The Competition Act affects every business operating in South Africa, and the serious consequences of contravention necessitate a sound understanding of its basic principles and access to the best possible legal advice. Our Competition practice is at the forefront of developments in competition law in South Africa.

In many respects, the principles of South Africa’s competition law are broadly similar to those of other major jurisdictions such as Canada, the European Union and the United States. An overarching law, the Competition Act prohibits anti-competitive behaviour such as price-fixing and collusion between competitors, and the abuse of dominance. The Act also provides for a merger control regime in terms of which the prior approval of the competition authorities must be obtained for certain mergers and acquisitions.

South African competition law differs from foreign models in that the focus is not purely on competition issues, but also on certain public interest and social goals – such as the promotion of small businesses, the interests of employees and black economic empowerment.

These additional requirements heighten the complexity of the competition law framework and highlight the value of legal advice that blends business and economic insight with legal expertise. The strength of our experienced Competition team is based on a complementary blend of legal and business skills and a focus on finding practical solutions on clients’ behalf.

Our team members have assisted a number of large corporates – including mining, manufacturing, telecommunications and financial services companies and foreign multinationals – with the competition law aspects of mergers and acquisitions. We also regularly advise on prohibited practices such as cartel conduct, bid rigging and abuses of dominance. We have acted in cartel proceedings in the following industries: steel, airline, construction, engineering, motor vehicle manufacturing, fuel, plastic pipes and milk.

Services include dealing with:

- Merger control compliance advice;
- Preparing and submitting merger approval applications to the Competition Commission and Competition Tribunal;
- Due diligence investigations and compliance audits;
- Exemption applications;
- Market investigations;
- Cartel investigations and settlements;
- Assistance in dawn raids;
- General advice on compliance with local and international competition laws and developing compliance programmes;
- Criminal, disciplinary and forensic investigations relating to cartels;
- Instituting and defending complaints relating to anti-competitive conduct, including appearances before the Competition Commission and Competition Tribunal in interim relief, intervention and defence proceedings;
- Competition law training courses including an extensive technology-based e-training programme; and
- Appeals and reviews to the Competition Appeal Court.
OBJECTIVES AND MAIN OPERATIVE PROVISIONS OF THE COMPETITION ACT

The purpose of the Act is to promote and maintain competition in the market place in order to:

> promote the efficiency, adaptability and development of the economy;
> provide consumers with competitive prices and product choices;
> promote employment and advance the social and economic welfare of South Africans;
> expand opportunities for South African participation in world markets and recognise the role of foreign competition in South Africa;
> ensure that SMMEs have an equitable opportunity to participate in the economy; and
> promote a greater spread of ownership, in particular to increase ownership of historically-disadvantaged persons.

PROHIBITED PRACTICES

Generally speaking, the Act prohibits any agreement between parties that substantially prevents or lessens competition unless the agreement can be justified based on technology, efficiency or other procompetitive gains.

Some agreements or practices have been prohibited outright ("per se"), without the possibility of justifying them on economic grounds. To continue with these practices, parties must apply for an exemption.

The Act outright prohibits any agreement or concerted practice between competitors or a decision of an industry association, which results in direct or indirect price fixing, allocation of markets between competitors or collusive tendering. Also prohibited is the setting or maintenance of minimum resale prices.

ABUSE OF DOMINANCE

Firms with annual turnover or assets in excess of R5 million which are dominant in a market are prohibited by the Act from abusing their dominance or market power.

In terms of the Act, a dominant firm is one which has a market share of:

> at least 45%; or
> at least 35%, but less than 45%, unless it can show that it does not have market power*; or
> 35% with market power.

A dominant firm may not engage in the following practices:

> charge excessive prices;
> refuse access to an essential facility;
> engage in exclusionary acts, such as:
  • requiring or inducing a supplier or customer not to deal with a competitor;
  • refusing to supply scarce goods to a competitor;
  • tying unrelated goods or services or making them conditional;
  • predatory pricing; or
  • buying up scarce resources required by a competitor.
> engage in price discrimination if:
  • it prevents or lessens competition;
> involves the equivalent sale of goods and services of like grade and quality to different customers; and
> involves discrimination between customers in terms of price, discounts, allowances, rebates, credit, the payment for and provision of goods and services.

*Market power is the ability of a firm to control prices or to act independently of its competitors, customers and suppliers.

ENFORCEMENT

The Competition Commission must investigate complaints of prohibited practices as provided for in the Competition Act. A prima facie case of contravention is referred to in the Competition Tribunal for final adjudication. A consent order is an agreement between the Competition Commission and a party, in terms of which a firm being investigated or having been investigated admits to a contravention of the Act, and agrees to the remedies required by the Commission, such as an administrative penalty up to 10% of the offender's annual turnover. Such agreement must be made an order of the Competition Tribunal.

LENIENCY

A firm involved in a cartel may however choose to make use of the Commission's corporate leniency policy. In terms of the policy, a cartel member who admits to the cartel and agrees to proactively cooperate with the Commission in bringing the other cartel members to book, will escape liability for prosecution in respect of the cartel. The leniency applicant must however be the first cartel member to approach the Commission in respect of that cartel. Therefore, immunity will not be granted to cartel offenders coming forward at a later stage.

EXEMPTIONS

An exemption may be granted if an agreement or practice constitutes a prohibited practice, but is required for its contribution to:

> maintain or promote exports;
> promote the competitiveness of small business or firms controlled or owned by historically disadvantaged persons;
> change the productive capacity to stop decline in an industry; or maintain economic stability of an industry designated by the Minister.

Exemptions are also available for the exercise of Intellectual Property (IP) rights.

An exemption may be defined as a licence to engage in activity that would otherwise not be allowed, offering protection from action by the Commission or any other party for potential breach of the Act.

MERGERS

The Act stipulates that the Commission must be notified of all mergers and acquisitions, where the transactions exceed applicable monetary thresholds. A merger is defined as a direct or indirect acquisition or establishment of control over the whole or part of the business of another firm. The most common types of merger transactions include the sale or acquisition of assets or shares in a firm and the amalgamation of two or more firms. Parties must notify the Commission at any time before the implementation of the transaction, where applicable monetary thresholds are exceeded.

> establishes or controls or owns an essential facility.
> promotes access to an essential facility;
> engages in exclusionary acts, such as:
  • requiring or inducing a supplier or customer not to deal with a competitor;
  • refusing to supply scarce goods to a competitor;
  • tying unrelated goods or services or making them conditional;
  • predatory pricing; or
  • buying up scarce resources required by a competitor.
> engages in price discrimination if:
  • it prevents or lessens competition;
> involves the equivalent sale of goods and services of like grade and quality to different customers; and
> involves discrimination between customers in terms of price, discounts, allowances, rebates, credit, the payment for and provision of goods and services.

*Market power is the ability of a firm to control prices or to act independently of its competitors, customers and suppliers.
In its analysis of merger transactions the Commission evaluates the competitive impact (whether the transaction substantially prevents or lessens competition in the market), efficiency gains and public interest issues that arise from the merger.

The public interest issues that the Commission takes into consideration are the effect of the merger on:

- a particular industrial sector or region;
- employment;
- the ability of small and black business to become competitive; and
- the ability of national industries to compete internationally.

Merging firms must notify registered trade unions representing the firm’s employees or an employee representative in cases where there is no registered trade union. Proof of delivery of a merger notice to trade unions must be included with the notification of the merger to the Commission.

(Source: Competition Commission’s Pocket Guide to the Competition Act)
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Established in the early 1900s, Werksmans Attorneys is a leading South African corporate and commercial law firm, serving multinationals, listed companies, financial institutions, entrepreneurs and government. Operating in Gauteng and the Western Cape, the firm is connected to an extensive African legal alliance through LEX Africa.

LEX Africa was established in 1993 as the first and largest African legal alliance and offers huge potential for Werksmans’ clients seeking to do business on the continent by providing a gateway to Africa.

With a formidable track record in mergers and acquisitions, banking and finance, and commercial litigation and dispute resolution, Werksmans is distinguished by the people, clients and work that it attracts and retains.

Werksmans’ more than 200 lawyers are a powerful team of independent-minded individuals who share a common service ethos. The firm’s success is built on a solid foundation of insightful and innovative deal structuring and legal advice, a keen ability to understand business and economic imperatives and a strong focus on achieving the best legal outcome for clients.