evolution of the STSA’s role in the industry.
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