The New Competition Act

by Tim Jooste

During 1997, the government issued guidelines for a competition policy which would form an integral part of its industrial and trade policies. In its policy statement, the government stated that two of its main objectives for the economy were to attract foreign investment and to create local investment opportunities.

For many years, a feature of the South African economy was the very high level of market concentration, by which were meant that a few competitors or, in many cases, only one competitor dominated a particular market. This feature made foreign investors unwilling to invest in South Africa and effectively made it difficult for local small or medium competitors to enter the market.This in turn made job creation difficult. The government therefore linked its economic policy and its socio-economic objectives with competition policy.

The objectives stated in the government's policy guidelines therefore included achieving a competitive economy creating sufficient jobs and redistributing opportunities in favour of the poor. The most important objective was to achieve sustainable growth and development of the economy, thereby ensuring a better life for all the people.

South Africa has for many years had various laws relating to competition. However, those laws did not have the desired effect. A new law was therefore drafted and after consultation and discussion the Competition Act, 89 of 1998, was passed by Parliament. The new Act is expected to come into force later this year.

The new Act is, as usual, divided into different sections. Unusually, the new Act spells out its objectives in detail and states that the purpose of the Act is to promote and maintain competition in South Africa 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 the Republic;
- ensure that small- and medium-sized enterprises have an equitable opportunity to participate in the economy;
- promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

Cartoon by V Mlakwende and V Mlilwana

Historically and increasingly today, companies in South Africa used mergers and acquisitions (where two or more companies were merged into one, or where one company took over another company or purchased its business) as preferred methods of achieving growth. The problem was that although financial growth (and in one sense, economic growth) were usually achieved through mergers and acquisitions, there were usually consequences which were directly contrary to the present government's policies Where, for example, a competitor in a market acquired ownership or the business of another competitor, rationalisation benefits were usually a major attraction Rationalisation benefits were achieved by retrenching duplicated staff and reducing overheads, and mergers and acquisitions invariably resulted in job losses A merger or acquisition usually also resulted in at least one competitor being removed, thereby leading to less arms-length competition in the relevant market.

It is therefore not surprising that the government has paid a great deal more attention to mergers and acquisitions in the new Act. There were 20 times more mergers and acquisitions in South Africa in 1997 than there were in 1993 Although the previous legislation allowed the Competition Board (the body which was given the task of implementing the previous Act) to consider and even to prohibit mergers and acquisitions, there was no obligation on any company to obtain approval for a merger or acquisition before the transaction was implemented Once the transaction had been implemented, it would usually have been extremely difficult to undo. The new Act requires any party to a merger (and the new Act does not distinguish between acquisitions and mergers) to notify the Competition Commission (the body empowered to enforce the new Act) of any intended merger. Interestingly, the new Act also requires such a party to provide a copy of the notification to any representative trade union in both companies to be merged

The new Act (apart from dealing with mergers and acquisitions and the usual formal provisions creating the Competition Commission, the Competition Tribunal, the Competition Appeal Court, the Competition Inspectorate and their various office bearers) prohibits certain restrictive practices These prohibited practices relate mainly to practices which result from anti-competitive co-operation between apparent competitors and which therefore reduce or avoid competition. However, the Act also introduces the concept of the abuse of dominance. In terms of the Act, the abuse of

a dominant position in a market is prohibited. Dominance is defined by market share and market power. Market power is defined as the power of a party to control prices or to exclude competition or to behave substantially independently of its competitors, customers or suppliers. For example, where the only supplier of a product for which there is no substitute produces or imports its own raw materials, it will be able to act completely independently because it has no competitors or suppliers and is in a position to dictate prices without regard to its customers. When those conditions exist, a dominant firm is prohibited from various actions which are likely to have the effect of preventing or reducing competition.

The new Act will be enforced by a number of different bodies created by the Act. Formally, the Act will be administered as follows:

Competition Commission

This body will consist of a commissioner appointed by the minister, at least one deputy commissioner, administrative staff and inspectors. The commission will be completely independent and subject only to the Constitution and the law. The commission's functions include the responsibility to:

- promote the objects of the Act;
- investigate contraventions of prohibited practices;
- authorise or prohibit mergers, or refer mergers or other matters to the Competition Tribunal;
- review legislation and report to the minister any legislation or regulation which allows uncompetitive behaviour.

The inspectorate, which forms part of the Competition Commission, has the responsibility and authority for conducting any investigations which may be required under the Act.

Competition Tribunal

The tribunal consists of a chairperson and between three and ten other persons appointed by the President on the recommendation of the minister. The President will designate one of the people on the tribunal to be the deputy chairperson. This body will have its own administrative staff. The functions of this body include granting exemptions from provisions of the Act and authorising or prohibiting mergers.

Competition Appeal Court

The Competition Appeal Court will be appointed by the President and will consist of at least three High Court judges and two other members of suitable qualification. This body will have the authority to confirm, amend or set aside any decision of the tribunal which has been appealed against. It may give any judgement or make any order that circumstances may require.

The new Act also, for the first time, has been given teeth. The Act provides for substantial penalties and fines for contraventions and for civil actions by parties who are detrimentally affected by prohibited practices.

It can therefore be seen that the new Act goes very much further than previous legislation in the direction of modern trends in protecting consumers, promoting trade and democratic values, spreading socio-economic power, protecting the public interest and increasing employment. The Act is clearly intended to achieve, not just government's economic and anti-monopoly policies, but also its socio-economic goals. ★

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