



South Africa: Competition Commission publishes Practice Note on the Promotion of Competition and Inclusion in Supplier Panels of Banks and Insurers

Overview

The Competition Commission in South Africa recently published a Practice Note on the Promotion of Competition and Inclusion in Supplier Panels of Banks and Insurers. This Note is intended to guide Banks and Insurers on the best practices and pro-competitive principles that can be applied when appointing suppliers to Supplier Panels (including conveyancing and automotive panels). Banks and Insurers should take measures to comply with this guidance, as non-compliance could attract enforcement action. Spheisihle Nxumalo, Associate, and Jarryd Hartley, Candidate Attorney, in the Antitrust & Competition Practice in Johannesburg, outline the details contained in this Note.

Contact Information

Jarryd Hartley
Candidate Attorney
Johannesburg

Spheisihle Nxumalo
Associate
Johannesburg

Lerisha Naidu
Partner
Johannesburg

In Depth

On 28 February 2022, the Competition Commission published a Practice Note on the Promotion of Competition and Inclusion in Supplier Panels of Banks (an entity registered as a bank in terms of the Banks Act) and Insurers (a legal person licensed as an insurer in terms of the Insurance Act, and any person acting on their behalf including brokers, intermediaries, underwriters and assessors). This Practice Note provides guidance on best practices and pro-competitive principles that can be applied when appointing suppliers to Supplier Panels of Banks and Insurers (which includes conveyancing and automotive panels) and is the culmination of various enforcement and advocacy engagements over a number of years. Supplier Panels are most commonly used where Banks and Insurers offer similar services to their customers over an extended period of time and thus need to procure certain

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goods and services for themselves or their customers on an ongoing basis. Banks and Insurers should take measures to comply with these guidelines as non-compliance may attract enforcement action and the exercise of the Commission's prosecutorial discretionary power under section 49B of the Competition Act ("**the Act**").

Scope of Application

The Practice Note is capable of applying to dominant and non-dominant Banks and Insurers.

In relation to dominance, the axiomatic but often understated principle is that a position of unrivalled dominance is not prohibited or even punishable under the provisions of the Act. Rather, it is the abuse of such a dominant position that attracts sanction. The Commission will consider a dominant Bank or Insurer's conduct to be an abuse of dominance under section 8 of the Act, where there are exclusionary standards and specifications set by firms to be met by prospective suppliers that seek to join their panels.

Non-dominant Banks and Insurers could also be investigated for anticompetitive conduct under section 5(1) of the Act, where there are long-term exclusive agreements concluded with their suppliers which result in foreclosure concerns.

The Practice Note also applies to Banks and Insurers vis-à-vis their primary service providers (i.e., companies contracted to manage Supplier Panels and/or allocation of work on behalf of Insurers) and secondary service providers (i.e., companies sub-contracted by the primary service providers). The Commission considers that such a relationship dynamic may facilitate market allocation cartels.

Anticompetitive practices in the appointment of, and allocation of work within, Supplier Panels

The Commission considers that the use of Supplier Panels increases the risk of the following practices, which may harm competition:

- **High barriers to entry:** This is often in the form of restrictive standards and evaluation criteria for appointment to panels (i.e. investment / capital requirements), which may exclude the entry and participation of new suppliers, particularly Small and Medium Enterprises (SMEs) and Historically Disadvantaged Individual (HDI)-owned companies.
- **Unfair allocation of work:** There may be unfair distribution of work among panel members, where some suppliers struggle to receive work despite being on the Panel, which may be attributed to market saturation or insufficient demand for a particular good or service.
- **Long-term exclusive agreements:** Long-term (exceeding five years) service level agreements (SLAs) are often renewed automatically and may require suppliers not to deal with other competitors. These agreements may also inhibit entry and participation of new suppliers, particularly SMEs and HDI-owned companies.
- **Lack of transparency on appointment criteria:** Prospective suppliers often have limited information on selection criteria, when new opportunities arise, and often are not given reasons for rejections of their applications to join panels.

- **Limited consumer choice to select suppliers from approved list:** Banks and Insurers select the suppliers from the panel themselves, and do not afford consumers with the opportunity to select a more cost-effective, geographically closer or more capable supplier from the approved list.
- **Supplier Panel subcontracting arrangements:** Subcontracting arrangements, where the establishment and management of Supplier Panels are outsourced to primary service providers who may sub-contract required goods or services to secondary service providers with whom they are often in horizontal competition, facilitates market allocation cartels and exclusionary practices — particularly where there is no oversight by the Bank or Insurer over these arrangements.

Competition-compliant principles for the establishment and management of Supplier Panels

The Guidelines propose these principles for Banks and Insurers when establishing and managing Supplier Panels, and for suppliers to consider when participating in these processes:

- **Fair and inclusive evaluation criteria for appointment:** Appointment criteria should not unnecessarily increase barriers to entry for suppliers. Selection of Supplier Panel members should be objective and suited to the scale and complexity of the type of work involved. Banks and Insurers should appoint as many suppliers as is economically feasible to Supplier Panels, particularly SMEs and HDI-owned participants.
- **Suppliers must comply with panel requirements:** Suppliers must be familiar with the standards and criteria of evaluation, ensure that they comply with these standards and criteria when applying for appointment to panels, request reasons for rejections of applications, and should make enquiries about rotating contract opportunities.
- **Fair allocation of work to suppliers on panels:** When establishing or reviewing a Supplier Panel, a Bank or Insurer should ensure fair allocation (by claim and rand value) by (i) deciding on a method to divide work between panel suppliers before inviting applications from new suppliers; (ii) considering implementing a panel rotation policy; (iii) considering fixing an upper limit for the amount of work that may awarded to each supplier; (iv) implementing a scoring or points system for appointment or allocation of work and enabling allocation to SMEs and HDIs.
- **Suppliers should support fair allocation of work:** Suppliers should familiarise themselves with the work allocation processes in use, communicate their capacity constraints, ensure that they provide timely and quality services when allocated work, and communicate to Banks, Insurers and consumers if they are unable to provide the service or meet deadlines.
- **Elimination of exclusive long-term agreements and reduction of contract periods:** Panels should only operate for a set time and then be reviewed. Contracts should persist for five years or less to allow rotation of work and open opportunities to suppliers, and longer periods should only be considered if supporting SMEs or HDIs. There should be no automatic renewals after five years without a competitive process in which all

suppliers are re-assessed as to whether they still meet the standards and evaluative criteria, and where new entrants are given an opportunity to be appointed.

- **Increase participation of SMEs and HDIs on Supplier Panels:** Banks and Insurers should appoint greater numbers of SMEs and HDIs to Supplier Panels and implement a competitive assessment for review of panel appointments with specific provision for appointment of SMEs and HDIs.
- **Measures to increase transparency:** Application processes and selection criteria should be transparent. This can be done by publishing standards and selection criteria for appointment to Supplier Panels on a website; publishing the list of approved suppliers on a website where consumers may access it; giving reasons when rejecting an application; considering a supplier review forum for reconsideration of rejected applicants; and keeping a database of previously rejected applicants and notifying previously rejected applicants of new opportunities.
- **Suppliers should support increased transparency:** Suppliers should support a transparent process by notifying Banks and Insurers when they experience challenges in accessing information on application processes, standards and selection criteria; and being transparent about their own quality, pricing, certifications or accreditations on skills, and capacity to complete the work.
- **Measures to promote consumer choice:** Banks and Insurers should allow and promote consumers' own choice to select approved suppliers from the panel, while balancing this against fair allocation of work. This may be done by implementing a system to allocate work to available suppliers and allow suppliers to indicate unavailability (i.e. for reasons of capacity constraints).
- **Suppliers should support measures to promote consumer choice:** Suppliers should not unduly influence consumers to not deal with competing suppliers and may decline work based on capacity constraints, but should not unreasonably decline work based on the value of the work or similar factors.
- **Monitoring of performance of Supplier Panels:** Banks and Insurers should monitor supplier performance to identify problems and identify which suppliers provide better value. This can be done by including a provision in SLAs providing for review of membership and removal if appropriate; periodic monitoring of performance of individual suppliers; routine monitoring for fair allocation of work; conducting reviews where mergers or investigations are launched by the Commission; and improving value given by Supplier Panel and enabling entry and participation of SMEs and HDIs.
- **Suppliers should participate in performance monitoring:** Suppliers should give Banks and Insurers the relevant information to monitor their performances with a reasonable time, and comply with process aimed at effectively monitoring Supplier Panels.

Supplier Panel subcontracting arrangements must comply with the Act and this Note: Banks and Insurers must ensure that if they engage in subcontracting agreements, the subcontractors obligations and practices comply with the Act and this Note. They should further consider adopting a framework to ensure the subcontractor practices are aligned with the Act and this Note (particularly in respect of allocation of work, creation of subpanels, and rules and regulations for selecting secondary service providers). Further, these arrangements should not create or facilitate hubs for cartel conduct. Banks and Insurers should continuously maintain oversight over Supplier Panels, even if they have outsourced their Supplier Panel management responsibilities.

While the Practice Note is not binding, compliance with it is crucial to mitigate exposure to enforcement action. Banks and Insurers are encouraged to seek antitrust legal advice in relation to Supplier Panel arrangements to ensure compliance with the Act.

Keywords (Use Title Case)

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