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**COMPETITION LAW ENFORCEMENT ISSUES RAISED BY
MONOPSONIES**

Presentation

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competition regulation for a growing and inclusive economy



competition commission
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Introduction

- From the onset, the South African Competition Act of 1998 had a clear focus on both competition and developmental objectives.
- Developmental objectives were premised on enhancing the participation of small and medium-sized businesses, particularly those owned by historically disadvantaged persons (HDPs), to overcome historical discrimination under apartheid rule.
- There were significant amendments to the Competition Act in 2019, with a sharp focus on economic transformation, inclusion and addressing high levels of market concentration, which sought to deliberately open up market access for SMEs and HDP-owned businesses
- in 2021, the Competition Commission released a market Concentration Report which revealed that industries such as ICT, energy, financial services, food and agroprocessing and infrastructure are highly concentrated, with high exit rates for SMEs.
- The study found that whilst 95% of all firms in South Africa were SMEs, these SMEs only accounted for 24% of total income. Large firms, in contrast, constituted 5% of all firms but accounted for 76% of total income. In most developing and developed countries, SMEs account for at least 50% of total income.

Legislative framework

- Pre-2019, the main challenge was that the legislation did not provide for enforcement against monopsony power and thus, despite receiving complaints of such practices, the Competition Commission had limited means to act against such practices.
- On 13 February 2019, the Amendment Act was signed into law aimed at addressing monopsony challenges, amongst others (2019 Amendment Act):
 - Insertion of a “buyer power” provision (s8(4)), which prohibits a dominant buyer in a sector designated by the Minister (DTIC) from requiring or imposing unfair prices or trading conditions on SMEs and firms controlled or owned by HDPs.
 - The amendment Act also prohibits a dominant firm from avoiding or refusing to purchase goods or services from an SME or HDP supplier in order to circumvent the operation of s8(4)(a). This, being one of the key features of the amendment.
- Enforcement instruments issued:
 - Buyer Power Regulations (2020) – issued by the Minister in consultation with the Commission; and
 - Buyer Power Enforcement Guidelines (2020) – provides considerable detail and insight into how the Commission will enforce the Buyer Power provisions.
- It is worth noting that our approach differs somewhat from traditional approaches to monopsony practices. This is because the ultimate rationale in the South African approach is focused on enhancing participation in the economy, and specifically on the interests of SMEs and HDP firms.
- The Regulation currently identifies three designated sectors, namely, agro-processing, grocery wholesale and retail, and e-commerce and online services sectors.

Buyer power concerns

- Before year 2019 (before the amendments to the Competition Act), the Competition Commission received numerous buyer power complaints mainly in the retail sector.
- For instance, small dairy farmers were concerned that they are victims of buyer power as they either face a monopoly buyer or a limited number of available buyers.
- Given the number of concerns in the retail sector, including the buyer power concerns, the Competition Commission initiated a market inquiry into grocery retail in 2015.
- At the conclusion of the grocery retail market inquiry in 2019, the Commission made various recommendation including one requiring retailers to commit to a code of conduct to address bargaining power imbalance between retailers and SMEs suppliers, in the main (see detailed example).
- In the ongoing market inquiry into online intermediation platforms, the Commission is also looking into buyer power issues in digital markets.

Market inquiry: Grocery retail sector

- On 27 November 2015, the Competition Commission initiated the grocery retail sector market inquiry (GMRI).
- The Inquiry outlined 6 main objectives for conducting its assessments, namely:
 - The impact of the expansion, diversification and consolidation of national supermarket chains on small and independent retailers;
 - The impact of long-term exclusive leases on competition in the sector;
 - The dynamics of competition between local and foreign owned small and independent retailers;
 - The impact of regulations, including inter alia municipal town planning and by-laws on small and independent retailers;
 - The impact of buyer groups on small and independent retailers; and
 - The impact of certain identified value chains on the operations of small and independent retailers.
- With respect to buyer power, the GMRI found that national supermarket chains received preferential treatment from suppliers of FMCG goods, which is indicative of the significant buyer power that these retailers have. The Inquiry established that this, ultimately, gives the national supermarket chains an advantage over their smaller rivals in the wholesale and independent retail segment who are not able to receive similar treatment.

Commission approach to buyer power

- The Competition Commission has issued guidelines aimed at SME/HDP suppliers and purchasers outlining how the Commission will go about enforcing the buyer power provisions.
- In prosecuting an alleged breach of section 8(4) provision (“buyer power”), the following elements must be established:
 - **The respondent or purchaser is a dominant firm;**
 - **In a designated sector, i.e., agro-processing, grocery wholesale and retail and the ecommerce and online services sectors;**
 - **The respondent has required or imposed (directly or indirectly);**
 - **On SME OR HDP; and**
 - **Unfair prices or unfair trading conditions.**
- For regulatory certainty and guidance, the Guidelines further clearly set out the following:
 - The qualification criteria for SMEs;
 - A provisional list of what constitutes unfair trading conditions in grocery, retail and agro-processing; and
 - A provisional list of what constitutes unfair trading terms in commerce and online services.
- The conditions include amongst others the buyer’s demand from the supplier of payments that are not related to the sale of the products of the supplier, and the buyer requiring the supplier to pay marketing fees in respect of its own products etc.

Concluding remarks

- Monopsony practices are an enforcement priority for South Africa.
- The Commission recognises that monopsony-related enforcement is central to unlocking participation of SMEs and HDP owned/controlled firms in key sectors of the economy.
- The Commission is also ramping up its advocacy efforts to enlighten SMEs and HDP owned firms of these provisions and their rights in terms of buyer power provisions.
- From a policy perspective, it is the legislature's intent in South Africa to ensure that competition authorities intervene in the bargaining power imbalance which has severe impact on the exclusion of SMEs and HDP owned firms from participating in critical sectors of the economy.

Thank you!

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