Competition Act 89 of 1998 (CA)

Topic: Business

IN A CALABASH

Introduction

Anti-competitive behaviour is defined as tactical practices that prevent or reduce competition in a market. Anti-competitive behaviour often forces the smaller player off the market, thereby allowing the bigger player to dictate factors pertaining to quality and cost of products to the detriment of the smaller competitor, consumer and public.

In order to ensure that unfair and anti-competitive practices do not occur, certain rules have been introduced under South African competition and anti-trust laws to give effect to fair and free trading.

These conditions will level the playing field and lead to fair competition, which will benefit smaller companies and trading entities and consumers, as they will have a larger range of services and products and commensurate prices to choose from.

Objectives of the Act

The Competition Act 89 of 1998 (CA) establishes the legal rules designed to maintain and promote economic rivalry, allowing big and small companies and trading entities to compete fairly and effectively in the South African economy.

The CA regulates and, in many cases, prohibits and restricts anti-competitive behaviours and actions.

Application of the Act and its implication to Tourism

The CA applies to all economic activity within or having an effect within South Africa.

The Act applies to all trading entities operating in South Africa, no matter what product or service it manufactures, sells, supplies or offers.

The Act applies to any dominant firm or legal entity operating or having any effect in South Africa.

Summary of the provisions of the Act

The CA regulates certain market behaviours performed or carried out by trading entities in South Africa or by entities situated outside the country whose activities have an unlawful effect in the South African market.

The CA regulates and governs–
- trading entities who are horizontal relationships;
- trading entities who are in vertical relationships;
- trading entities who are dominant in the market; and
- trading entities who merge with each other.

Horizontal Relationships

A horizontal relationship is an arrangement, agreement or understanding between two or more competing companies, entities or firms which may have a negative and detrimental impact on the economy, market place and end consumer.

The CA does not allow competing companies or entities to enter into any form of arrangement or understanding which results in their combined activity preventing or lessening competition in the market, unless those firms prove that the effects of the relationship are positive and outweigh the anti-competitive effects. A horizontal arrangement which gives rise to certain anti-competitive behaviour will only be allowed if it can be justified and it is positive to the economy in general.

That being said, some anti-competitive horizontal relationships cannot be justified and will be unlawful.

Before one can conclude that a relationship is horizontal, one must analyse the relationship to determine if parties to the relationship compete with each other in the relevant market. If they are competitors, they are in a horizontal relationship.

Competing parties compete against each other in the same geographical territory, manufacturing and/or selling the same goods, products or services which have the same properties and functions.

The CA singles out three restrictive horizontal practices which are unlawful and cannot be justified under any circumstances.

The three behaviours are–

- where two or more competitors directly or indirectly fix a purchase or selling price or any other trading term;
- where two or more competing firms divide the markets and agree to allocate customers, suppliers, territories or specific types of goods or services; and
- where two or more competitors carry out an act of collusive tendering.

However, many horizontal relationships are capable of being justified.

When a horizontal relationship results in substantially preventing or lessening competition in a market, if at least one of the parties to the relationship can show that there are technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect, such activity will be justifiable.

Vertical relationships

A vertical relationship is any arrangement or dealing between a firm and its customers or suppliers.

The CA prohibits any arrangement or understanding between customers and suppliers which restricts the competitive activities of either or both, unless the regulator is able to adopt a rule of reason approach. The rule of reason approach means that the commercial rationale and business efficiencies flowing from the agreement or arrangement are weighed against any possible anti-competitive consequences which could arise from the agreement or arrangement.

Dominant firms

The CA regulates the activity of dominant firms in the South African market place.

Dominant firms are those which have market power, being the power to control prices, exclude competition or behave independently of forces exerted by customers, competitors or suppliers.

For example, if a firm could increase prices significantly without being forced to decrease them by loss of customers or other pressures, it may have market power.

A firm is dominant in a market if–

- it has at least 45% of that market;
- it has at least 35% but less than 45% of that market, unless it can show that it does not have market power; or
- it has less than 35% of that market but has market power.

The test for dominance is a consideration of the market share and market power of a company within a particular market.

A firm with a market share of more than 45% will definitely be dominant. No further consideration into market power will need to be made.

When a firm has a market share ranging between 35% and 45%, it is not necessarily dominant. An enquiry will have to be made to determine its market power. If that firm is unable to show that it does not hold market power, it will be dominant.

When a firm has less than 35% market share, it will be dominant if it is shown to have market power.

A dominant firm may not, under any circumstances–

- charge an excessive price to the detriment of consumers;
- refuse to give a competitor access to an essential facility when it is economically feasible to do so;
- engage in an exclusionary act if the anti-competitive effect of that act outweighs its technological efficiency or other pro-competitive gain;
- engage in any of the following exclusionary acts unless the firm concerned can show technological efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act–
    - 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 which are unrelated to the objects of the contract or forcing the supplier to accept a condition unrelated to the object of a contract;
    - selling goods or services that are below their marginal or average variable costs; or
    - buying up a scarce supply of goods or services or resources required by a competitor.

Being dominant in a market is not, in itself, a problem. Many companies have increased market share and obtained a dominant position in a market as a result of efficiencies and the ability to realise economies of scale when it holds and sells a superior product or has good infrastructure and support systems.

Some firms may become dominant as a result of abusive behaviour in the marketplace when it engages in strategic behaviour designed to exclude competition. The competition is smaller and less powerful than the dominant player and, hence, is unable to fight back.

Competition law and the CA, specifically, aim to regulate the anti-competitive strategic behaviour of dominant firms when market forces cannot.

Mergers

The CA governs and regulates merger and acquisition activity.

> A merger occurs when one or more firms directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another firm.

A merger may occur through a purchase or lease of shares and assets, joint ventures and/or pure amalgamation of firms/businesses.

Control is acquired when a firm, including close corporations and trusts–

- owns more than 50% of the issued share capital of another firm;
- has majority votes in general meetings;
- can appoint or veto the appointment of majority directors; and/or
- has the ability to materially influence the policy of the firm.

The CA describes three types of mergers which are categorised by looking at the combined turnover and asset value of the firms involved in the merger. These are intermediate, large and small mergers.

Intermediate merger

The Competition Commission must be notified of an intermediate merger when the value of the proposed merger equals or exceeds R560 million (calculated by either combining the annual turnover of both firms or their assets) and the annual turnover or asset value of the transferred/target firm is at least R80 million.

Large merger

If the combined annual turnover or assets of both the acquiring and transferred/target firms are valued at or above R6.6 billion, and the annual turnover or asset value of the transferred/target firm is at least R190 million, the merger must be notified to the Competition Commission as a large merger.

Small merger

If the proposed transaction does not meet criteria of an intermediate or large merger, it will be categorised as a small merger.

A company will not be required to give notice of a small merger to the Competition Commission. However, the Commission may require the parties to a small merger to notify it of the merger within 6 months after implementation.

Firms entering into intermediate or large mergers are required to notify the Commission of that merger in a prescribed manner and form and may not implement that merger until it has been approved with or without conditions by either the Commission (intermediate merger), Tribunal (large merger) or Competition Appeal Court.

If a business is uncertain about whether a transaction is a merger which would need to be notified to the Competition Commission, a written request for a non-binding advisory opinion detailing the nature of the business proposal may be submitted to the Chief Legal Counsel: Legal Services division. A charge of R2 500 will be levied for the advisory opinion. The advisory opinion is non-binding on the Competition Commission and the business. It would merely give the business a guide on matters that the Competition Commission would consider in the case of a merger, as well as an indication of potential difficulties.

WHAT HAPPENS IF YOU DO NOT COMPLY?

Non-compliance with the CA will give rise to severe consequences, ranging from administrative penalties of up to 10% of the offending entities turnover, orders to divest or undo the transaction and potential civil damages and a tarnished reputation.

The Competition Tribunal may impose an administrative penalty when a prohibited horizontal or vertical practice or an abuse of dominance has been proved

RECOMMENDED ACTIONS OR CONTROLS WHICH SHOULD BE IMPLEMENTED BY THE TARGET AUDIENCE TO ENSURE COMPLIANCE WITH THE ACT

- Awareness of the provisions and prohibitions housed under the Act;
- Training and education of all employees who are involved in pricing, marketing and other transactions that may fall foul of the Act; Dedicated competition legal advisors and scrutiny of all horizontal or vertical practices when the firm is in any way dominant within the market where it operates;
- Regular internal and external competition audits; and
- Merger approval, where applicable.

FURTHER INFORMATION

Regulators

Department of Trade and Industry
Competition Tribunal
Competition Commission

Websites

www.thedti.gov.za
www.comptrib.co.za
www.compcom.co.za