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Trade associations need to beware of information exchange between competitors

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IF you didn't know that being a member of a trade association in South Africa is a high-risk activity, read the Competition Commission's draft Guidelines on Information Exchange between Competitors published for comment on July 14, 2017. The Guidelines reinforce the impression that the Commission seems to be targeting trade associations in its quest to stamp out cartels.

The Guidelines are largely based on the European Union's competition rules on horizontal co-operation agreements. Unlike the abbreviated South African Guidelines, the EU rules deal with information exchange generally and provide specific guidance in the context of research and development, production, purchasing, commercialisation agreements and standardisation agreements. By contrast, the South African Guidelines demonstrate a conservative and restrictive approach to information exchange. This is evident from the fact that the Guidelines briefly acknowledge that certain (although very limited) competitor information exchange can be procompetitive, including "exchanges related to accounting methods, stock control or book-keeping practices, new forms of technology and research results". The Commission's view is that there is little about which competitors can exchange information without straying into cartel territory. The subtext of the Guidelines is a warning to competitors that the Commission considers almost all information exchange as proof of cartel activity or a platform for facilitating cartel activity.

The Commission says it drafted the Guidelines partly because of concerns about the scope of permissible information exchange raised with the Commission by trade associations. It's quite clear that the Commission is concerned about trade associations because they are the perfect way for competitors to address the cartel dilemma. Competitors who want to establish a cartel need a legitimate reason to meet, and then to monitor cartel compliance and punish cheaters. Trade associations deal neatly with this problem.

Trade associations, however, often have important legitimate procompetitive benefits. One of the concerns with the draft Guidelines is the somewhat dismissive way in which they deal with these benefits and place overwhelming emphasis on the fact that every trade association is a cartel risk and every trade association meeting is an opportunity to form or check on a cartel. Irrespective of what the final Guidelines look like, the draft Guidelines provide useful insight into the way the Commission thinks about trade associations – and it clearly considers trade associations to be targets.

So, be warned! Before joining a trade association, ask yourself why you need to be a member. If membership is a must for objective commercial reasons, make sure you do your homework and read the draft Guidelines. In the context of cartels, silence is consent. If your fellow competitors step over the cartel line, you are guilty too unless you expressly object and distance yourself.

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