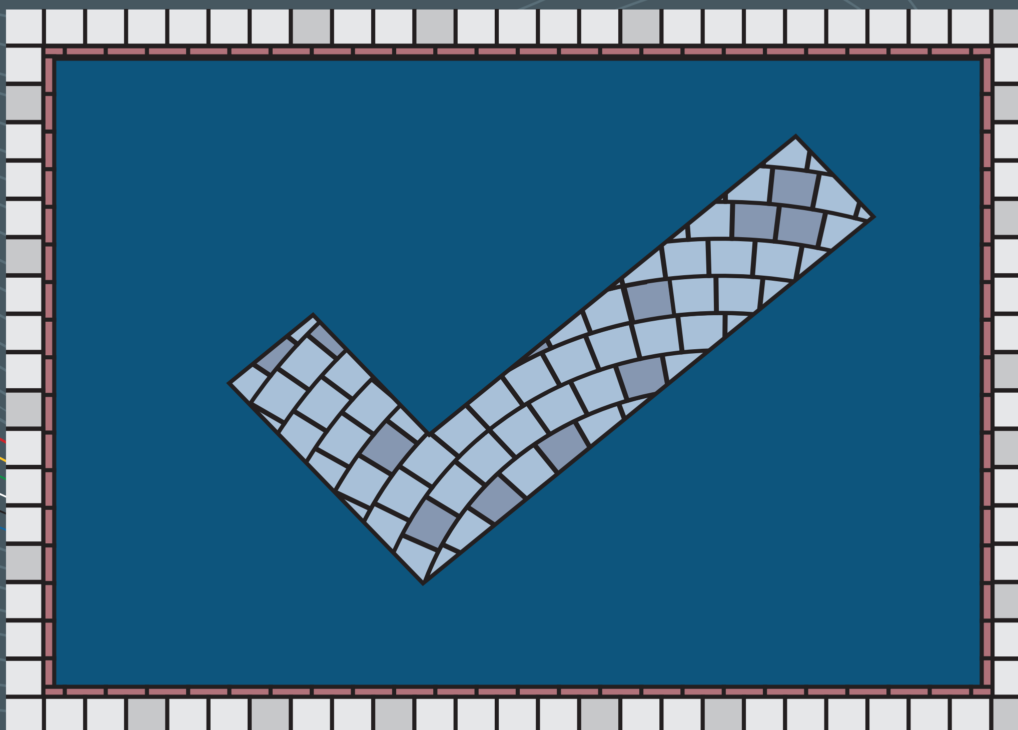

13

COMPETITION

Martin Versfeld and Janine Simpson

2015 / 2016

WEBBER WENTZEL
in alliance with > Linklaters

COMPETITION

Martin Versfeld and Janine Simpson

Introduction

Any potential investor in South Africa will need to be aware of South African competition law, both in terms of acquiring a business and in terms of on-going business on a day-to-day basis. A high-level overview of the South African Competition Act, the authorities and the key provisions of the Act follow below.

Legislation and Jurisdiction

Competition law in South Africa is governed by the Competition Act, No. 89 of 1998, as amended (the Competition Act). The Competition Act came into effect on 1 September 1999.

The Competition Act is designed to promote and enhance competition within South Africa by:

- promoting the efficiency, adaptability and development of the economy;
- providing consumers with competitive prices and product choices;
- promoting employment and advancing the social and economic welfare of South Africans;
- expanding opportunities for South African participation in world markets and recognising the role of foreign competition in South Africa;
- ensuring that small to medium-sized enterprises have an equitable opportunity to participate in the economy; and
- promoting a greater spread of ownership and, in particular, increasing the ownership stakes of historically disadvantaged persons.

Subject to a few exceptions, the Competition Act applies to all economic activity within, or having an effect within, South Africa. Where another regulatory authority has jurisdiction over a particular industry, or sector of an industry, and this conduct is also governed by the provisions of the Competition Act, the competition authorities are granted concurrent jurisdiction in respect of such conduct.

Competition Authorities

The three independent bodies that are created by the Competition Act to regulate competition law are the:

- Competition Commission (Commission): an investigation and enforcement body and the public's first point of contact;
- Competition Tribunal (Tribunal): an adjudicative body which also considers appeals and reviews against decisions of the Commission; and
- Competition Appeal Court (CAC): a specialist court which hears appeals and reviews of the Tribunal's decisions.

The Supreme Court of Appeal (SCA) may hear appeals and reviews of CAC decisions, but only in limited circumstances. The Constitutional Court may also hear appeals and reviews of CAC and SCA decisions if leave to appeal is granted on the narrow grounds prescribed.

Prohibited Practices

Restrictive horizontal practices

A horizontal relationship is defined as a relationship between competitors. Section 4(1)(a) of the Competition Act prohibits agreements, concerted practices or decisions between firms in a horizontal relationship which substantially prevent or lessen competition "unless a party to the agreement…can prove that any technological, efficiency, or other pro-competitive gain resulting from it outweighs that effect". The party to the agreement must prove, on a balance of probabilities, that a "technological, efficiency or other pro-competitive gain" results from the agreement and that it outweighs the anti-competitive effect.

Section 4(1)(b) of the Competition Act contains an outright prohibition on any agreement, concerted practice or decision that involves any of the following restrictive horizontal practices:

- directly or indirectly fixing a purchase or selling price or any other trading condition;
- dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
- collusive tendering.

This is collectively referred to as "cartel conduct". Firms found to have engaged in cartel conduct in contravention of Section 4(1)(b) may be subject to an administrative penalty for a first-time offence. The administrative penalty may not exceed 10% of the firm's annual turnover in South Africa and exports from South Africa during the firm's preceding financial year. Firms found to have contravened Section 4(1)(a) may only be subject to an administrative penalty if the conduct is a repeat of conduct previously found to have contravened the Competition Act.

In terms of the Competition Amendment Act, No. 1 of 2009 (Amendment Act), which has been assented to by the President but is not yet effective, any director or manager of a company who participates in cartel conduct, or who has actual knowledge that a business is engaging in cartel conduct and tacitly consents to such conduct may be held liable for a fine of up to ZAR 500 000 and/ or imprisonment for up to 10 years.

South Africa has an established Corporate Leniency Policy (CLP). The CLP aims to serve as an incentive for cartel members to "whistle-blow" on other members of the cartel in exchange for immunity from prosecution. The CLP outlines a process through which the Commission may grant a self-confessing cartel member, who is first to approach the Commission, immunity or indemnity for its participation in cartel activity upon fulfilling specific requirements and conditions. The CLP applies to firms and not individuals involved in cartel conduct.

Restrictive vertical practices

A vertical relationship is defined as one between a firm and its suppliers, its customers or both. Section 5(1) of the Competition Act prohibits "an agreement between parties in a vertical relationship…if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or pro-competitive gain resulting from that agreement outweighs that effect". The party to the agreement must prove, on a balance of probabilities, that a "technological, efficiency, or other pro-competitive gain results from the agreement and that it outweighs the anti-competitive effect".

Section 5(2) of the Competition Act contains an outright prohibition on the practice of minimum resale price maintenance (MRPM). Section 5(3) provides that a supplier or producer may, however, "recommend" a minimum resale price to the reseller of a good or service, provided it is clear to the reseller that the recommendation is not binding and if the product has the price stated on it, the words "recommended price" appear next to the stated price. Firms found to have engaged in MRPM in contravention of Section 5(2) may be subject to an administrative penalty for a first-time offence. The administrative penalty may not exceed 10% of the firm's annual turnover in South Africa and exports from South Africa during the firm's preceding financial year. Firms found to have contravened Section 5(1) may only be subject to an administrative penalty if the conduct is a repeat of conduct previously found to have contravened the Competition Act.

Abuse of dominance or unilateral conduct

The Competition Act prohibits the abuse by a firm of its dominant position within a market. Section 7 of the Competition Act provides that a firm with a market share of:

- at least 45% is deemed to be dominant;
- at least 35% and less than 45% is presumed to be dominant, unless that firm can prove that it does not have market power; or
- less than 35% is dominant only if the complainant can show that the firm has market power.

"Market power" is defined as "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers".

Section 8 of the Competition Act prohibits a dominant firm from:

- charging an excessive price to the detriment of consumers (Section 8(a));
- refusing to give a competitor access to an essential facility when it is economically feasible to do so (Section 8(b));
- engaging in an exclusionary act, other than the ones listed below, if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain (Section 8(c)); or
- engaging in any of the following exclusionary acts (Section 8(d)):
  - requiring or inducing a supplier or customer to not deal with a competitor;
  - refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
  - selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
  - selling goods or services below their marginal or average variable cost; or
  - buying-up a scarce supply of intermediate goods or resources required by a competitor.

An "exclusionary act" is defined as "an act that impedes or prevents a firm from entering into, or expanding within, a market".

Dominant firms found to have contravened Sections 8(a), (b) or (d) may be subject to an administrative penalty for a first-time offence. Dominant firms found to have contravened Section 8(c) may only be subject to an administrative penalty if the conduct is a repeat of conduct previously found to have contravened the Competition Act. The administrative penalty may not exceed 10% of the firm's annual turnover in South Africa and exports from South Africa during the firm's preceding financial year.

In terms of Section 9 of the Competition Act, a dominant firm may also not engage in prohibited price discrimination. Subject to certain exceptions (set out below) an action by a dominant firm, as the seller of goods or services, is prohibited price discrimination if:

- it is likely to have the effect of substantially preventing or lessening competition;
- it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and
- it involves discriminating between those purchasers in terms of the price charged for the goods or services, any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services, the provision of services in respect of the goods or services or payment for services provided in respect of the goods or services.

Price discrimination will not be regarded as prohibited price discrimination if the dominant firm establishes that the discrimination:

- makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which goods or services are supplied to different purchasers;
- is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or
- is in response to changing conditions affecting the market for the goods or services concerned, including: the actual or imminent deterioration of perishable goods, the obsolescence of goods, a sale pursuant to a liquidation or sequestration procedure, or a sale in good faith where the business is discontinuing its supply of the product or service concerned.

Firms found to have contravened Section 9 may only be subject to an administrative penalty if the conduct is a repeat of conduct previously found to have contravened the Competition Act.

Prohibited practices – exemptions

A firm may apply to the Commission for an exemption in relation to "an agreement or practice…or category of agreements or practices", which would, failing the granting of the exemption, contravene the prohibited practice provisions of the Competition Act.

An exemption can be obtained on the grounds that the agreement or practice contributes to any of the following objectives:

- the maintenance and promotion of exports;
- the promotion of the ability of small businesses, or firms controlled by historically disadvantaged persons, to become competitive;
- the prevention of a decline in an industry; or
- the economic stability of an industry designated by the Minister of Trade and Industry, after consulting the Minister responsible for that industry.

The Commission may, in its discretion, determine the duration of an exemption and may, in particular circumstances, revoke an exemption.

Merger Control

In terms of Section 12 of the Competition Act, the competition authorities must be notified of a merger if:

- a transaction constitutes a "merger" as defined;
- the parties meet the prescribed assets and turnover thresholds; and
- the merger has an effect within South Africa.

A transaction constitutes a merger when, "one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm". A merger may be achieved in any manner, including through the purchase or lease of the shares, or an interest or asset of the other firm in question, or through the amalgamation or other combination with the other firm.

In terms of Section 12(2), a person controls another firm if that person among other things:

- beneficially owns more than one half of the issued share capital of the firm;
- is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
- is able to appoint or veto the appointment of a majority of the directors of the firm;
- is a holding company, and the firm is a subsidiary of that company; or
- has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to above.

In South Africa, there are two categories of mandatorily notifiable mergers referred to as "intermediate" and "large" mergers. To qualify as an intermediate merger, the acquiring firm and the target firm must have combined assets or turnover in South Africa (whichever combination is the higher) of at least ZAR 560 million and the target firm must have assets or turnover in South Africa (whichever is the higher) of ZAR 80 million. To qualify as a large merger, the acquiring and the target firm must have combined assets or turnover in South Africa (whichever combination is the higher) of at least ZAR 6.6 billion and the target firm must have assets or turnover in South Africa (whichever is the higher) of ZAR 190 million.

A party to an intermediate or large merger may not implement that merger until the merger has been approved (with or without conditions) by the relevant competition authority. Implementation of the merger without approval may result in the imposition of an administrative penalty which may not exceed 10% of the firm's annual turnover in South Africa and its exports from South Africa during the firm's preceding financial year. The Tribunal may also order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger. The fee payable to the Commission for intermediate mergers is ZAR 100 000 and for large mergers is ZAR 350 000. Mergers which do not meet the prescribed thresholds constitute "small" mergers. Small mergers do not require mandatory notification, except in limited circumstances.

In the case of an intermediate merger, the Commission investigates and makes a decision to approve, approve with conditions, or prohibit the merger. It has a maximum of 60 business days to make this decision. In the case of a large merger, the Commission has 40 business days to investigate the merger and send a written recommendation to the Tribunal. This period may be extended with the consent of the Tribunal by periods of no more than 15 business days at a time.

In considering the desirability of a merger, the Commission or Tribunal must firstly determine whether or not the merger is likely to substantially prevent or lessen competition by assessing the strength of competition in the market and whether the firms, after the merger, will behave competitively or cooperatively.

In making such an assessment, the Commission or Tribunal must take into account any factor that is relevant to competition in that market, including:

- the actual and potential level of import competition in the market;
- the ease of entry into the market, including tariff and regulatory barriers;
- the level, trends of concentration and history of collusion in the market;
- the degree of countervailing power in the market;
- the dynamic characteristics of the market, including growth, innovation and product differentiation;
- the nature and extent of vertical integration in the market;
- whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
- whether the merger will result in the removal of an effective competitor.

If it appears that the merger is likely to substantially prevent or lessen competition, the Commission or Tribunal must then determine whether the merger is likely to result in any technological, efficiency or other pro-competitive gains which will be greater than, and offset, the effects of any prevention or lessening of competition that may result from the merger.

In addition, the Commission or Tribunal must consider whether the merger can be justified on public interest grounds (whether the merger raises anti-competitive concerns or not) by assessing the effect the merger will have on:

- a particular industrial sector or region;
- employment;
- the ability of small businesses or firms, controlled or owned by historically disadvantaged persons, to become competitive; and
- the ability of national industries to compete in international markets.

The South African competition authorities have increasingly shown an inclination to broadly interpret the public interest considerations, approving mergers subject to various conditions particularly related to local supply and retrenchments. One of the most significant mergers which considered the public interest grounds was Wal-Mart/Massmart. Webber Wentzel advised Wal-Mart in this merger.

Competition Law Developments

The most significant changes, from a risk perspective, introduced by the Amendment Act are:

- criminal liability: the Amendment Act provides that any director or manager of a company who participates in cartel conduct, or who has actual knowledge that a business is engaging in cartel conduct and tacitly consents to such conduct, may be held liable for a fine of up to ZAR 500 000 and/or imprisonment for up to 10 years;
- market inquiries: the Amendment Act allows the Commission to conduct a formal inquiry in respect of a general state of competition in a market, without necessarily referring to the conduct or activities of a particular firm or having some actual evidence of an actual offence to validate the investigation; and
- complex monopolies: the Amendment Act allows the Commission to investigate and deal with uncompetitive outcomes resulting from conscious parallel or coordinated conduct.

The market inquiries provision (Section 6 of the Amendment Act) has been effective since 1 April 2013. The Commission has commenced the first market enquiry into the private healthcare sector. The remaining provisions of the Amendment Act were not in force at the time of writing.

Conclusion

South Africa's competition law regime, although relatively new in terms of its establishment, has fairly broad parameters of application as well as enforcement. A contravention of the Competition Act may have fairly significant financial consequences and going forward, significant consequences for the individuals involved.

E&OE INFORMATION VALID AT TIME OF PRINT