

**Standard Operating Procedure and Policy (“SOP”):**

**SAMED COMMITTEES**

**Version 14**

**Approved by SAMED Board on: 23 July 2020**

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## **1. PURPOSE OF THIS SOP**

- 1.1. This SOP establishes –
  - 1.1.1. The process for the composition, selection and approval of SAMED Committees to ensure fairness, consistency and alignment with SAMED’s strategic objectives;
  - 1.1.2. The general terms and reference for SAMED Committees;
  - 1.1.3. The process for establishing specific terms and references, as well as a work programme for each Committee for a 12-month period;
  - 1.1.4. All administrative arrangements relating to meetings, minutes and similar arrangements;
  - 1.1.5. Setting basic procedural rules for the running of SAMED Committees;
  - 1.1.6. Rules for report-backs and mandates from the SAMED Board.
- 1.2. This SOP is adopted under the Constitution of SAMED.

## **2. PROCEDURE FOR AMENDMENTS AND APPROVAL OF THIS SOP**

- 2.1. This SOP may be amended by the SAMED Board from time to time as is permitted in the SAMED Constitution.
- 2.2. All amendments shall be recorded by the Executive Officer and implemented on a date agreed by the Board.
- 2.3. All amended versions shall have the suffix “Version [number] of [year]” and shall numerically follow the previous version’s number.
- 2.4. Previous versions of the SOP and reasons for changes, shall be archived for 5 years for record-keeping purposes.
- 2.5. All Committee members shall be provided with the latest version of the SOP when becoming a member of a SAMED Committee together with all subsequent amended versions.
- 2.6. The Chairperson of each Committee shall go through this SOP with all Committee members at the first meeting after its adoption or amendment and again annually.
- 2.7. The SAMED Executive Officer will ensure that this SOP is circulated to any new Committee members.

## **3. STATUS OF THE SOP**

- 3.1. This SOP shall be binding on all SAMED members and persons elected, appointed or designated to fulfill duties on behalf of SAMED.
- 3.2. In the case of a conflict between this SOP and the SAMED Constitution, the Constitution will supersede this SOP and the Board shall correct such conflict at the next board meeting after such conflict has come to its attention.

## **4. FORMATION AND COMPOSITION OF SAMED COMMITTEES**

- 4.1. The Board shall review annually and form the Committees it requires to undertake the work to fulfill its strategic objectives. It is recommended that this align with board elections and / or the board strategic planning session.
- 4.2. The number of individuals on each Committee shall be tailored according to the needs of the specific strategic objective allocated to such a Committee, but shall be guided by the following principles:
  - 4.2.1. Committees should not be too large to become unmanageable and ineffective – it is recommended that Committees not be larger than 12 individuals and not smaller than 5

- individuals; however the numbers of Committee members will be at the discretion of the Chairperson.
- 4.2.2. Representation of different types of SAMED member companies, skills and expertise of the specific individual, and how such skills and expertise will enhance the achievement of the specific strategic objective(s);
  - 4.2.3. Chairpersons are urged to ensure that there is racial and gender representation in support of the SAMED transformation policy and Committee objectives;
  - 4.2.4. Chairpersons are urged to appoint individuals who may benefit from the exposure and experience gained by serving on a specific SAMED Committee;
  - 4.2.5. Chairpersons are urged to ensure that their Committees think about succession planning and building new capacity for the association;
  - 4.2.6. External persons acting in an advisory capacity to the Committee shall only attend SAMED Committee meetings by invitation and with the approval of the Chairperson who shall advise the SAMED office of such invitation. This provision shall not be construed as preventing any Committee from inviting any person to address it as an invited speaker or presenter, but said person shall only attend the Committee meeting for the duration of their required expertise;
  - 4.2.7. Committees may, on application to and after approval by the Board, co-opt individuals who are non SAMED members to the Committee on the basis of that particular individual's skills, experience, knowledge or contacts, with a view to assist the Committee in achieving particular Committee objectives.
  - 4.2.8. A committee member shall cease to participate in a committee if he or she –
    - 4.2.8.1. absents him or herself from three consecutive committee meetings without tendering an apology for his or her absence; and/or
    - 4.2.8.2. fails to attend at least 50% of committee meetings, even if having tendered apologies, in any financial year and
    - 4.2.8.3. the Chair, in conjunction with the Vice Chair and SAMED Executive Officer resolves that he/she be removed from the committee
    - 4.2.8.4. In the event that the person happens to be the Chair or Vice Chair in terms of clauses 4.2.8.1 and/or 4.2.8.2 then the Executive Officer will bring this to the Board's attention for actioning.
- 4.3. The Board shall follow the following process in the appointment of Committees:
- 4.3.1. Aligned with the SAMED strategic plan, a Board decision is made on types of Committees needed
  - 4.3.2. SAMED Ordinary Members, SAMED Association Members (including member companies of Association Members) and SAMED Associate members are invited to nominate individuals who are employed by their company to specific Committees, and who are experienced/skilled and have the time available to contribute to Committee work.
  - 4.3.3. Nominations will be circulated to the entire committee, however the Chairperson and Vice-Chairperson(s) of the specific Committee (refer par 6 on appointment of Committee Chairpersons) will decide on acceptance thereof.
  - 4.3.4. Individuals appointed to Committees must be informed of their appointment at the earliest possible opportunity and their appointment communicated to the SAMED Office, SAMED Board, Committee members and the SAMED members.
- 4.4. Vacancies on SAMED Committees will be filled at the discretion of, and by, the Committee Chairperson and Vice Chairperson.

## **5. MANDATES AND TERMS OF REFERENCE OF COMMITTEES**

- 5.1. Each Committee shall develop a programme of action based on the overarching mandate it receives from the SAMED Board as an outcome of the SAMED Annual Strategic Plan.

- 5.2. Each Committee shall only be empowered to act within the Committee programme and activities as approved by the SAMED Board.
- 5.3. Ad hoc projects may only be embarked upon with Board approval.
- 5.4. Committees shall only have that decision-making power, that is afforded to them by the Board and no Committee's decisions shall bind SAMED or the SAMED Board.
- 5.5. Committees shall investigate matters within the scope of approved work plans, draft position statements, submissions and the like, and shall put such matters to the SAMED Board for approval prior to putting any such recommendations, positions or the like to outside stakeholders.
- 5.6. Committees may, within the scope of approved work plans, meet with healthcare stakeholders, but unless position statements and documents have been approved by the Board, Committees should make clear that their meetings are pursuant to their investigative powers, and that they are unable to commit to anything on behalf of SAMED.
- 5.7. Where SAMED representation is required, only individuals who are members of SAMED Committees and SAMED office staff, together with if deemed necessary, Board members may attend meetings with external stakeholders. Consultants and advisors may only attend with explicit Board or Committee approval and with a clear rationale why such attendance would be necessary. Such representation will be decided upon by the Committee Chairperson.
- 5.8. Committees are empowered to divide work amongst their members, according to the approved work programme, into subcommittees, provided that all subcommittee work is brought back into the full Committee for final consideration.
- 5.9. Committees may request the Board to re-open a matter and provide it with a mandate to take (further) action in investigating a matter.

## **6. CHAIRPERSONS AND VICE-CHAIRPERSONS OF SAMED COMMITTEES**

- 6.1. The Committee(s) will appoint the Chairperson and Vice Chairperson for a tenure of 1 year, provided that no person shall be elected Chairperson or Vice-Chairperson, respectively, for more than four consecutive years. In this regard, the SAMED office will manage the nomination and/or voting process. If a Chair steps down the Vice Chair will assume the role.
- 6.2. Either the Chairperson or Vice-Chairperson must be a board member unless otherwise approved by the Board.
- 6.3. The role of the Chairperson is to set the agenda, oversee the Committee and its work, and ensure feedback and accountability to the Board on Committee progress.
- 6.4. The role of the Vice-Chairperson is to stand in for the Chairperson when the Chairperson is unavailable or unable to fulfil his/her duties and to support the Chairperson with ensuring all administrative and procedural duties are fulfilled.
- 6.5. The Chairperson and Vice-Chairperson shall assist the SAMED Executive Officer /Secretariat in ensuring compliance with all administrative and procedural requirements of the Committee.
- 6.6. The Chairperson shall, with the Executive Officer and in consultation with the SAMED Executive Officer schedule the dates for all the specific Committee meetings for the coming 12 months, and the SAMED Executive Officer shall ensure that there are no conflicts with other Committee meetings, and/or with significant health sector events.
- 6.7. The Chairperson in conjunction with the SAMED Executive Officer shall decide whether an external consultant or advisor may access Committee minutes and/or other documents, bearing in mind the role and function of such an external person in the Committee.

## **7. PROCEDURES, ADMINISTRATION AND COMMUNICATION**

- 7.1. Each Chairperson shall ensure that, in each Committee, a person is made available to take minutes. This person may be a staff member of SAMED, of the Chairperson's member company, or an individual serving on that Committee.

- 7.2 The Chairperson shall set the agenda for each meeting in line with the Committee's approved work plan and the minutes of the previous meeting and cause such agenda to be circulated to the Executive Officer and all Committee members at least one week prior to the meeting. In the event of an impromptu meeting being called, the Chairperson will endeavor to circulate an agenda as quickly as possible prior to the meeting.
- 7.3 Committee members may be invited prior to the sending out of a final agenda to provide agenda items, which fall within the Committee's mandate, to the Chairperson.
- 7.4 Meetings dates and times shall only be rescheduled if both the Chairperson and Vice-Chairperson are unavailable to attend such a meeting.
- 7.5 All Committee members shall be copied in on all matters pertaining to the Committee and its work. Side-bar discussions should be avoided, as it could cause unnecessary conflict within Committees. This provision shall not prohibit the Chairperson, Vice-Chairperson and Executive Officer from discussing how or whether matters are to be proceeded/progressed. In cases of dispute, the SAMED Chairperson shall adjudicate the matter.
- 7.6 Signed attendance registers shall be kept of each Committee meeting. The Chairperson shall cause minutes to be kept using the SAMED template, and ensure that minutes are signed and action items executed.
- 7.7 In general, all Committee documents and information shall be accessible only to Committee members and not circulated further, unless approved by the Board and marked for distribution to the general membership of SAMED. Where the SAMED Executive Officer is unable to attend meetings, s/he must receive all Committee documents for record-keeping in accordance with the SAMED Constitution.

## **8. QUORUMS AND DECISION-MAKING**

- 8.1 At least 50%+1 or 8 individuals (whichever is the lesser) have to be present in a meeting to constitute a quorum. If within five (5) minutes of the fixed time a quorum is not present, the meeting shall stand adjourned to such date and place as the chairperson of the meeting shall decide and written notice of the adjourned meeting shall not be required to be given to committee members. At such an adjourned meeting the committee members present shall be deemed to be a quorum. However, the Chairperson needs to exercise good judgment when it comes deciding on a quorum.
- 8.2 Voting on matters where consensus is not achieved shall be by way of "majority rule". In the case of equality of votes, the Chairperson shall have the casting vote. The majority opinion shall then be furnished to the Board for decision making. Proxies on matters requiring votes are permitted.
- 8.3 It is not permitted to have an alternate person representing an individual appointed to a Committee. Committee members are there in their own right and not as representatives of their respective companies.

## **9. REPORT-BACKS, FEEDBACK AND EVALUATION**

- 9.1 The performance of each Committee shall be tracked at each Board meeting against the SAMED strategic objectives and the approved work plan of each Committee.
- 9.2 Each Committee shall also track its own progress using the standard SAMED templates and/or report forms and, if required, request amendments to its work plan or direction from the Board.
- 9.3 The Chairperson of each Committee shall ensure that the requisite templates and/or reporting forms are completed and circulated to the Board prior to each Board meeting, for interrogation by Board members.
- 9.4 All draft position papers, research outcomes, letters and the likes shall be included as part of the specific Committee's report-back to the Board.

- 9.5 If there are no approvals required or contentious areas that require Board attention, the report of a specific Committee can be noted by the Board.
- 9.6 At the end of each strategy-year, the Board shall evaluate the overall performance of each Committee against the strategic objective and against the Committee's approved work plan. The Board shall give due consideration to special feedback to be provided by each Committee as to their performance, what they predict the challenges in the next 12 months to be, and what they would recommend be included in the subsequent strategic direction of SAMED.

## **10. REMUNERATION, DISBURSEMENTS AND OTHER COSTS**

- 10.1 Reimbursement for services rendered is payable by the Member company whose employee renders services to the Committee, which includes travel, accommodation, parking, meals, photocopies, electronic and mobile communications and any other expense.
- 10.2 SAMED will not provide any advances to cover any costs relating to Committee work as outlined in 10.1.
- 10.3 Consultants and or/Advisors serving as a member of a committee will not be remunerated for Committee or SAMED work. The SAMED Executive Committee will make decisions on exceptions to this rule.
- 10.4 Should an individual represent SAMED at a national event (Parliament, national conferences, national department meetings, international events, etc.), which attendance shall only occur with Board approval, SAMED may, in its discretion, fund the costs associated with such a person's travel and accommodation according to the relevant SAMED Policy prevailing at such time.

## **11. COMMITTEE EXPENDITURE**

- 11.1 Committees must submit their operating budget to the SAMED Executive Officer and Treasurer for the ensuing year by the end of September of each year.
- 11.2 The SAMED Executive Officer and Treasurer will review and may amend Committees' budgets as they see fit.
- 11.3 This budget will be incorporated into the overall SAMED budget which will be submitted for SAMED Board approval by the second last Board meeting of each year.
- 11.4 Subject to such approval, the expenditure may take place within budget at the discretion of the Committee.
- 11.5 The expenditure must however, be approved by the Committee and the Executive Officer and Treasurer.
- 11.6 No other expenditure may be incurred by the Committee.
- 11.7 Should the Committee wish to exceed their budgeted expenditure, Board approval is required prior to such expenditure being approved.

## **12. COMPLIANCE MATTERS**

- 12.1 Committee activities should align with the overarching scope of the SAMED Constitution, and with due regard to the provisions of King IV, the Companies Act of 2008 and the regulations thereto.
- 12.2 Special care should be taken in relation to Competition Law. All Committee members must ensure they are familiar with and understand the following Competition Law Compliance Guidelines for SAMED and SAMED Members including "Do's and Don'ts".

## **13. COMPETITION LAW COMPLIANCE GUIDELINES**

### **13.1 Introduction**

SAMED brings together suppliers and others involved in the South African Medical Device sector to discuss issues of industry-wide importance. In particular, Members may actually or potentially compete directly with each other and so both individual SAMED Members and the Association have to comply fully with South African Competition law.

It is the responsibility of SAMED and each of SAMED's Members individually, to ensure compliance with competition law. This document contains guidelines which will help ensure compliance. SAMED members should raise any concerns about suspected anti-competitive conduct with SAMED in addition to informing their company counsel.

### **13.2 Associations and competition law**

When considering associations from a competition law perspective, two forms of potentially anti-competitive conduct immediately come to the fore.

The first concerns agreements, understandings, decisions or recommendations made by the Association, which may contravene outright prohibition on price-fixing, market allocation or collusive tendering contained in section 4(1)(b) of the Act or have anti-competitive effects as envisaged in section 4(1)(a) of the Act.

The second concerns the facilitation, by the Association, of the exchange of commercially sensitive information which may in itself amount to an anti-competitive agreement between competitors or may result in the replacement of individual conduct with a co-ordinated conduct by members.

### **13.3 The prohibition of anti-competitive agreements – general**

The Competition Act 89 of 1998 prohibits competitors (which include potential competitors) from concluding agreements or understandings which restricts competition or from operating in a co-ordinated manner. In particular, price fixing, dividing markets and collusive tendering are strictly prohibited.

Agreements between parties in a vertical relationship (i.e. at different levels of the supply chain) are prohibited if they restrict competition. However, the practice of minimum resale price maintenance is prohibited outright. This refers to an agreement between a supplier and a customer in terms of which that customer must sell the supplied product on to its customers at a price determined by the original supplier, rather than by market forces.

No Member should ever discuss or be involved in any of the following anti-competitive activities or agreements:

- 13.3.1 price-fixing, including the co-ordination of prices, discounts or any other element of pricing, and even discussing prices with competitors;
- 13.3.2 market division such as the allocation of customer groups or territories between competitors;
- 13.3.3 agreements on investment levels or production quotas;
- 13.3.4 the exchange of competitively sensitive information, for instance, on pricing, pricing philosophy, business plans, customers, customer relations or ongoing or planned bids or tenders;
- 13.3.5 restrictions on trade such as export bans, or prohibitions on sales to certain customers;
- 13.3.6 joint negotiations, selling or buying with competitors, except after obtaining legal advice;
- 13.3.7 any other agreement restricting competition such as, a collective boycott, any arrangement to avoid direct competition, or joint action to exclude competitors or new entrants;
- 13.3.8 resale price maintenance arrangements.

The Competition Act defines an agreement as including,

*“a contract, arrangement or understanding, whether or not legally enforceable”*



To be prohibited, an anti-competitive agreement need not be formal, written down or binding. The same is true of the decision of an association of undertakings. A verbal information exchange or an informal agreement can be an infringement even if it is a mere understanding or "gentleman's agreement".

From an Association point of view, a recommendation (binding or non-binding) or a decision requiring members to operate in a particular manner could be anti-competitive depending on the nature of the recommendation or decision. For example, the Association's criteria for admission as a member must be based on non-discriminatory and objective criteria as exclusion of some potential members on subjective criteria may be anti-competitive to the extent that the potential member cannot participate and benefit from the Association's work.

Another example would be rules of an Association which dictate pricing strategies or affect the price-quality-quantity nexus of a member's product. Such a rule would likely be anti-competitive.

### **13.4 Information Exchange**

Although there is not yet a precedent in our law prohibiting information exchange by competitors in itself, the Competition Commission views exchange of information between competitors as an area of extreme concern. This is particularly so where the exchange of information leads to a replacement of individual conduct on the market by members to a co-ordinated conduct. Please see the example below.

The Commission has published a draft guideline on this issue – see <http://www.compcom.co.za/wp-content/uploads/2017/11/Competition-Commission-draft-guidelines-on-information-exchange-between-pdf>. It emphasises that any information exchange between competitors should be aggregated and historical. Exchange of disaggregated and current data and information may serve to chill competition by increasing transparency in the market thereby either facilitating or stabilizing collusion.

Members must not exchange information regarding price, volume, commercial strategy, business secrets or any other competitively sensitive information. Members should take particular care in discussions with fellow-Members who are or who may become competitors, whether the discussions are formal or informal.

In short, although the exchange of information may have some pro-competitive aspects, by increasing transparency in a market, where the exchange of information reaches a level of transparency wherein confidential competitive information relating to one or more individual members may be ascertained, then such level of transparency is likely to be anti-competitive.

#### **13.4.1**

It is acceptable to discuss public policy, educational and scientific developments, regulatory matters of general interest (including Government-imposed prices or reimbursement policies), demographic trends, publicly available information and historical information that has no impact on future business. Members may display or demonstrate new or existing products, but not discuss non-public R&D or production plans.

### **13.5 EXAMPLE – the bike retailer cartel**

The Competition Commission investigated a potential cartel between a large number of bicycle wholesalers and retailers. It was alleged by the Competition Commission that at a meeting held between the retailers and wholesalers, certain increases to the mark-ups on bicycles and cycling accessories were agreed to as well as to stop discounting products. It was also alleged that wholesalers would be asked to recommend higher retail prices. It is unclear whether these were ever put into place.

Unfortunately, some of the retailers that simply attended the meeting and did not expressly consent to the proposals were also held to have contravened the competition act, their mere attendance, without more, being sufficient to allege guilt.

The example is important to the extent that it demonstrates that even though anti-competitive conduct was not carried out, mere attendance and discussion of price sensitive information is sufficient to attract the risk of contravening the Competition Act.

See the end of this document for further examples.

### **13.6 Abuse of a dominant position prohibited**

Dominant firms have an added responsibility to behave in a way which does not exploit consumers or prevent or impede competitors from entering into or expanding within the market. A firm which has a market share of 45% or more is automatically dominant. A firm which has less than 45% of the market is dominant if it has 'market power' which means it can control prices, exclude competition, or behave to an appreciable extent independently of its suppliers, customers or competitors.

Members should be aware of the market in which they operate because the smaller the market, the easier it is for a firm to exercise market power and therefore be classified as dominant.

In the medical sector, certain areas / markets tend to be highly concentrated (only a few, relatively big competitors). It is concentrated markets such as this where competition concerns are greatest.

As soon as a dominant firm's behavior has an anti-competitive object or effect, unless it can be justified on efficiency, technological or other pro-competitive grounds, it may result in fines and civil liability. There is no need to demonstrate the existence of an agreement or collusion. Examples of abuse of dominance which are specifically prohibited by the Competition Act include:

13.6.1 Charging an excessive price to the detriment of consumers;

13.6.2 Price discrimination;

13.6.3 Refusing to give a competitor access to an essential facility infrastructure or resource when it is economically feasible to do so;

13.6.4 Engaging in any act which impedes or prevents a firm entering into or expanding within the market;

13.6.5 Requiring or inducing a supplier or customer not to deal with a competitor;

13.6.6 Refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

13.6.7 Selling goods or services on condition that the buyer purchase separate, unrelated goods or services;

13.6.8 Forcing a buyer to accept a condition unrelated to the object of a contract;

13.6.9 Selling goods or services below cost in order to drive a competitor out of the market;

13.6.10 Buying up a scarce supply of intermediate goods or resources required by a competitor;

13.6.11 Charging different prices to different customers when the difference in price cannot be justified by cost considerations.

Amendments to the Act in 2019 also specifically restrict price discrimination by dominant firms against SMMEs and historically disadvantaged firms.

### **13.7 What to do if you suspect a breach of these guidelines**

Presence at meetings where anti-competitive conduct is discussed can be enough to incur liability under the Competition Act. Check the agenda, object in advance to impermissible discussion items and stay away if the agenda is not changed. As soon as you become aware of an infringement, walk out of the meeting and have it minuted that you left the meeting and contact your legal counsel, express your disagreement and ensure that a record is kept of your

disagreement. If you miss a meeting, check the minutes upon receipt, and warn your legal counsel if these suggest an infringement. If there is a possibility that sensitive matters are discussed, consider having legal counsel present at meetings.

*If you are uncertain whether a particular agreement, discussion or information exchange between competitors is allowed, immediately contact your company lawyer, who will take appropriate steps.*

### **13.8 Do's and Don't's: Guidelines on participation in SAMED meetings**

#### **DON'TS**

**Don't** reach understandings or agreements or even hold discussions with a competitor (or even a potential competitor) on commercially sensitive topics such as selling or purchase prices, trading or credit terms (including delivery charges, minimum purchase quantities or interest rates) or billing practices, production, inventory, supply volumes, sales, costs, future business plans, budgets, upcoming tender or bids, or individual suppliers or customers.

**Don't** attend meetings with competitors or any industry body without written agenda or clear indication of the purpose.

**Don't** attend unscheduled gatherings with competitors or any industry body unless you know that they are for a bona fide purpose or that they are purely social gatherings.

**Don't** discuss business related topics at social functions.

**Don't** accept written non-public information or agree to the exchange of oral non-public information with Members who manufacture, market or sell (or could manufacture, market or sell) competing products.

**Don't** exchange any current or future information with your competitors (what your company intends to charge or do).

**Don't** participate in market surveys, or benchmarking exercises that allow access to any competitive information of any individual company. Any data published pursuant to a market survey must be aggregated nationally, over at least a year, and contain only aggregated/average data for at least 5 competitors. DO NOT publish information broken down by town/province, by individual customers, by individual firm or sub-product category.

**Don't** engage in joint negotiations, joint sales or joint buying without legal advice.

**Don't** agree to exclude competitors or engage in collective boycotts of suppliers or customers.

#### **DO'S**

**Do read the SAMED Competition Law Compliance Guidelines that precede Don'ts's and Do's.**

**Do** discuss public policy, education, scientific developments, regulatory matters of general interest, general industry trends, appropriately aggregated and non-individualized (statistical) market surveys or benchmarking projects, publicly available information and historical information, but be prepared to terminate the discussion and record your disagreement if anyone mentions any of the subjects listed in the "Don't" list above.

**DO** insist that your company's individual, commercial information is kept confidential by anyone conducting a survey.

**Do** inform SAMED if you disagree with any of its decisions and keep a copy for your files of any such correspondence.

**Do** return commercially sensitive information you receive from any competitor, without keeping copies, and explain in writing that you do not wish to obtain such information.

**Do** inform your company counsel of any approaches seeking to exchange non-public information or coordinate conduct on the market.

Do ask SAMED to have counsel attend SAMED meetings if you or your company has any doubts.

### 13.9 Exchanging Data and Information

Any discussions where information is exchanged between competitors, whether in a formal or informal context, can constitute an anti-competitive agreement or practice.

If you are part of information or benchmarking 'pool' or other market survey, ensure that individual manufacturers are not identifiable from the data, avoid meetings to discuss the results of the information gathering exercise, and allow open and voluntary participation in the exchange. Exchanging certain types of sensitive information may be more anti-competitive than is the case with other forms of information. Factors that could make for a high risk of infringement of the competition rules are set out in the table overleaf.

*Note that although the conduct listed in the right hand column is 'low risk', exchange of all types of information should be regarded with caution and if in doubt, legal advice should be sought. The Competition Commission has suggested that in general when information is exchanged it should be aggregated and of a historical nature.*

High Risk of Infringement	Low Risk of Infringement
Supply, acceptance or exchange of information with competitors or potential competitors	Publication of information; exchange of information with customers or non-competitors
Supply/accept/exchange information on prices and discounts, individual bids, customer relations, supply volumes, costs, investment and general business strategy, production levels	Exchange information on public policy matters, educational and scientific developments, regulatory matters of general interest, demographic trends, publicly available information
Confidential information	Public information
Current information	Historic information
Individual company data	Aggregated industry data
Implied or explicit recommendations or agreements accompanying the exchange	No further discussion of the information exchanged

### 13.10 Lodging a complaint with the Competition Commission

Any person may provide information concerning an allegation of a breach of a prohibited practice to the Commission. See: <http://www.compcom.co.za/lodge-a-complaint>

### 13.11 Requesting an advisory opinion from the Competition Commission

An advisory opinion is a written opinion of the Commission's position in respect of a set of facts submitted by external parties. Its aim is to assist in interpreting provisions of the Act and to provide business with guidance on the position that the Commission is likely to take in respect of certain transactions, agreements or practices. An advisory opinion is not binding on the Commission. The Commission may at any time review its position vis-à-vis the facts presented. Furthermore, the

Commission will only formulate an opinion on the basis of a disclosed set of facts. Should the facts change in any way, the Commission may revise its position.

For a party to obtain an advisory opinion a letter outlining the facts on the matter in question must be sent to the Competition Commission's Registry on fax number (012) 394 0166 or post it to Private bag x 23, Lynwood Ridge, 0040 or email [ccsa@compcom.co.za](mailto:ccsa@compcom.co.za).

### **13.12 Fees**

In terms rule 10.4 of the Rules for the Conduct of Proceeding in the Competition Commission, a fee of two thousand five hundred rand only R2500 is payable by the party requesting an advisory opinion.

See: <http://www.compcom.co.za/request-an-advisory-opinion/>

Note that the Commission has suspended this service, and so any party requesting an advisory opinion should confirm with the Commission at the relevant time whether this service is available.

### **13.13 Further examples**

In 2015, the Federal Trade Commission (the US equivalent to our competition commission) found the conduct of the North Carolina State Board of Dental Examiners (the Board) to be anti-competitive. In short, the Board members got together to discuss and take action against third parties that were providing tooth whitening services at much lower prices than what dentists were charging. The Board issued some 47 cease and desist letters to these third parties on the basis that unlicensed practice of dentistry was a criminal offence. The legislation cited by the Board did not include, within its ambit tooth whitening as the practice of dentistry and the conduct was held to be anti-competitive.

In 2014, the Indian Competition Commission found the Kerala Film Exhibitors Federation, an association of some 315 film theatres, guilty of anti-competitive conduct. The association controlled and restricted the exhibition of new movies in Kerala and in 2012 directed its members to strike or stop screening films as a mark of protest against an increase in service charges. The complainant was placed in a position such that it could not sit out the strike and would incur huge losses. The complainant resigned from the association with the result that in 2013 the association directed distributors not to distribute movies to the complainant.

## **14. SAMED CONFIDENTIALITY, NON DISCLOSURE AND CONFLICT OF INTEREST AGREEMENT FOR BOARD AND COMMITTEE MEMBERS**

### **14.1 Confidentiality Policy**

14.1.1 The purpose of this agreement is to ensure that confidential matters brought before the Members of the Board of SAMED or any of its committees, are not disclosed until disclosure is properly authorized, except as is necessary in the proper performance of your duties as Board Member and unless required by law or a legal act of a competent authority. SAMED Board and Committee members are in positions of trust towards SAMED as a voluntary membership organization, and such trust may require that elected and appointed persons act with the highest integrity and keep certain information confidential, and avoid conflicts of interest.

14.1.2 This agreement is designed to provide clarity for each Board Member and Committee Member with regard to confidential matters that come before- or arise out of meetings and matters of the Members of the Board of SAMED or any of its committees, and provides certainty as to how situations of conflict of interest are to be handled.

14.1.3 Its objective is to address matters of confidentiality in a manner that facilitates the Board, and Committees in maintaining the highest business and ethical standards, protects the integrity of SAMED, the Board, and Committees, allows for appropriate levels of transparency and accountability in matters before the Board, and supports the maintenance of effective

relationships among Board Members, SAMED and Committee Members.

## **14.2 Definitions**

- 14.2.1 "Agreement" means this Confidentiality and Non-Disclosure Agreement
- 14.2.2 "Board" means the Board of SAMED.
- 14.2.3 "Board Members" means members of the Board.
- 14.2.4 "Chair" means Chair of the Board.
- 14.2.5 "Committee" means a committee of the Board.
- 14.2.6 "Committee Members" means members of any Committee.
- 14.2.7 "Meeting" means a meeting of the Board or a Committee, as applicable.
- 14.2.8 "Policy" means this Confidentiality Policy
- 14.2.9 "SAMED" means South African Medical Technology Industry Association
- 14.2.10 "Vice-Chair", means Vice-Chair of the Board

## **14.3 The information**

"Information" shall for the purposes of this agreement include, without limitation, any technical, commercial, scientific information, know-how, trade secrets, processes, machinery, designs, drawings, technical specifications, clients, prospects, historical and forecast financial information, organisational and operational structure and data in whatever form, communicated to the receiving party or acquired by the receiving party from the disclosing party during the course of the parties' association with one another.

## **14.4 Confidentiality**

- 14.4.1 Regular Board meetings are, in the ordinary course of events, not open to the public and/or media.
- 14.4.2 Members of SAMED may on invitation attend Board meetings.
- 14.4.3 Once the Board has dealt with an issue in a board meeting and has decided on that matter, the issue is considered to be accessible to members to the extent of that decision. Matters that are so declared may be accessible to the public at large to the extent so declared by the Board.
- 14.4.4 All decisions that would be accessible to the general membership and/or the public at large will be recorded as such in the Board minutes.
- 14.4.5 If no recordal is made, the matter, discussions and all resolutions should be deemed to be confidential unless declared by the Board by resolution as not confidential.
- 14.4.6 When considering whether matters are confidential or not, the nature of SAMED as a membership organization, the prospects of harm to SAMED (including harm to its reputation, good processes and procedures and good governance), as well as the impact of any such decision on members or groups of members, must, amongst others, be considered.
- 14.4.7 The Board also holds in-camera meetings, All present at any in-camera meeting will be bound to keep the proceedings confidential, unless otherwise directed by the Chairperson of the Board Members or any committee created by it with a support of the majority. Exiting and re-entering an in camera session will be permitted with the understanding that all present are obligated to keep the proceedings confidential.
- 14.4.8 Non-members will be permitted to attend an in-camera session of the Board Members or any Committee created by it, only after a motion requesting attendance to an in camera session is approved by a majority vote of members present and voting.
- 14.4.9 External consultants present during such in camera sessions may be required to preserve the confidentiality of discussions during such a session.
- 14.4.10 If any person in attendance at a meeting of the Board Members or any Committee created by it, held in-camera, shall give notice of their intention not to be bound by the provisions of this by-law of SAMED, and refuse to leave the room when requested to do so, the Chair shall, subject to a resolution of the board supported by a majority vote, adjourn the meeting, after

having informed members that it will be reconvened at a time and place of which the offending person will not be notified.

- 14.4.11 Committees are advisory to the Board. Only the full Board makes formal decisions. Committee meetings are held in-camera, and their recommendations should not be discussed outside of the Committee or the Board. Discussions with others for the purpose of gathering input for committee consideration are acceptable and each Committee chair would have to exercise discretion and communicate that decision to all present during a Committee meeting where an external person is present.

## **14.5 Conflict of Interest**

- 14.5.1 A conflict of interest arises when there is a relationship which exists which could result in the Board or Committee member being perceived as being biased either for or against the topic of discussion.
- 14.5.2 Any Member of the SAMED Board, Executive, and/or Staff who has a personal interest, directly or indirectly, in any contract, transaction, proposed contract, or proposed transaction, under consideration of the Board Members or of a Committee created by it shall be deemed as being in a conflict of interest, where:
- 14.5.2.1 Contract is defined as any written or verbal agreement between two or more parties for the doing or not doing of something specified which is related to the matter at hand.
  - 14.5.2.2 Transaction is defined as an exchange of money, services, goods, position, or favours are exchanged for money, services, goods, position or favours.
  - 14.5.2.3 Interest is defined as any instance where any contract or transaction, proposed contract or proposed transaction could be to the benefit or detriment of themselves, family, partners, roommates/housemates, other organizations to which they are currently affiliated, that do not pertain to their job description or mandate.
  - 14.5.2.4 Conflicts of interest may also arise in matters that may lead to a direct benefit to a particular Board member and/or his/her company, which position may conflict with either the law and/or codes of good practice and/or SAMED policy on a particular matter or the approach that should be taken to specific types of matters.
- 14.5.3 Where the Board Members or a Committee created by it is of the opinion that a conflict of interest exists that has not been declared, the Board Members or Committee may declare, by a resolution carried by two-thirds of the members present and voting at the meeting, that a conflict of interest exists and that the member found in conflict shall follow the procedure below.
- 14.5.4 In the event of a conflict of interest, the interested party shall:
- 14.5.4.1 Prior to any vote on the issue, declare the conflict of interest to the Chair or Board as a whole.
  - 14.5.4.2 Refrain from voting in relation to the matter.
  - 14.5.4.3 Withdraw from the meeting when the matter is discussed if requested to do so by a simple majority of the members present and voting at the meeting.

## **14.6 Breaches**

- 14.6.1 A breach of this Confidentiality and Conflict of Interest Agreement may result in action being taken against the member (up to and including removal from the Board and/or SAMED Committee).
- 14.6.2 In the case of a breach by a Board or Committee Member, the Board will determine what steps should be taken under the circumstances (provided that consideration of the removal

of a Board member shall be on thirty (30) days notice to the Board Member. After thirty (30) days notice to the Board Member, the Board, may remove the person from the Board through the applicable provisions and procedures created by the SAMED Constitution.

#### **14.7 Terms**

This agreement shall commence upon the date of signature by both parties ("the effective date") to this agreement and shall continue to bind the parties for the duration of one year. A new agreement must be signed should a person be re-elected or re-appointed as a Board- and/or Committee member.

#### **14.8 Additional action**

14.8.1 Each party to this agreement shall execute and deliver such other documents and do such other acts and things as may be necessary or desirable to give effect to the terms and provisions of this agreement.

This may include the return and/or distraction of documents, information, files, emails and the like that came to be in his/her possession during his/her tenure as a Board- and/or Committee member, upon resignation or removal from such a position.

#### **14.9 Amendments**

No amendment, interpretation or waiver of any of the provisions of this agreement shall be effective unless reduced to writing and signed by both the parties.

#### **14.10 Entire agreement**

This agreement contains the entire agreement of the parties with respect to the subject matter of this agreement and supersedes all prior agreements between the parties, whether written or oral, with respect to the subject matter of this agreement.

#### **14.11 Governing law**

This agreement and the relationship of the parties in connection with the subject matter of this agreement shall be governed and determined in accordance with the laws of South Africa.

#### **14.12 Severability**

In the event of any one or more of the provisions of this agreement being held for any reason to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this agreement, and this agreement shall be construed as if such invalid, illegal or unenforceable provision was not a part of this agreement, and the agreement shall be carried out as nearly as possible in accordance with its original terms and intent.

#### **14.13 Undertaking Respecting Confidentiality and Conflicts of Interests**

Whereas, and based on the above rules, from time to time, arising out of the relationship between the undersigned and the Board and/or any Committee of SAMED, the undersigned shall come into possession or have knowledge of certain matters, information and things which are confidential, i.e. "confidential information and s/he may be in situations of conflict as outlined in the aforementioned provisions, therefore the person declares as follows:

*I have read the above undertakings and certify that I fully understand the nature and effect of these undertakings, and acknowledge receipt of a copy thereof.*



*I further agree to be bound by the rules of confidentiality and conflict of interest as set out above. I also understand the need for these requirements and I believe I can meet the requirements as set out above.*

Signed at \_\_\_\_\_ on \_\_\_\_\_

\_\_\_\_\_

Committee member full names and surname

\_\_\_\_\_

Signature