New Competition Laws will impact businesses

Before leaving his ministerial position, the outgoing Minister of Competition, Trade and Industry, Ebrahim Patel (the Minister), published two important regulations (one of which is in draft form). These regulations, relevant to all sectors of the economy, relate to commercial dealings amongst small businesses and agreements between suppliers, customers, and distributors.

Small, Micro and Medium-Sized Business Block Exemption Regulations 2024 (SMME Block Exemptions)

Throughout his tenure, the Minister placed great emphasis on SMME empowerment and building an economic environment conducive to meaningful participation. True to this objective, and shortly before South Africa's general elections, Minister Patel signed the SMME Block Exemptions into law on 23 May 2024. SMMEs looking to enhance their collaboration should consider the scope of the exemptions.

The Competition Act 89 of 1998 (Competition Act) prohibits certain agreements and practices between SMMEs, which the SMME block Exemptions aim to permit. In particular, section 4 prohibits certain conduct among competitors, and section 5 prohibits certain conduct between suppliers and customers.

A business is classified as an SMME according to the sector in which it operates, the size or class of its business, its total full-time paid employees, and its total annual turnover. These specific categories are defined on page 9 of Government Gazette No.4258 of 12 July 2019 (accessible here).

What conduct has the Minister exempted?

Seven categories of agreements or practices have been exempted, including certain categories of (i) research and development agreements; (ii) production agreements and toll manufacturing agreements (which do not result in the removal of a competitor from the market); (iii) joint purchasing agreements; (iv) joint selling agreements; (v) commercialisation agreements; (vi) standardisation agreements; and (vii) collective negotiations with large buyers or suppliers for the terms and conditions of purchase or supply.

What conduct is not exempted?

Under these regulations, SMMEs would not be permitted to fix selling prices of goods or services to consumers or engage in collusive tendering (in other words, bid-rigging).

It remains to be seen how these exemptions will coexist with the provisions of section 4(1)(b) of the Competition Act, which refer to certain categories of conduct that are absolutely and automatically prohibited. These include fixing selling and purchase prices, dividing markets, and collusive tendering.

Although the regulations explicitly provide that the fixing of selling prices and collusive tendering fall outside the scope of the safe harbour created in terms of the regulations, the fixing of purchase prices and market division are omitted from the exclusion. Is this an oversight, or does it mean that the Minister intended to relax the hard prohibition against fixing purchase prices and dividing markets by competitor SMMEs?

How does a business secure an exemption?

SMMEs need prior approval from the Competition Commission (Commission) to benefit from the exemption. The Commission must approve or decline a written application from an SMME within 30 business days of receiving it. Given the historic experience of drawn-out timeframes which ordinarily accompany section 10 exemption applications, the 30-day window is a positive move on the Minister's part.

Notably, after approval and within 30 business days of implementation, the exempted SMME must notify the Commission of the upcoming rollout. The exempted SMME is also obliged to keep meeting minutes and written records of any agreements or practices rolled out pursuant to the SMME Block Exemption and the Commission's approval.

Draft Vertical Restraint Regulations (the Vertical Regulations)

The Minister also published *draft* Regulations to help the competition authorities assess whether certain agreements between suppliers, customers, and distributors may be anticompetitive. The draft Vertical Regulations are significant for market participants engaged in selective distribution models, franchise arrangements, and the provision of spare parts or aftermarket repairs.

Vertical relationships, such as those between (i) manufacturers and retailers, (ii) wholesalers and distributors, or (iii) franchisors and franchisees, are common in the business world. In terms of the Competition Act, an agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect.

The Vertical Regulations provide a non-exhaustive list of relevant factors in determining whether a vertical agreement may contravene the Competition Act. The Vertical Regulations blend well-established legal principles with a uniquely South African approach that aims to incorporate support for SMMEs and black-owned businesses into the assessment.

While most of the Vertical Regulations echo familiar concepts in competition law, the shortness of the text sometimes sacrifices clarity. Additionally, some foreign legal principles seem to have been incorporated without sufficient context, particularly in the treatment of selective distribution agreements.

Of particular concern for businesses is the list of eight specific practices deemed "*likely to result in a substantial prevention or lessening of competition*" including: (i) restrictions on active or passive sales by members of a selective distribution network, (ii) restrictions on passive sales to customers outside assigned territories or customer groups, (iii) restrictions on members of a selective distribution agreement on selling the brands of competing suppliers, (iv) restrictions on the supply of spare parts, repair tools and technical information to independent repairers and service providers from the manufacturer, (v) restrictions on a buyer to manufacture, purchase or sell or resell goods and services after the termination of an agreement, (vi) obligations causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favorable conditions via competing online intermediation services, (vii) agreements with business infrastructure or service providers which restrict access to that infrastructure or service by third party competitors; and (viii) restrictive agreements that exclude SMEs and HDPs.

This list, seemingly drawn from foreign precedents and recent market inquiries in South Africa, could be interpreted as introducing a presumption of anti-competitiveness for certain ordinary business practices. Such a presumption could force businesses to have to justify these agreements to the competition authorities.

It's also important to note that these Vertical Regulations are not mere guidelines but subordinate or secondary legislation with the force of law. Therefore, businesses and legal practitioners should carefully scrutinise the draft and consider submitting their comments before the 16 July 2024 deadline. The final regulations will undoubtedly shape the landscape of vertical agreements in South Africa, influencing how businesses interact within their supply chains and impacting the broader competitive environment.

Source: Mark Garden, Clare-Alice Vertue, & Annerita Maritz - https://www.ebnet.co.za/new-competition-laws-will-impact-businesses/

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