COMPETITION ENFORCEMENT AGENCIES

HANDBOOK 2019

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Competition Enforcement Agencies Handbook 2019

A Global Competition Review Special Report

This article was first published in May 2019

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Competition Enforcement Agencies Handbook 2019

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ISBN: 978-1-83862-222-0

Printed and distributed by Encompass Print Solutions
Tel: 0844 248 0112

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Global Competition Review's 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

We would like to thank all those who have worked on the research and production of this publication: the enforcement agencies and our external contributors.

The information listed is correct as of April 2019.

Global Competition Review
London
April 2019

Overview

Maryanne Angumuthoo and Shakti Wood
Bowmans

Introduction and Legislative framework

The Competition Act No. 89 of 1998 (the Act) came into effect on 1 September 1999 and has been amended in terms of the Amendment Act of 2009 and the Amendment Act of 2018. The most recent amendments have been assented to by the President and will come into operation on a date yet to be determined.

The Act applies to all economic activity within, or having an effect within, South Africa. It regulates mergers, restrictive vertical and horizontal practices, dominant firm conduct and market inquiries.

The enforcement agencies are the Competition Commission (Commission), the Competition Tribunal (Tribunal) and the Competition Appeal Court (CAC). The Commission is responsible for the investigation and evaluation of mergers, prohibited practices and exemptions, and conducting market inquiries. The Tribunal is empowered to adjudicate large mergers, prohibited conduct and to impose penalties. The Tribunal hears appeals and reviews in respect of the Commission's decisions. The CAC has final jurisdiction over the merits of competition cases and hears appeals against Tribunal decisions. Parties also have limited rights of appeal to the Constitutional Court.

The Act has always made provision for 'traditional' competition and socio-economic objectives, distinguishing it from 'traditional' competition legislation in many other jurisdictions. The most recent amendments have heightened the emphasis on socio-economic objectives aimed at advancing the inclusion of small- and medium-sized enterprises (SMEs) and firms owned by historically disadvantaged persons (HDPs) in the economy. The Minister for Economic Development (Minister), Ebrahim Patel, has indicated that the overarching objective of the amendments is to foster a new deal for economic transformation and inclusion.

The recent amendments include provisions in relation to conduct by dominant firms, national security and additional powers afforded to the Minister and additional powers afforded to the Commission in respect of market inquiries.

Highlights of recent amendments to the Act

Dominant firms

The main objective of the amendments is to address high levels of concentration and the skewed ownership profile of the economy that are a result of the imbalances created by the apartheid regime.

Accordingly, the most significant changes relate to the dominance provisions of the Act. These provisions introduce a different standard of assessment for dominant firms' treatment of SMEs and firms owned or controlled by HDPs. Significantly, the assessments do not entail 'traditional' tests to assess the substantial lessening or preventing of competition, but are instead focused on whether certain dominant firm conduct impedes or prevents smaller players, or firms owned by HDPs from participating effectively. The changes introduced place the burden of proof on dominant firms in relation to these particular types of entities. In the words of the Minister:

> *It is . . . key that our competition statute ensures that concentration does not present unacceptable barriers to market entry and does not lead to economic stagnation where firms with significant market power use their power to capture rents while preventing entry of innovative small and medium-sized firms or those owned by black South Africans.*

Buyer power

The recent amendments introduce a new 'buyer power' provision prohibiting a dominant firm from imposing an unfair price or trading condition on a supplier that is a SME or firm owned by an HDP. An anti-avoidance provision is included to prevent dominant firms from ceasing to deal with SMEs or firms owned by HDPs in an effort to circumvent the new provision.

This provision will apply to designated sectors to be determined by the Minister. At the time of writing, these sectors had not been identified.

Regulations are required to give further content to the buyer power provisions. Draft regulations were published for comment and are undergoing revision. These regulations, among other things, state that – an

unfair price is a price that inhibits an efficient firm from sustainably operating and growing, or is otherwise unconscionable; an unfair trading term includes provisions that unreasonably transfer risk or costs to the supplier, are one-sided or onerous or otherwise not proportionate to the objective of the contract. The first draft of the regulations highlighted the need for clarity and objectively determinable criteria in respect of conduct that may be considered unlawful.

Price discrimination

Price discrimination by a dominant firm is prohibited if it is applied in respect of equivalent transactions and is likely to result in a substantial lessening or prevention of competition. The discrimination may be justified on certain grounds, including allowances for differences in costs of supply, meeting price competition, and changing market conditions.

As with the buyer power amendments, these amendments introduce a separate test specifically applicable to SMEs and firms owned by HDPs. This test requires a complainant to make out a prima facie case of price discrimination by showing that it has been impeded from participating effectively in a relevant market. If such a case is made, the dominant firm must show that its action does not impede the complaining firm from participating effectively. However, in presenting its defence, the dominant firm may not rely on differences in volume to justify the differences in price.

The Minister is required to make regulations to give effect to the above provisions, including the benchmarks for determining their application to firms owned and controlled by HDPs and factors and benchmarks for determining whether a price discrimination impedes the participation of SMEs and firms controlled or owned by HDPs. Draft regulations have been published for comment and are being revised to address their lack of clarity.

Excessive pricing

The original provision, which prohibited a dominant firm from charging an excessive price 'to the detriment of consumers' has been expanded to include detrimental impacts on either consumers or customers of the dominant firm. Under the original provision, a customer of a dominant firm had to prove harm not only to itself, but also to end consumers. It is now sufficient for the customer to show harm only in relation to itself. In addition, a 'reverse onus' now applies, such that a complainant need only make out a prima facie case of excessive pricing, following which the dominant firm takes on the onus to prove that its price is reasonable.

This provision did not previously articulate the factors that should be considered in assessing an excessive pricing claim, other than requiring a comparison of the price relative to the 'economic value' of the good or service in question. The amendments now require the price to be assessed relative to the notional 'competitive price' and provide parameters by reference to which this assessment may be carried out, for example the dominant firm's price-cost margin, internal rate of return, return on capital or profit history as well as other structural characteristics of the market. These parameters take into account various considerations raised in previous excessive pricing cases.

Increased penalties

Prior to the amendments, administrative penalties were only imposed for first-time offences in respect of outright prohibited conduct. Post the amendments, all first-time offences of any prohibited conduct will incur a penalty of up to 10 per cent of annual turnover. The maximum penalty for repeat offences has been drastically increased from 10 per cent to 25 per cent of annual turnover.

Mergers

Public interest considerations in mergers

The amendments elevate the public interest inquiry to an equal footing with the competition assessment for mergers. In practice, however, public interest factors have often been given greater import than competition considerations, hence the amendments may not be as far-reaching as they appear. The amendments expand the range of public interest grounds that the Commission may take into account to include the ability of SMEs, or firms controlled or owned by HDPs 'to effectively enter into, participate in or expand within the market' and 'the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market'.

Minister's powers and ability to intervene on public interest grounds

The Minister (who previously only had rights of review) now has a right of appeal in merger proceedings, although this right is limited to public interest grounds. The Minister must have participated in the merger proceedings or must have leave of the CAC. The Minister may now participate in small, intermediate and large mergers (as opposed to only large mergers previously).

National security provisions

The amendments introduce 'national security' provisions in mergers where a foreign firm seeks to acquire a business operating in South Africa. The new provision contemplates the establishing of an executive body (Committee) by the President. A notifiable transaction involving a foreign acquiring firm, and impacting a specified list of national security interests must be simultaneously notified to the Committee and the Commission. The Committee must decide whether the transaction may have an adverse effect on national security interests. The competition authorities may not make any decision where the merger has been prohibited on national security grounds.

Relevant factors in determining the list of national security grounds include:

- defence capabilities and interests, or the enabling of foreign surveillance or espionage;
- the use or transfer of sensitive technology or know-how outside of South Africa;
- security infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of citizens and the effective functioning of government;
- supply of critical goods or services to citizens or the government;
- international interests or relationships; and
- economic and social stability.

There are, as at the date of writing, no further indications as to the composition of the Committee, the list of national security interests, or the form or process to be followed for the submission of a notice in terms of this provision.

Market inquiries

The amendments to the market inquiry provisions enhance the Minister's powers to initiate and oversee market inquiries, allowing the Minister to appoint one or more full-time or part-time deputy commissioners specifically responsible for conducting market inquiries. These changes effectively allow the Minister to identify appointees to conduct market inquiries as the Minister (rather than the Commission) deems necessary.

In line with the general tenor of the amendments, the Commission is required to take reasonable steps to promote the participation of SMEs and firms owned by HDPs, which may have a material interest in the inquiry and are not adequately represented. The provisions also allow for participation by trade unions and employee representatives. Finally, there is a catch-all allowing for participation by a person with a material interest, but not adequately represented by another participant and who would substantially assist with the inquiry.

Whereas the Commission previously had the power to make recommendations and initiate complaints, it may now take action to remedy, mitigate or prevent any identified adverse effect on competition without first initiating a complaint and conducting a further investigation. The Commission's actions to remedy adverse effects on competition are binding in nature but may be appealed to the Tribunal.

Exemptions

Additional categories of exemptions have been introduced:

- promotion of the effective entry into and participation and expansion within a market by SMEs or firms owned or controlled by HDPs;
- promotion of competitiveness and efficiency gains that promote employment or industrial expansion; and
- promotion of the economic development, growth or transformation of an industry designated by the Minister.

Conclusion

The amendments signal:

- that dominant firms operating in South Africa cannot afford to be agnostic about who they procure from, or supply to, and should proactively take measures to avoid falling foul of these new prohibitions; and
- an increasingly interventionist approach by the Minister in mergers and market inquiries.

Notably, while the Minister has described the amendments as necessary, he regards them as insufficient alone to facilitate greater economic inclusion and transformation, and has indicated that the Act must work in conjunction with other forms of government support for SMEs.

Maryanne Angumuthoo
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Maryanne Angumuthoo is a partner in our Johannesburg office and a member of the competition practice.

She advises on various aspects of competition law including merger notifications, cartel investigations, leniency applications and competition compliance audits across a number of industries including healthcare, energy (oil, natural gas and liquefied petroleum gas), and chemicals. Her experience also extends to competition-related litigation and training. Maryanne assists clients with merger filings and competition law conduct in other African countries. Aside from her competition work, Maryanne advises on the gas regulatory framework in terms of the Gas Act and Regulations, including the gas pricing regime.

Maryanne has BA, LLB and LLM degrees from the University of KwaZulu-Natal, an LLM from Duke University School of Law, United States (as the recipient of a World Bank Graduate Scholarship) and certificates in competition law and advanced administrative law from the University of the Witwatersrand and in European competition law and policy from the London School of Economics and Political Science.

Shakti Wood
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Shakti Wood is a partner in our Johannesburg office and a member of the competition practice.

She specialises in merger control, behavioural competition matters, preparing exemption applications and conducting compliance reviews.

Shakti's experience has been primarily regarding the South African Competition Act, but she also has experience of competition law in the Common Market for Eastern and Southern Africa, Kenya and Tanzania. Shakti has acted for clients across various sectors including food and beverages, agriculture, mining, pharmaceuticals and healthcare, petroleum and telecommunications.

Shakti has BCom Honours (economics) and LLB degrees from the University of the Witwatersrand.

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With 400 specialised lawyers, Bowmans is differentiated by its independence and the quality of legal services it provides.

The firm delivers integrated legal services to clients throughout Africa from six offices (Cape Town, Dar es Salaam, Durban, Johannesburg, Kampala and Nairobi) in four countries (Kenya, South Africa, Tanzania and Uganda).

Bowmans works closely with leading Nigerian firm, Udo Udoma & Belo-Osagie, which has offices in Abuja, Lagos and Port Harcourt, and has strong relationships with other leading law firms across the rest of Africa.

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Our competition practice

Competition law presents various challenges for companies doing business in Africa. The number of competition law regimes across Africa has increased significantly in recent years and national regulators across the continent are becoming increasingly active.

There are also a number of regional intergovernmental organisations regulating competition, for example, the East African Community and the Common Market for Eastern and Southern Africa.

We are at the forefront of developments in African competition law. We monitor competition law developments in various jurisdictions. Our internationally recognised competition law experts participate in special committees on competition law; actively comment on draft legislation, guidelines and amendments in a variety of African countries; and regularly contribute to local and international competition law publications.

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ISBN 978-1-83862-222-0