

## HOW TO CONTACT US

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We offer a variety of services designed to clarify the Act and to improve the level of participation of SMEs and HDI firms. For these services, you may contact us at:

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south africa



**the competition act**  
*a guide for SMEs*

*Towards a free and fair economy for all.*



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# SME GUIDE

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## ABOUT THE GUIDE

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This guide aims to inform our stakeholders, be they small or medium business owners, about our functions and proceedings so that they are able to engage us to their full advantage. It thus attempts to make our role as outlined in the Competition Act 89 of 1998 (“the Act easily understandable)


## WHAT THE ACT SEEKS TO ACHIEVE FOR SMEs AND HDIs

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The act establishes three competition authorities: i.e. the Competition Commission (“the Commission”), to investigate and evaluate restrictive practices, abuse of a dominant position and merger control; the Competition Tribunal (“the Tribunal”), to adjudicate such matters and the Competition Appeal Court (“the Court), as the Court of final instance on competition law issues.

The overall objective of the Act is to promote and maintain competition in South Africa in order to, amongst other things, ensure that small and medium sized enterprises (SMEs) and businesses owned or controlled by historically disadvantaged persons (HDIs) have an equitable opportunity to participate in the national economy. this requires us to monitor the markets to ensure that there are no unreasonable barriers for SMEs and HDI firms is not hampered by collusive and/or exclusive arrangements and that SMEs and HDI firms are not forced to exit markets because of abusive behavior by dominant firms.

Our activities are therefore designed to level the playing field for all firms, big and small in order for them to participate fairly and



contribute to growth and development of our economy. However, we are unlikely to achieve this objective to the fullest without the participation of SMEs and HDI firms in our processes and activities.

## THE ACT AND THE ROLE OF SMEs AND HDIs

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The Act deals with the structure of the market through the control of mergers and acquisitions. Any firm wishing to buy another firm would have to get our approval before they can do so. When mergers are being evaluated, SMEs or HDI firms may participate by making written submissions, either for or against a merger affecting their competitiveness in the market.

The Act further controls the behavior of firms by prohibiting certain practices considered detrimental, not only to SMEs and HDI firms to be well informed about what is prohibited so that they are able to lodge complaints regarding any perceived breach of the Act by big business or their competitors. The complaint must be accompanied by evidence in the form of documentation or witness statements, to assist us in our investigation of the alleged practice.

In certain circumstances, the Act allows for firms to apply for exemption from certain provisions of the Act for a limited period of time. SMEs and HDIs can make use of this process to get exempted if they themselves wish to participate in an anticompetitive practice designed to enhance their competitiveness in a market. They can also make submissions to oppose an exemption application by other firms, if in their view, the granting of an exemption will promote anti-competitive conduct that could be detrimental to their competitiveness in the market.

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## RESTRICTIVE PRACTICES THAT ARE PROHIBITED BY THE ACT

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The practices prohibited by the Act can be classified as 'per se' prohibitions, meaning there is no room for justifying why a firm(s) engages in these practices, and the 'rule of reason' prohibitions, meaning a firm may engage in these practices for as long as it has defenses based on efficiencies, technological or other grounds that offset the anti-competitive nature of the practice.

The Act prohibits certain practices between firms in a horizontal relationship, i.e. firms competing in the same level of the market in respect of the nature of products and services and their geographic location, agreements between firms in a vertical relationship, i.e. firms that operate at different levels of the supply chain, such as a manufacturer and a retailer, and practices by dominant firms, i.e. that dominate the market because they have either large market shares or the power to influence prices in a market, or both

### Firms in a horizontal relationship

Firms in a horizontal relationship are not allowed to engage in the following practices, unless they have an exemption:

- fix prices – this occurs where competitors agree on what they will charge for a particular product/service as well as agreements relating to discounts, rebates or credit terms;
- divide markets – this occurs where competitors agree not to conduct business in each other's regions or with each other's customers;
- tender collusively – this occurs where competitors agree not

to tender against each other by either withholding their bid, taking turns in bidding, one party tendering and then subcontracting to the other party or tendering in different regions.

Other than the above-mentioned practices, the Act prohibits any practice or conduct by competing firms that has the effect or preventing or lessening competition in a market, if such practices cannot be justified.

#### Firms in a vertical relationship

Firms in a vertical relationship are not allowed to engage in the practice of minimum resale price maintenance. This a manufacturer of motor vehicles or spare parts, for instance, is not allowed to dictate to a dealer or retailer a certain minimum price at which to re-sell such goods or, to determine the maximum discount that can be given to a buyer. They can only recommend a price that they feel gives credence to the value and quality of the product, but the recommendation should not be binding to the dealer or retailer.



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The Tribunal imposed a fine of R3 million on Federal Mogul Aftermarket for setting a minimum resale price in respect of spare parts. Toyota also paid an administrative penalty of R12 million for dictating maximum discounts that dealers are allowed to give customers in respect of certain cars that Toyota manufactures.

Since most of the retailers or dealers are relative small firms, they are often the ones subjected to this kind of conduct by manufactures or suppliers. We therefore encourage SMEs and HDI firms to report this kind of practice should they encounter it in the industry.


In addition to the above, any agreement between firms in a vertical relationship is not allowed if it results in the lessening and prevention of competition, unless it can be justified.

## Abuse of a dominant position

It is not wrong for any firm to grow its market share or power in any industry, but because there is potential to abuse such power, the Act stipulates certain practices that are not acceptable by such dominant firms, if they cannot be justified.

Therefore, a dominant firm is not allowed to charge excessive prices to the detriment of consumers. This is a case where the value of the product, its production and other related costs are not in line with the selling price.

Further, a dominant firm may not refuse to give a competitor access to an essential facility when it is economically feasible to do so. An essential facility is an infrastructure that cannot be easily duplicated, such as railway lines, telephone networks or fuel pipelines.



A dominant firm is further not allowed to engage in the following exclusionary acts without justifications:

- ***Inducing or requiring a supplier or customer not to deal with a competitor.*** A person alleging inducement in this regard must provide proof in the form of letters or affidavits by persons alleged to have been induced;
- ***Refusing to supply scarce goods to a competitor when it is economically feasible to do so.*** A dominant firm will, however, not be forced to supply goods or services to a customer or retailer with a bad credit record;
- ***Tying of unrelated goods or services.*** A dominant firm is not allowed to force a buyer of its product to purchase another product or agree to a term not related to the buying of that particular product;
- ***Selling goods or services below their marginal or average variable costs (predator pricing).*** This occurs where a competitor drops its prices below costs in anticipation of new competition, or to eliminate existing competition. Thus low prices do not necessarily mean predation;
- ***Buying up scarce supply of intermediate goods or resources required by a competitor.*** This is often intended to eliminate a competitor or prevent entry of a new competitor;
- ***Discriminating customers based on price.*** This is treating retailers or clients differently by charging different prices, offering different rebates, discounts, credit agreements and terms of settlement for the same product or service of the same quantity and quality.

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## GRANTING EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT

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The Act recognises that although some practices may be anti-competitive, there may be other benefits to the economy and consumers if such practices were allowed. The Act thus makes provision for us to allow such practices if they contribute to:

- Maintenance or promotion of exports;
- Promotion of the ability of small firms and HDI firms to become competitive;
- Change in productive capacity necessary to stop decline in an industry; or
- The economic stability of any industry designated by the dti Minister, in consultation with the Minister responsible for that sector.

Interested parties are allowed 20 days from the date of the notice to make a written representation as to why an exemption should not be granted. Seeing that the competitiveness of SMEs and HDI firms may be used as one of the grounds for an exemption, it is important that they are aware of the processes so that they can fully participate to their benefit.

## CONTROLLING MERGERS AND ACQUISITIONS

A merger may occur when a firm amalgamates with or buys a controlling stake in another firm. It may also occur when a firm sells its business assets to another firm without selling the firm itself. Determining if a merger has occurred is not straightforward, and thus depends on the facts of each case.

We are required to assess all mergers that meet the required threshold before they are implemented. These are mergers where the combined assets or turnover of the firm(s) in the merger is R200 million or above. The asset or turnover value of the firm(s) being acquired must be at R30 million or above. It is not compulsory for firms to notify the Commission on deals falling below the said threshold, but we may request notification if a merger raises public interest or competition concerns.

In analysing mergers notified, we require, amongst other things, the effects of the merger on the competitiveness of SMEs and HDIs, although it is not always guaranteed that the facts relating to the impact will be known. This is where the full participation by SMEs and HDI firms to provide input is required. This way, we can ensure that mergers creating barriers and hampering the participation of SMEs and HDI firms in the economy are not allowed.



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Notifications of proposed mergers are publicised in the media and SMEs and HDIs should monitor them closely.

## WHAT THE COMMISSION CANNOT DEAL WITH

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### Contractual disputes

Many complaints lodged by small businesses for investigation relate to contractual disputes and not competition issues. In each of these cases we had to advise complainants to seek legal advice. To avoid this happening, we encourage SMEs and HDIs to obtain legal advice or contact business advice centres before entering into binding contracts that may ultimately have a negative effect on their business or on them personally.

### Franchise agreements

Franchise matters should be referred to FASA (Franchise Association of South Africa) except in circumstances where there is a contravention of the Act or competition issues arising out of the agreement. A typical competition issue would be those similar to the Federal Mogul Aftermarket and Toyota cases relating to minimum resale price maintenance.

### Restraint of Trade

Restraint of trade is usually imposed on a competitor by a former employer, whereby an ex-employee is prohibited from opening a similar business to that of the employer within a certain radius or region for a certain period of time. This practice is not in itself anti-competitive unless a dominant firm uses this practice to bar several firms from operating within that radius or region, thereby eliminating competition and securing that market or region for itself.

## Lease agreements

Tenants are advised to analyse contracts carefully or seek advice before signing them. We will not investigate disputes arising from these contracts unless there are anti-competitive issues arising, for instance, where an anchor tenant or competitor uses an agreement with the landlord to the effect that no one else should sell the same product or be in competition with that anchor tenant in those premises.

