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**the *competition* act:**  
*an introduction*



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# *The* **people of South Africa** *recognise*

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- That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans
- That the economy must be open to greater ownership by a greater number of South Africans
- That credible competition law, and effective structures to administer that law, are necessary for an efficient, functioning economy
- That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans

## **IN ORDER TO:**

- provide all South Africans equal opportunity to participate fairly in the national economy;
- achieve a more effective and efficient economy in South Africa;
- provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
- create greater capability and an environment for South Africans to compete effectively in international markets;
- restrain particular trade practices which undermine a competitive economy;
- regulate the transfer of economic ownership in keeping with the public interest;
- establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic.

Preamble to the Competition Act (No. 89 of 1998)

No one ever said  
doing business  
in South Africa was  
going to be fair.

*Until now.*

A number of major players in the South African business community still rely on unfair trade practices to keep their share of the market intact. Under the new Competition Act this state of affairs

is set to change. The Act was specifically designed to promote fair competition. Which, ultimately, means a growing economy and a fairer deal for all. *Towards a fair and efficient economy for all.*



**competition commission**  
south africa

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## *Preface* ***the purpose of this brochure***

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This brochure is specifically designed as an explanatory guide to the Competition Act itself. It is intended for the use of companies and their advisors. Its structure broadly follows that of the Act - unpacking each chapter and clarifying the core content and the legal and commercial implications of each of these sections.

It is not, of course, an exhaustive legal reference manual - nor is it a substitute for the Act. The three competition authorities, i.e. the Competition Commission, the Competition Tribunal and the Competition Appeal Court, preside over the final interpretation of the law. The brochure is therefore intended to assist companies in obtaining a better understanding of how the Act may or may not affect their business.

One of the objectives of the Compliance Division of the Competition Commission is to provide appropriate information materials to enable companies to comply with the Act and consequently act within the law. Along with the Competition Commission's general introductory brochure - also available from the Compliance Division - this more detailed guide will be the first in a series of brochures covering key competition issues.

The Act is relatively new and, accordingly, we urge anyone in doubt about whether they may be affected by the legislation to seek legal advice or to consult the Compliance Division at the Competition Commission for advice or clarification. Contact details are given on page 22.

# *Introduction* **a word from the Commissioner**

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The new Competition Act, which became law in 1998, has a major influence on how we do business in South Africa. The Act will make sure that the way that businesses compete with each other is as fair as possible. Consequently, it plays an important role in the Government's economic policy. It creates a framework within which companies can compete against each other, both locally and internationally - something which will ultimately benefit us all through increased product choice and lower prices.

The new Competition Act (No. 89 of 1998), which replaces the old Act of 1979, also seeks to create an environment where business is opened up to greater ownership by all South Africans. Consequently, it is designed to remove some of the barriers that previously made it difficult to start and run a business successfully. The Act also supports the Government's promise to promote small business - something that will create more jobs and ensure the country's long-term growth and success.

We trust that the brochure will be of assistance to you.



Adv Menzi Simelane  
Commissioner, Competition Commission

# 1 *what* **is the Competition Act?**

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## ***DEFINITIONS, INTERPRETATION, PURPOSE & APPLICATION OF THE ACT***

The Competition Act's main aim is to create a fair and efficient economy for all. This supports the Act's commitment to equal opportunity for business people, whatever the size of their business. One of the main ways it does this is to respond to complaints about illegal business practices. This includes investigating complaints about such practices.

Over and above this, the Competition Act has six specific objectives:

- to build the South African economy
- to provide South Africans with fair, competitive prices and product choice
- to create jobs and improve the lives of all South Africans
- to increase opportunities for South African business to compete internationally
- to make sure that small and medium-sized businesses have a fair and equitable chance of operating in the local economy
- to promote a greater spread of business ownership, in particular to include historically disadvantaged people.

More practically, the Act provides for the establishment of three institutions: the Competition Commission, the Competition Tribunal and the Competition Appeal Court. The Competition Commission is an independent body responsible for the investigation, control and evaluation of certain business activities. These activities include restrictive business practices; abuse of dominant position in a market; and mergers and acquisitions. The Competition Tribunal and the Competition Appeal Court make judgments about these activities. The activities and the three bodies that oversee them will be discussed in greater detail later in this brochure.

As for the application of the Act, it "applies to all economic activity within, or having an effect within, the Republic" - subject to certain exclusions detailed in Appendix A on Page 23.

N.B. This brochure will use some technical words, but they will either be explained in the text or later in the Glossary of Terms.

## practices does the Act regulate?

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### PROHIBITED PRACTICES

In order to monitor business activity, the Act sets out rules for businesses in relation to competitors, suppliers and customers. Certain activities, which would have a major negative effect on competition, are therefore not allowed by the Act.

These activities include:

- illegal arrangements between competitors (restrictive horizontal practices);
- illegal arrangements between suppliers, producers and their customers (restrictive vertical practices); and
- illegal use of market power by large companies (abuse of a dominant position).

The Act also states that the Competition Commission must approve all mergers and acquisitions involving firms of a certain size. This will be covered in more detail in the following section.

### So what does the Act prohibit?

#### a) Restrictive horizontal business practices

The Act forbids restrictive horizontal practices - horizontal simply means a relationship between competitors at the same level. The Act does not allow practices which substantially prevent or lessen competition in a market, unless these practices can be justified on the basis of technology, efficiency or other pro-competitive gains. It is therefore the responsibility of companies engaged in restrictive practices to prove that their relationship is beneficial to the economy in a broader sense, and that there are gains which outweigh the anti-competitive effects. This would constitute a defence against a horizontal restrictive practice charge.

Further to the above, there are three restrictive horizontal practices that are prohibited outright. No defence is allowed for these unfair arrangements. They are:

- the direct or indirect fixing of prices (e.g. agreeing to keep a price at a specific level, sometimes called price fixing)
- the agreed division of markets (e.g. splitting regions between companies or market sharing)

- collusive tendering (e.g. making secret agreements to apply for government work).

### **b) Restrictive vertical business practices**

The Act also forbids restrictive vertical practices (vertical means a relationship between a manufacturer and a wholesaler or retailer).

This means that:

- no agreement between producers and wholesalers or traders is allowed if it prevents or lessens competition in a market
- setting minimum resale prices is illegal, unless it is made clear to the reseller that the suggested price is only recommended and not compulsory.

As with restrictive horizontal practices, it is the responsibility of companies engaged in restrictive vertical business practices to prove that their relationship is beneficial to the economy - and that there are gains which outweigh the anti-competitive effects.

### **c) Abuse of dominance**

The third thing the Act forbids is the abuse of dominant market power in any particular geographical market. The Act says a firm is dominant if:

- it has at least 45% of a market, or
- it has at least 35%, but less than 45%, of a 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.

Market power means the power of a company to control prices, to exclude competition or to behave independently of its competitors, customers and suppliers.

It is important to understand the relationship between the size of a business, its market power and the abuse (or not) of that power. The size of a company - even one that is the biggest seller in a particular market - is not in itself a problem. Large businesses may need their size to achieve lower production costs and to compete effectively against foreign and domestic competitors. The Act, however, does concern itself with large companies who use their power in a way that hurts their customers or other businesses.

Thus, if a firm is dominant in any market in which it operates (e.g. food manufacturing or financial services provision in the Western Cape), it is not allowed to abuse its position of strength. For example, a dominant firm is not allowed to engage in the following activities:

- charging excessive prices: this means prices that do not bear a reasonable relation to the costs of producing the product or service on offer
- refusing to give competitors access to an essential facility (e.g. infrastructure such as telephone lines, roads, ports, etc.) when it is economically possible to do so

- persuading a supplier or customer not to deal with a competitor (e.g. bribing a bottle store to buy from only one wine producer)
- refusing to supply scarce goods to a competitor when it is economically possible to do so
- selling goods or services on condition that the buyer purchases other goods or services unrelated to the original purchase (e.g. being forced to buy a dispenser or storage item for the goods you want to purchase)
- selling goods or services below their marginal or average variable cost (i.e. the average cost of producing the goods or services): this is sometimes called predatory pricing
- buying up a scarce supply of intermediate goods or resources required by a competitor (intermediate goods are goods or services which are required to create a finished product or service, e.g. computer chips).

### ***Exemptions from prohibited practices***

An Exemption is a written permission by the Competition Commission to engage in a prohibited practice, as defined by the Act. Therefore, an Exemption can only be granted if the practice brought before the Commission is prohibited under the Act. If the practice proves not to be a prohibited practice, a letter of advice is issued to this effect. If the practice is prohibited under the Act, then the Competition Commission considers whether the prohibited practice in question can be exempted from prosecution.

Exemptions from prohibited practices are granted in cases where the practice contributes to one or more of the following:

- the maintenance or promotion of exports
- the promotion of small businesses and black business (firms controlled or owned by historically disadvantaged persons)
- the reversal or reduction in the decline of a particular industry (e.g. the clothing industry)
- the stability of an industry, as designated by the Minister of Trade and Industry.

In addition, Exemptions may be granted for an agreement or practice that relates to rights protected in terms of the following intellectual property laws: the Performers' Protection Act (1967), the Plant Breeder's Rights Act (1976), the Patents Act (1978), the Copyright Act (1978), the Trade Marks Act (1993) and the Designs Act (1993). All of these Acts define areas of business practice that can be protected from plagiarism or infringement of copyright, the better to safeguard the creators of new ideas, products and services.

It is important to note that firms are not automatically exempted from the rules of the Competition Act as a result of the rights granted in terms of laws like the intellectual property laws. What this means is that firms cannot be automatically allowed to continue with a particular prohibited practice as outlined in the Competition Act because that practice is allowed by another Act. Furthermore, the Competition Commission can exempt a pro-

hibited practice with or without certain conditions. The Competition Commission also has powers either to make a single exemption or to exempt categories of agreements or practices.

Finally, professional associations may apply to have all or part of their rules exempted from the restrictive practices section of the Competition Act. Professional associations are bodies that make rules for professions such as doctors, accountants and lawyers and represent them as a group. They are either a governing body for that association, as defined by an Act of Parliament (e.g. the Attorneys Act, 1979), or an association that the Competition Commission is satisfied represents the interests of a profession.

By their very nature, these professional associations are potentially in a position within their defined professions to work together to the exclusion of other persons who are not members of the association (otherwise known as collusive behaviour). They may also restrict competition.

The Competition Act recognises that there are other reasons for these groups to exist, such as the need to keep up professional standards and for the ordinary practice of the professions. Consequently, it asks those associations whose rules are binding and are anti-competitive in terms of the new law to apply for their rules of association to be exempted from the Act so that they can continue to exist legally.

These associations must therefore apply for this exemption from the restrictive practices section of the Act (Chapter 2, Part A).

A full list of the major associations, and the laws relating to them, is given at the end of the Competition Act (Schedule 1, Part B). Any other associations linked to these same professions are also allowed to apply for exemption. The relevant professions are as follows:

- Accountants and Auditors
- Architects
- Engineers
- Estate Agents
- Attorneys and Advocates
- Natural Scientists
- Quantity Surveyors
- Surveyors
- Town and Regional Planners
- Valuers
- Medical Practitioners, including doctors, dentists, pharmacists, nurses, vets and alternative medical practitioners
- Any other professional association that the Minister of Trade and Industry has said must apply for exemption from the Competition Act.

## *what* **does the Act say about mergers?**

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### **MERGER CONTROL**

#### ***Definition of a merger***

One of the most important powers that the Competition Commission has is to investigate and approve (or prohibit) mergers between companies of a certain size. The Act defines a merger as “the direct or indirect acquisition or direct or indirect establishment of control... over the whole or part of the business of another firm.” In everyday language this could take the form of a simple acquisition of another company, a hostile takeover of another company or a planned and agreed merger between two companies.

The issue is the establishment of control. If a firm gains control of another company - that is, control that it did not have before - that transaction would constitute a merger in terms of the Competition Act. Control over another firm can be established either through the purchase of shares or assets - or by any other means.

#### ***Merger thresholds***

Currently there are specific thresholds beyond which mergers must be notified to the Competition Commission, one of the bodies that administers the Competition Act. They are worked out on the basis of the value of the combined annual turnover or assets involved in any merger transaction. The Competition Act takes account of small, intermediate and large mergers. It defines them separately as follows:

- A small merger refers to a merger or proposed merger a) where the combined annual turnover or assets of the buying firm and the target firm are valued below R200 million; or b) where the annual turnover or asset value of the target firm is under R30 million
- An intermediate merger refers to a merger or proposed merger a) where the combined annual turnover or assets of the buying firm and the target firm are valued at or above R200 million but below R3.5 billion; or b) if the annual turnover or asset value of the target firm equals or exceeds R30 million but is less than R100 million

- A large merger refers to a merger or proposed merger
  - a) where the combined annual turnover or assets of the buying firm and the target firm equals or exceeds R3.5 billion; or b) if the annual turnover or asset value of the target exceeds R100 million.

**Merger notification**

Companies considering a merger that falls into the intermediate or large categories must notify the Commission before it is implemented. In addition, such companies must provide a copy of that notice to trade unions representing the employees of any of the merging firms, or an employee representative, if there are no registered trade unions involved. Written proof of employee/union notification having been received must form part of the submission of the merger notification to the Competition Commission.

Small mergers do not need to be notified to the Commission and may be completed without approval, unless it appears, within six months, that the merger may substantially prevent or lessen competition, or cannot be justified on public interest grounds.

Companies involved in an intermediate or large merger must not implement that merger until they have received approval from either the Competition Commission (in the case of intermediate mergers) or the Competition Tribunal (in the case of large mergers).



No merger is complete without it.

The new Competition Act compels companies planning mergers valued at, or above, a combined annual turnover of R200 million to notify the Competition Commission. Companies must not implement a merger until they have received approval from either the Competition Commission or the Competition Tribunal.

Failure to comply with these provisions could result in penalties ranging from divestiture to fines of up to 10% of turnover. Applying to us for approval, however, will cost you a lot less. For further information, please contact The Competition Commission.

*Towards a fair and efficient economy for all.*



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## ***Approval or prohibition of mergers***

In turn, the Competition Commission has 20 business days to complete an intermediate merger analysis and 40 business days to complete a large merger analysis. However, if the transaction is very complex or the parties fail to provide the required information, the Commission may ask for an extension of a maximum of 40 days to consider an intermediate merger and 15 days at a time for a large merger.

Within those maximum periods, the Commission must either:

- approve the merger by issuing a clearance certificate
- approve the merger subject to conditions
- prohibit the merger.

For large mergers, the Competition Commission must refer the matter to both the Competition Tribunal and the Minister, who may also offer input in the case of intermediate mergers. However, the Minister cannot approve or prohibit a merger independently. All referrals are accompanied by a recommendation in writing for either approval, approval with conditions or prohibition of the merger in question.

Any merger decision made by the Competition Commission may be referred to the Competition Tribunal for a second opinion (appeal) so merging firms may ask the Competition Tribunal to consider conditions or prohibition set by the Competition Commission. In contrast, all decisions on large mergers are referred on to the Competition Tribunal, which must,

within the agreed time, either approve the merger (with or without conditions) or prohibit it. Appealing these decisions can be done through the Competition Appeal Court within 20 business days of the Competition Tribunal's decision. Two appeals are allowed for intermediate mergers and one appeal for large mergers.

## ***Merger considerations***

The Competition Commission or Competition Tribunal must decide whether or not the merger is likely to prevent or reduce competition in a particular market. This is achieved by assessing the strength of competition in the relevant market and the likelihood that the companies in that market will behave competitively after that merger. Several factors must be taken into consideration in this situation, including:

- the actual and potential level of competition from imports
- the ease of entry into the market, including tariff and other regulatory barriers
- the level and history of collusion (secret agreements) in the market
- the ability of suppliers and customers of a particular firm to negotiate business with it (sometimes called countervailing power)
- the likelihood that the purchase would result in the merged firm having market power
- the dynamic characteristics of the market, including growth, innovation and product choice

- the nature and extent of vertical integration in the market, i.e. where companies own other companies that are their suppliers, their customers or both
- whether the business or part of the business of one of the merging firms has failed or is likely to fail
- whether the merger will result in the removal of an effective competitor.

After considering and assessing the above factors, the Competition Commission or the Competition Tribunal must further consider two matters:

- whether anti-competitive effects are outweighed by technological, efficiency or pro-competitive gains which would occur as a result of the merger and which will be greater than the prevention or lessening of competition
- whether the merger can or cannot be justified on substantial public interest grounds by assessing such factors and the effect it will have on:
  - a particular industrial sector or region
  - employment
  - the ability of small or black/emerging business to become competitive
  - the ability of national industries to compete in international markets.

Note: The Commission must consider public interest issues whether or not the merger is pro-competitive or anti-competitive, e.g. it may appear that a merger would monopolise or prevent competition in a market, but one or more of the above public interest factors might outweigh those seemingly negative effects.

### ***The Competition Appeal Court***

If companies involved in a merger wish to appeal against a decision of the Competition Tribunal, they may do so within 30 days of receiving notice of that decision. The Competition Appeal Court must then either:

- reverse the decision of the Tribunal
- change that decision by ordering restrictions or by adding conditions; or
- confirm the original decision of the Tribunal.

Intermediate merger decisions can be appealed twice; large mergers can be appealed once. This is the final court of appeal on competition matters, subject to any rulings that may take place as to the powers of market regulators (such as ICASA, the Independent Communications Authority of South Africa) in relation to the powers of the Competition Commission, Tribunal and Appeal Court. The Minister of Trade & Industry may also be involved with cases, particularly if there are substantial public interest grounds involved.

**COMPETITION COMMISSION, TRIBUNAL & APPEAL COURT**

The three bodies mentioned above jointly administer the Competition Act. They are all independent, impartial and subject only to the Constitution and the law. They are also entirely independent of each other.

***The Competition Commission***

The Competition Act lists what the Competition Commission must do to make sure its objectives are met. These functions are, in summary:

- to make rules and publicise decisions that increase open and transparent business practice (e.g. by publishing merger notifications in the Government Gazette)
- to inform people of the powers and functions of the Act
- to investigate business practices that break the law (see Chapter 2)
- to allow or prohibit mergers over a certain value (see Chapter 3)

- to refer complaints to the Competition Tribunal
- to talk with, advise and receive advice from sector regulatory authorities (such as ICASA, the Independent Communications Authority of South Africa)
- to work towards and conclude agreements with such sector regulatory authorities in order to make it clear who monitors and controls competition matters in those sectors.

The team of people responsible for putting these objectives into practice is headed by the Commissioner, who is the Chief Executive Officer of the Competition Commission. He is accountable to the Minister of Trade and Industry and to Parliament. There are six divisions in the Commission that reflect its core activities: Enforcement & Exemptions, Mergers & Acquisitions, Compliance, Legal Services, Policy & Research, and Corporate Services. Further details of their specific activities are available on our website: [www.compcom.co.za](http://www.compcom.co.za)

### ***The Competition Tribunal***

The Competition Tribunal has matters referred to it by the Competition Commission and may:

- judge any prohibited conduct related to prohibited practices
- decide on remedies in cases of prohibited conduct
- make decisions on any other matters brought before it
- hear appeals from, and review decisions of, the Competition Commission
- make any decisions necessary to the performing of its function in terms of the Act.

### ***The Competition Appeal Court***

The Competition Appeal Court is the final body to which cases from the Competition Tribunal can be referred. Its function is to review and then confirm, amend or set aside any decision that results from an appeal to the Competition Tribunal, other than consent orders, which allow appeals to the Supreme Court or the Constitutional Court.

### ***Finances and reports***

The Competition Commission, the Competition Tribunal and the Competition Appeal Court are financed by Parliament, fees payable to them, and income derived from invested monies and money received from any other source. The three bodies must also prepare and submit an annual report within six months of the end of their financial years. Fines have to be paid to the Government's National Revenue Fund.



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*s o u t h a f r i c a*

**INVESTIGATION AND ADJUDICATION PROCEDURES*****Making a complaint***

The Commissioner can bring a complaint against a prohibited practice by a firm - as can any other person - so long as the complaint is made in the correct way. There are specific complaints forms available from the Competition Commission (Forms CC1 and CC2). The investigation of complaints is done by Competition Commission staff, who have the power to enter and search premises if there are reasonable grounds to believe that a prohibited practice has taken place, is taking place or is likely to take place on the premises. In all cases, a warrant is necessary and searches must be made during daylight hours.

When an investigation is complete, the Competition Commission must either refer the matter to the Competition Tribunal - if it believes a prohibited practice has taken place - or issue a notice of non-referral to the complainant.

***Notices of non-referral***

A notice of non-referral is issued if the Competition Commission

rejects a complaint and therefore will not act on it. This will be because the practice in question is not prohibited in terms of the act and therefore there is no case to be made against the firm/s in question. However, the person who made the complaint may ask for a review of the Competition Commission's decision by the Competition Tribunal, so long as it is requested within 10 days of first receiving the notice of non-referral. The hearing of this complaint by the Competition Tribunal will be at the complainant's expense.

***Referral to the Competition Tribunal***

If the Competition Commission does not refer the matter to the Competition Tribunal, the complainant may, on receipt of a non-referral from the Competition Commission, then refer the matter to the Tribunal, which will hear the matter as quickly as possible, in line with the principles of natural justice. The following people may take part in a Competition Tribunal hearing, in person or through a representative:

- the Commissioner, or any person appointed by the Commissioner

- the firm or person making the complaint (the complainant)
- the firm whose conduct is in question (the respondent)
- any other person who has a material interest in the matter.

### **Competition Tribunal procedures**

The Competition Tribunal operates in a similar manner to a High Court and has similar powers. Thus it can:

- summon people to appear before it
- question any person under oath
- order any person to produce any relevant document as evidence; and
- direct whether any evidence given to the Competition Tribunal may be published or not.

### **Costs**

Complainants and respondents must carry their own costs unless the Competition Tribunal has:

- found the respondent guilty, in which case the Tribunal may rule that the respondent must pay his/her own costs and those of the complainant
- found the respondent innocent, in which case the Tribunal may rule that the complainant must carry both his/her own costs and those of the respondent.

### **Appeals**

Any participant in a Competition Tribunal hearing may appeal against its judgment to the Competition Appeal Court, which will review the decision. A judgment of the Competition Appeal Court is binding on both the Competition Tribunal and the Competition Commission.



## **REMEDIES, ENFORCEMENT AND PENALTIES**

There are a number of rulings that the Competition Act empowers the Competition Commission and the Competition Tribunal to make.

These include:

- the granting of interim relief
- rulings on prohibited practices and mergers
- adjourning hearings where prohibited practices might qualify for an exemption
- imposing administrative fines
- requiring divestiture in the case of disallowed mergers and proven prohibited practices
- confirming agreements as consent orders (see below).

### ***Interim relief***

If a case of prohibited practice is still to be brought before the Competition Tribunal, and it is clear that serious, irreparable damage (in the words of the Act) may be done to a complainant or that the law is clearly being broken, an interim ruling can be made to prevent the prohibited practice from continuing. These orders can extend either until the actual hearing before the Competition Tribunal or for a period of six months - whichever is the sooner. If

the case has still not been heard after six months, the law allows for the interim ruling to continue for another six months.

A complaint must be made to the Competition Commission before an interim relief application can be made, whether or not a hearing or investigation has commenced in respect of the prohibited practice. Applications must be made directly to the Competition Tribunal, using the prescribed form.

### ***Competition Tribunal rulings***

In relation to proven prohibited practices, the Competition Tribunal may:

- forbid any such practice
- order a firm or person to supply or distribute goods or services to another firm or person
- impose an administrative fine (see below)
- prohibit any merger agreement
- order divestiture
- declare the conduct of a firm to be a prohibitive practice
- declare the whole or part of an agreement to be illegal

- order access to an essential facility (e.g. infrastructure such as telephone lines, ports or roads)
- confirm a consent agreement as an order of the Tribunal
- approve any breach of its rules and procedures, if good reason is shown.

### **Administrative fines**

The Competition Tribunal may impose a penalty for the following:

- first-time occurrences of certain prohibited practices (see Appendix B for details)
- repeated breaches of other prohibited practices (see Appendix B, as above)
- failure to give notice of a merger as required
- proceeding to implement a merger when either the Competition Commission or the Competition Tribunal has prohibited it
- proceeding to implement a merger contrary to conditions imposed by either the Competition Commission or the Competition Tribunal.

Fines can be up to but not more than 10% of the sum of a firm's annual turnover in the Republic and its exports from the Republic in the preceding financial year. They are paid into the National Revenue Fund referred to in section 213 of the Constitution. They are determined by considering the following factors:

- the nature, length and seriousness of the illegal practice
- the amount of loss or damage caused by it

- the behaviour of the guilty firm or person
- the market conditions in which the practice happened
- the level of profit made because of the illegal practice
- the level of co-operation of the guilty firm with the Competition Commission and Competition Tribunal
- whether the guilty firm has been found guilty of a prohibited practice before.

### **Divestiture**

Divestiture means the reversal of investments or agreements made in merger agreements, e.g. the purchasing of shares in another firm. If a merger is prohibited by the Competition Commission or Competition Tribunal, and the merger is still carried out, the Competition Tribunal can order firms involved in the merger to sell any shares, interest or other assets acquired as a result of the merger. It can also declare as void any merger agreement previously made.

If a firm is found guilty of abusing its dominant position in a market (see Chapter 2) or a prohibited practice cannot be remedied by another part of the Act, or the prohibited practice has been repeated, then divestiture may also be ordered by the Competition Tribunal. However, in these cases, such orders must be confirmed by the Competition Appeal Court before they can be enforced.

All divestiture orders may set a time limit for compliance and any other terms that the Competition Tribunal may consider appropriate, but taking into regard the commercial interests of the firm concerned.

### ***Consent orders***

A consent order is a document in which a firm or firms admit that they have committed a prohibited practice. The order may include damages. A consent order means that the Competition Commission will not bring a charge against the firm or firms because they have admitted guilt. The Competition Tribunal confirms and records all consent orders. When a consent order has been agreed and concluded, the firm or firms cannot be sued for further damages in a civil court.

### ***Status and enforcement of judgments***

Any decision, judgment or order of the Competition Commission, Competition Tribunal or Competition Appeal Court has the same legal status as a ruling of the High Court. In addition, the Competition Commission may apply to the High Court for recovery of unpaid administrative fines imposed by the Competition Tribunal.

### ***The Act's relationship with civil law***

Any court cases that raise matters covered by or connected to the Competition Act must be referred to the Competition Tribunal or Competition Appeal Court for consideration. However, a person or firm who has suffered loss as a result of a prohibited practice (damages) may not commence a civil action for compensation if damages have already been awarded through a consent order agreed by the Competition Tribunal. When applying for damages in a civil court, a person or firm must get a notice from the Competition Tribunal or Competition Appeal Court certifying that a prohibited practice has been ruled against and the judgment made, with reference to the relevant section of the Act that applies.

The right to damages starts from the day the Competition Tribunal makes its ruling or an appeal process is concluded.

If a ruling of the Competition Tribunal is appealed against, no civil action in that case may be started until the appeal has been heard and ruled on.

### ***Limitations on making complaints***

Complaints in respect of prohibited practices must be brought within three years of the practice taking place. Finally, a complaint may only be made in respect of one section of the Act, if the complaint relates substantially to the same conduct.

### ***Offences***

The following offences attract penalties under the Competition Act:

- passing on or misusing confidential information about any person or firm involved in any communication or complaint relating to the Competition Act
- preventing the administration of the Act through obstruction or unfair influence
- failing to appear before the Competition Tribunal or Competition Appeal Court when requested
- refusing to be sworn in or refusing to make a statement
- failing to produce a book or document on request
- failing to answer fully or to tell the truth
- trying to influence the Competition Commission or Competition Tribunal over any matter connected to an investigation

- guessing at the outcome of a ruling and, in doing so, trying to influence it
- showing no respect for an investigation
- disturbing cases by interrupting or behaving badly
- acting contrary to an order to enter and search a place (e.g. obstructing a search and seizure operation)
- entering a place and taking documents without permission
- failing to act on the ruling of the Competition Tribunal or Competition Appeal Court.

**Penalties**

There are two types of penalty under the Competition Act. The first applies to the last offence above - failing to act on a ruling. In this case, a person or firm can be fined up to R500,000 or sent to prison for up to 10 years, or a combination of both penalties. All other offences can lead to a fine of up to R2000 or a prison stay of up to six months, or a combination of both penalties.

These penalties can be ordered by both the Competition Tribunal and the Competition Appeal Court, as well as any civil Magistrate’s Court.

**Serving documents**

Unless otherwise provided for by the Competition Act, a notice, order or other document that must be given to a person will only have been passed to them properly if:

- a) it is delivered to that person directly

- b) it is sent by registered post to that person’s last known address; or
- c) it is published in the Government Gazette.

**Proof of facts**

In the presenting of facts in criminal cases brought under the Competition Act, there are certain areas where facts are taken as proven unless otherwise disproved. These are:

- a) if it is said that a person at a firm was an employee, that person must be presumed to be an employee at that firm, unless proved to the contrary
- b) if it is proved that false information appears in or on a document or computer disk, the person who kept that item must be presumed to have created that information, unless the contrary is proved
- c) an order certified and signed by the Chairperson of the Competition Tribunal or the Judge President of the Competition Appeal Court is conclusive proof of the contents of the order.

Furthermore, information found in or on a document or computer disk is allowed in evidence as an admission of the facts by the person who appears to have created that information, unless it is proved that person did not create or store it.

# is there anything else I need to know?

## GENERAL PROVISIONS AND CONTACT INFORMATION

### *Additional powers relating to the Competition Act*

There are certain official powers that help put the Competition Act into practice. These include:

- the power of the Minister to make rules
- the power of the Competition Commission to make guidelines that help people understand and comply with the Competition Act
- the requirement for the Competition Commission to co-operate with regulatory authorities with jurisdiction over Chapters 2 & 3 of the Act, through the sharing of information and the establishment of procedures for the management of concurrent areas of jurisdiction
- the repeal of old competition laws.

### *More information on the Competition Act*

For more information on the Competition Act, the Competition Commission, the Competition Tribunal and the Competition Appeal Court, please contact the Compliance Division of the Competition Commission at the address below.

Furthermore, the Compliance Division is happy to respond to enquiries from firms who would like the Commission to arrange seminars or presentations about the Competition Act.

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## *Appendix A* **what the Act covers**

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The amended Section 3(1) of the Competition Act refers to the application of the Act and reads as follows:

“This Act applies to all economic activity within, or having an effect within, the Republic, except -

- a) collective bargaining within the meaning of Section 23 of the Constitution, and the Labour Relations Act, 1995 (Act No.66 of 1995);
- b) a collective agreement, as defined in Section 213 of the Labour Relations Act, 1995; and
- e) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.”

Paragraphs c) and d) - which were deleted from the amended Act - referred to the powers of regulatory authorities such as ICASA (the Independent Communications Authority of South Africa), whose power of jurisdiction over competition issues is now shared with the Competition Commission.

## *Appendix B* **administrative fines**

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1) These fines are applied in two ways. They are applied for first-time prohibited practices in terms of the following sections of the Competition Act (1998):

### **Section 4(1)(b):**

- i) Price fixing
- ii) Dividing markets; and
- iii) Collusive tendering.

### **Section 5(2):**

- i) Minimum resale price maintenance.

**Section 8(a), (b) and (d):**

- i) Charging excessive prices
- ii) Refusing access to an essential facility to a competitor
- iii) Persuading a supplier or customer not to deal with a competitor
- iv) Refusing to supply scarce goods to a competitor when it is economically possible to do so
- v) Selling goods or services on condition that the buyer purchases other goods or services unrelated to the original purchase
- vi) Selling goods or services below their marginal or average variable cost
- vii) Buying up a scarce supply of intermediate goods or resources required by a competitor.

2) Fines also apply for repeated prohibited practices in terms of the following sections of the Competition Act (1998):

**Section 4(1)(a):**

- i) A horizontal relationship preventing or lessening competition

**Section 5(1):**

- i) A vertical relationship preventing or lessening competition

**Section 8(c):**

- i) Engaging in exclusionary acts

**Section 9(1):**

- i) Price discrimination.



All these prohibited practices are dealt with in more detail in Chapter 2 of this brochure and in the Competition Commission's separate publication "The Competition Act: A Guide to Prohibited Practices", available free of charge from the Compliance Division at the address given in Chapter 7.

# ***GLOSSARY OF TECHNICAL TERMS***

## ***Cover***

### ***COMPETITION***

In business terms, a competitive environment is created when businesses can charge prices that include a normal profit. This is usually created in markets that have no barriers of entry, so that any new business in the market also has the opportunity to make a profit. Competition occurs when the level of profit varies from company to company and prices vary.

## ***Preamble***

### ***ANTI-COMPETITIVE***

This is when the way businesses compete is illegal in terms of the Act (see Chapters 2 & 3). This sort of behaviour means that a fair, efficient and competitive market is not possible and that businesses can suffer as a result.

### ***CREDIBLE***

This refers to the Act's standing as a law that must, in order to be more effective, be respected and trustworthy in its monitoring of business practice in South Africa.

## ***Preface***

### ***COMPLIANCE***

Compliance is the act of responding to, acting within and acting on any rul-

ing resulting from the Competition Act (1998). Compliance is increased and assisted by the information materials created by the Compliance Division of the Competition Commission.

## ***Chapter 2***

### ***RESTRICTIVE PRACTICE - HORIZONTAL AND VERTICAL***

These are practices that limit competition in anti-competitive ways. Sections 4 & 5 of the Act detail the specific practices that are considered restrictive and are, therefore, prohibited. Chapter 2 of this brochure refers.

### ***MARKET POWER***

This refers to the power of a firm or business to control prices, to exclude competition or to behave, to a large extent, independently of its competitors, customers or suppliers.

### ***MONOPOLY***

This refers to the power of a company to influence a market by means of its market power (above). The price that monopoly firms can charge is usually greater than a normal or competitive rate, therefore making it difficult for other companies to compete.

**INTERMEDIATE GOODS**

These are goods or services which are required to create a finished product or service, e.g. computer chips.

**PRO-COMPETITIVE**

Activities that promote equitable and fair competition in a market are considered to be pro-competitive.

**MARGINAL COST or AVERAGE VARIABLE COST**

The average cost of producing goods or services, sometimes referred to as the 'cost price'. This cost does NOT include any profit margin.

**ESSENTIAL FACILITY**

This refers to infrastructure such as telephone lines, roads, ports and other facilities that are, in the normal course of business, too large to build independently and therefore are shared by a number of companies and firms. They are by their nature essential to the proper and profitable functioning of those businesses, e.g. necessary for the transport and distribution of goods and services.

**Chapter 3  
THRESHOLDS**

The limits, set in rands, which define small, intermediate and large mergers. These are defined in detail in Chapter 3.

**COLLUSION**

Collusion is the act of working together with another company, usually in secret and in an anti-competitive way. This is sometimes done so as to share out work between companies, usually by, again, secret agreement beforehand.

**COUNTERVAILING POWER**

The ability of suppliers and customers of a particular firm to negotiate business with that firm, usually determined by the bargaining power of the parties concerned.

**VERTICAL INTEGRATION**

Vertical integration means the extent to which companies in a particular market own other companies that are their suppliers, or customers, or both.

**Chapter 4  
PREMISES**

The buildings or offices that a company operates from.

**Chapter 6  
JURISDICTION**

The power as defined by the Act to implement and enforce the Competition Act through the rulings of the Competition Commission, Competition Tribunal and the Competition Appeal Court.

## ***OFFENCES***

Activities that are against the law under the Competition Act and therefore attract penalties under the Act.

## ***PENALTIES***

The punishments and fines set out in terms of the Competition Act that are imposed when offences are committed. These take the form of fines or prison sentences.

## ***MAGISTRATE'S COURT***

A civil court in a local or provincial district - as opposed to the Constitutional Court or the Supreme Court, which are national bodies.

## ***REPEAL***

The reversal or overturning of a ruling, usually on appeal from one court to another, e.g. a ruling by the Competition Tribunal can be repealed by the Competition Appeal Court.

# ***Chapter 7***

## ***CONCURRENT JURISDICTION***

This describes the situation when two bodies or institutions (here the Commission and other regulatory authorities such as ICASA - the Independent Communications Authority of South Africa) have equal power to monitor and regulate firms operating in South Africa. Both parties must agree when considering complaints and merger applications or any other matter that falls under the jurisdiction of the Competition Act.



## *Contacting the Commission*

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