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Eight trends in Competition Law in 2018

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As the Competition Amendment Bill seeks to give competition authorities bigger teeth, so we are likely to see greater enforcement and an impact on commercial dealings in the year to come.

New amendments to the Competition Act

The Competition Amendment Bill (2017) has been published in the Government Gazette and interested parties have until the end of January 2018 to comment on the Bill.

Economic Development Minister Ebrahim Patel said the amendments would address “persistently high levels of economic concentration” in the country and noted that the proposed changes would mean that the South African competition authorities would have extended powers to investigate market concentration and impose structural remedies.

The Bill identifies five priorities in terms of competition law amendments, with the first priority being the strengthening of provisions of the current Competition Act that relate to prohibited practices and mergers. Secondly, the impact of anti-competitive conduct on small businesses and businesses owned by historically disadvantaged persons is given more attention. Thirdly, the Bill addresses market inquiries, strengthening the actions that can be taken to address features and conduct that prevent, restrict or distort competition. Further, the Bill highlights the necessity to promote the alignment of competition-related processes with other public policies in South Africa. Lastly, alongside their increased powers, the administrative efficacy of the competition regulatory authorities is also addressed by the Bill.

Healthcare inquiry finally finalised

The Competition Commission was expected to release its report on the health market inquiry in December. The Commission launched the inquiry in 2014 to address concerns regarding the functioning of private healthcare in South Africa. The process itself has been plagued with delays and challenges – mostly related to the complexity of an assessment of a market such as the private healthcare market. A further extension to the deadline for the publication of the Inquiry's report was published earlier in December and the Commission is anticipated to finalise this inquiry by 31 August 2018.

Continued market inquiries

The Competition Commission has launched several market inquiries in identified priority sectors in the past few years. It has undertaken inquiries in the grocery retail, private healthcare, LPG, data services and public passenger transport sectors, among others. We can expect this trend to continue as the Commission increases scrutiny in sectors identified as being possibly anti-competitive. This is especially true in light of the proposed amendments to the Competition Act that are aimed at providing the Commission additional powers to address features and conduct in particular markets that prevent, restrict or distort competition. Notably, the proposed amendments include a provision that will require the Commission to complete market inquiries within an 18-month period (that can only be extended with the approval of the Minister).

More unique enforcement approaches

The Commission recently released a draft competition code of conduct for the automotive sector to deal with concerns regarding anti-competitive conduct as well as transformation in the sector. The code of conduct is only binding on its signatories and does not constitute an industry-wide enforcement guideline. This raises queries in respect of the enforceability of the code of conduct against firms that opt not to subscribe to it and whether it would be procedurally fair for the Commission to investigate non-signatory firms that engage in conduct that contravenes the code of conduct.

Stronger crack-down on the employment impact of mergers

The competition authorities of South Africa have always taken their mandate to protect the public interest as an objective in addition to ensuring the competitive functioning of South African market. It is well known that any loss of employment as a result of a transaction will be scrutinised and merging parties will only be permitted to engage in merger-related retrenchments if it is absolutely necessary. The Competition Tribunal has fortified its approach to this factor by requiring merging parties to large mergers that require the Tribunal's approval to provide undertakings not to engage in any merger-related retrenchments, even where the transaction does not raise the possibility of any merger-related retrenchments. As such, the aim is to ensure that in all instances, the employees of merging parties are protected from being retrenched as a result of the merger taking place.

Although we have not yet observed such an instance, it is likely that the Commission will be guided by the Tribunal and will also start requiring merging parties to provide blanket undertakings not to effect any retrenchments as result of the mergers, even in cases where the transaction would not result in any retrenchments.

It is almost a certainty that the competition authorities will continue to take their role as regulators charged with protecting

the public interest very seriously and it is now proposed that employment in a particular market should be a relevant consideration in a market inquiry.

Prohibition of mergers that may result in co-ordination

The Commission continues to be inclined to prohibit any merger that, in its view, may result in coordination between competing firms due to consolidation in the industry. The theory of harm that the Commission is concerned with is that when there is a change in structure in a market as a result of a merger that results in fewer competitors operating in a market, the consolidation in that market may make it easier for the market participants to coordinate their competitive endeavours and collusion. The Commission is especially suspicious of mergers between competitors (or between firms where there are any structural link to a competitor) that have previously been implicated in collusion – even if there is no finding against the firms that they have colluded.

In conducting this part of its merger assessment, the Commission will consider, inter alia, the number of players in the market and the number of players that will remain in the market post-merger, any history of collusion in the relevant markets and the risk of possible future coordination due to the change in the structure of the market.

International trend - prosecution for not providing accurate and complete information during merger approval processes

While the Commission has not yet sought to prosecute any firms for not providing complete or accurate information in mergers, internationally there is a prevalent trend of antitrust regulators prosecuting firms on this basis. In South Africa, the Commission's current modus operandi when it is not provided with complete or accurate information is to take a diplomatic and collaborative approach and to ask for the information and, in rare cases, issue a certificate of incomplete filing. Time will tell if the Commission will follow this intentional trend in enforcement.

International trend - the development of the new innovation theory of harm

The European Commission has developed a non-product-specific innovation theory of harm to justify the prohibition of mergers. The concern that the European Commission has identified is that innovation may be impacted if parties in a merger in a sector where there are a limited number of firms that develop new products. The EU Commission suggests that mergers involving innovators in concentrated industries with high barriers to entry, and in industries with no history of innovation outside of the sector, might result in a reduction of the number of new innovative products being developed and should thus be viewed as anti-competitive.

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