

Competition Law Implications for Procurement, Supply & Enterprise Development in the Mining Industry

Presentation to OEMs and Multinationals in Mining
Sectors

Isando Johannesburg

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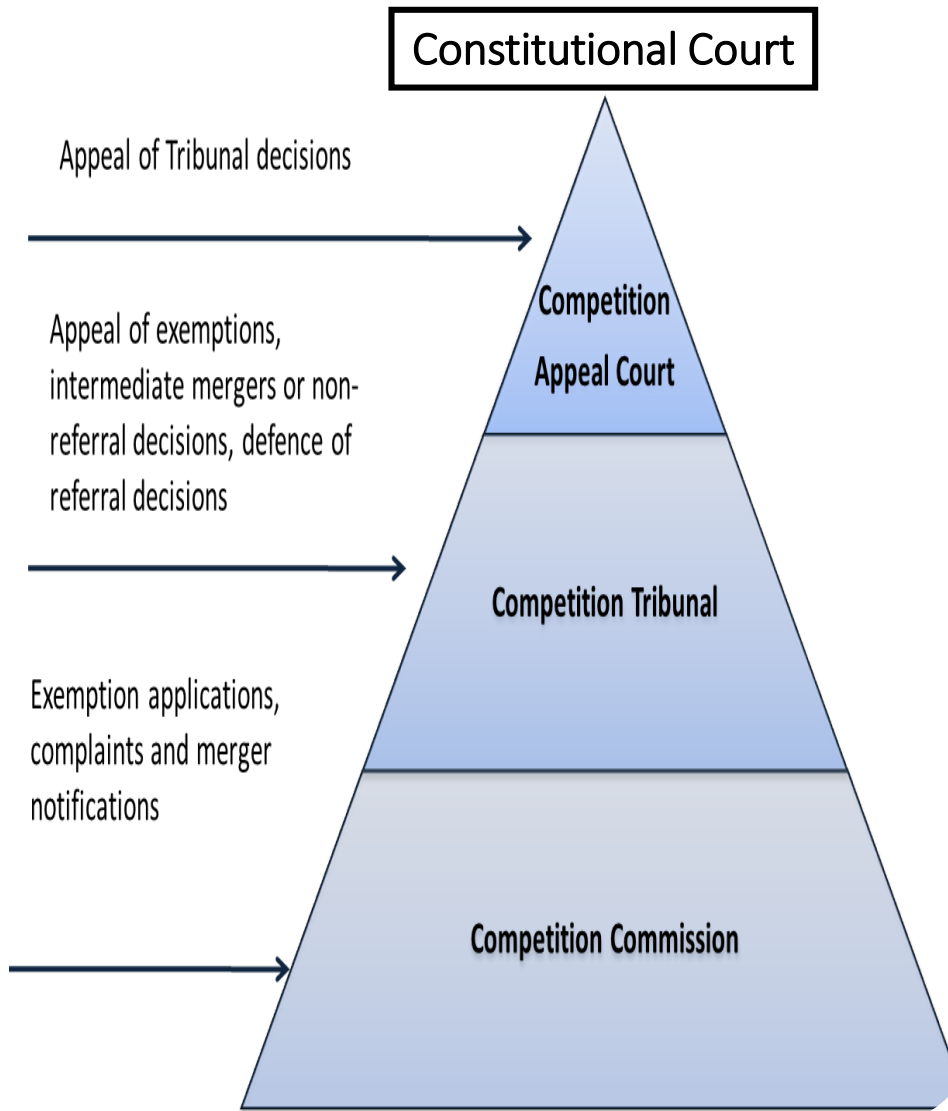
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Introduction

- This discussion is based on information submitted to the Competition Commission following the meeting of the OEMs and Multinationals of 15 March 2019
- Should the OEMs and Multinationals require the Competition Commission to provide a substantive response to these and other concerns raised today and in the future, this will necessitate substantially more information and time, including but not limited to:
 - The depth and scope of the envisaged cooperation
 - Understanding the product market(s)
 - Who the players in the relevant market(s) are
 - The size of the player(s) within the relevant market(s)

Competition Enforcement Authorities



- ❑ **Competition Commission** - which reports to Parliament through Ministry (Economic Development Department-EDD) which appoints Commissioner and Deputy Commissioner(s) and Commissioner appoints staff
- ❑ **Tribunal** - which reports to Parliament through EDD, members of Tribunal (including Chairperson and Deputy Chairperson) are appointed by President of the Republic of South Africa on recommendation of Minister EDD, Chairperson is responsible for appointing staff
- ❑ **CAC** - is analogous to a High Court with its judges being appointed by the President on recommendation of the Judicial Services Commission, not a court of first instance but rather considers appeals and reviews of the Tribunal but is the court of last instance on all competition-related matters

Structure of the Act

- Chapter 1 – interpretation, purpose and application of the Act
- Chapter 2 – prohibited practices
- Chapter 3 – merger control
- Chapter 4 – Competition Commission, Competition Tribunal and Competition Appeal Court
- Chapter 4A – market Inquiries (came into effect 2013)
- Chapter 5 – investigation and adjudication procedures
- Chapter 6 – enforcement
- Chapter 7 – offences
- Chapter 8 – general provisions
- Schedules

Objectives of Act

- Section 2 – purpose of Competition Act is to promote and maintain competition in order to:
 - Promote 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 citizens
 - Expand opportunities for South African participation in world markets and recognize the role of foreign competition
 - Ensure small and medium-sized enterprises (SMMEs) have an equitable opportunity to participate in the economy
 - Promote greater spread of ownership

Competition Regulation Across the Globe

- The International Competition Network records 137 competition authorities a which include regulators and adjudicators both at a national and multinational level – <https://www.internationalcompetitionnetwork.org/about/>
- Most laws across the globe regulate similar conduct outlined in the South African Competition Act and particularly hardcore cartels, mergers and acquisitions, the abuse of dominance and market inquiries
- Most national and multinational jurisdictions also publish guidelines relating to competition-related conduct such as:
 - ❑ European Commission Guidelines on horizontal co-operation agreements – [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN)
 - ❑ Information Exchanges Between Competitors under Competition Law 2010 - <http://www.oecd.org/competition/cartels/48379006.pdf>

Competition Act: Prohibited Practices

Section 4 – Restrictive Horizontal Practices

(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if—

(a) It has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect: or

(Rule of Reason assessment)

(b) It involves any of the following restrictive horizontal practices:

- (i) Directly or indirectly fixing a purchase or selling price or any other trading condition;
- (ii) Dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
- (iii) Collusive tendering

(Per se prohibited)

Definitions relevant to the application of section 4

- **Agreement** – includes a contract, arrangement or understanding whether or not legally enforceable
- **Concerted practice** – co-operative or coordinated conduct between firms achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement
- **Horizontal relationship** – a relationship between competitors, including potential competitors

Exemption Provisions

Section 10 (1998 Act)

- A firm may apply to the Competition Commission to exempt from the application of, *inter alia*, section 4 of the Act, **an agreement or practice or category of agreements or practices, if these meet any of the relevant requirements:**
 - Maintenance or promotion of exports
 - Promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive
 - Change in the productive capacity necessary to stop decline in an industry
 - Economic stability of any industry designated by the Minister, after consulting the Minister responsible for that industry
- **The Competition Commission can refuse, unconditionally grant or conditionally grant an exemption**
- **The exemption will be bound in time and scope depending on the application itself**

Competition Amendment Act 2019: Exemption Provisions

- Signed into law by the President on 13 Feb. 2019 with aim to, *inter alia*, promote alignment of competition-related processes with other public policies and place emphasis on small businesses and firms owned or controlled by historically disadvantaged persons to enter and participate in the economy
- The amended criteria are:
 - Promotion of the effective entry into, participation in or expansion within a market by small and medium businesses, or firms controlled or owned by historically disadvantaged persons
 - The economic development, growth, transformation or stability of any industry designated by the Minister, after consulting the Minister responsible for that industry
 - Competitiveness and efficiency gains that promote employment or industrial expansion
 - The Minister may, after consultation with the Competition Commission, and in order to give effect to the purposes of this Act as set out in section 2, issue regulations in terms of section 78 exempting a category of agreements or practices from the application of this Chapter – i.e. block exemptions

Implementation Guidelines for the Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry



2018

Firm-Specific Requirements under the Guidelines

- Guidelines introduce minimum requirements for **individual firms** to, *inter alia*:
 - ❑ Increase individual local procurement of mining goods
 - ❑ Increase individual local value addition activities within the mining sector value chain
 - ❑ Supplier development with firms owned and/or controlled by historically disadvantaged persons, women, youth or BBBEE compliant
- Concerns by OEMs in the mining industry include:
 - ❑ Ability of multinational OEMs to invest in local production to comply with local procurement requirements
 - ❑ Given that OEMs source globally they are unlikely to meet the local procurement requirements
 - ❑ Low volume purchases of new yellow and other capital equipment by South African mines will not justify sustainable production of high value items or export from South Africa to other global OEM sourcing centres

Competition Commission position on previous and similar policies

- The Competition Commission has previously provided advisory opinions on similar local procurement initiations to:
 - ❑ Department of Planning, Monitoring and Evaluation at The Presidency (2015) regarding “Participation by companies that are competitors in the Mining Phakisa Pre-Workshop and the Workshop”
 - ❑ Economic Development Department (2012) regarding the Local Procurement Accord
- In the two advisory opinions, the Competition Commission broadly stated:
 - ❑ Policies not inherently anticompetitive in intent
 - ❑ But implementation may give rise to industry collaboration between competitors which may raise some competition concerns

Preconditions to pro-competitive cooperation between competitors

- Cooperation must either:
 - Contribute to improving the production or distribution of products
 - Contribute to promoting technical or economic progress – efficiency gains
 - Indispensable to the attainment of pro-competitive objectives
- Customers/consumers must receive a fair share of the resulting benefits, including qualitative efficiency gains and must be sufficiently passed on to consumers so that they are compensated for the restrictive effects of the agreement
- Cooperation must not afford parties the possibility of substantially eliminating competition

Cooperation may be anti-competitive if it:

- Limits the possibility of parties to compete against each other
- Requires parties to contribute such assets that their independent decision-making is appreciably reduced
- Affects the parties' financial interests in such a way that their independent decision-making is appreciably reduced
- Leads to the disclosure of strategic information, increasing the likelihood of coordination among the parties within or outside the field of the cooperation
- Achieves significant commonality of costs so the parties may more easily coordinate market prices and output (detection and punishment to maintain collusive arrangement)

Cooperation by OEMs: competition implications South Africa

Administrative sanctions

- Section 59 of the Act empowers the Tribunal to impose an administrative penalty for a prohibited practice (including conduct under section 4) of up to **10% of a firm's total turnover in South Africa** (<http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Guidelines-for-Determination-of-Admin-Penalties-MAY-2015.pdf>)
- A finding by the Tribunal against a firm can also attract civil/follow-on damages in terms of section 65 of the Act

Criminal sanctions

- Causing or permitting firm to engage in prohibited practice in terms of section 4(1)(b):
 - Caused or knowingly acquiesced in the firm engaging in a prohibited practice
 - That person is a director of a firm or purported to be engaged by a firm in a position having management authority
- Administrative fine not exceeding R500 000.00 or imprisonment for a period not exceeding 10 years or both

Exemption Process: Cooperation Between Firms



Contravention of section 4 of the Act

Contravention of section 4 of the Act



Application for Exemption in terms of section 10 of the Competition Act

No application for Exemption



Exemption granted (unconditionally or conditionally) for a limited period of time and can be revoked subject to section 10(5) of the Competition Act

Investigation and prosecution by the Competition Commission with liability to pay up to 10% of total turnover, follow-on damages and/or criminal prosecution

| Dos | Don'ts |
|--|---|
| Ensure that the OEM Forum structure is set up with a clear agenda and purpose | Use the OEM Forum to engage in outright collusion in contravention of section 4(1)(b) of the Act (price fixing, market allocation, collusive tendering) |
| Ensure that the OEM Forum engenders transparency by keeping detailed records, minutes, recordings and other relevant documentation and activities | Discuss or exchange any competitively sensitive information with competitors i.e. trade, business or industrial information which has a particular economic value to a firm and its business strategy and is generally not available or known by others |
| Ensure that the OEM Forum meetings have agendas circulated before hand – if any problematic items are included, note your objections in writing | Share any confidential information and which is not in the public domain collated for competitors by independent third parties with competitors within the Forum |
| The OEM Forum must engender a strong competition culture both collectively and across individual firms and ensure that members undertaken regular competition law compliance training for all relevant personnel | Exchange information beyond what is strictly necessary to achieve the purposes of implementing and engaging with government in relation to the Mining Charter and the Implementation Guidelines |
| Have regard to the Competition Commission's draft guidelines on information exchange – particularly paragraph 7.3.2.2. which provides general guidance for participation by firms that are competitors, in discussions with Government aimed at the development of local suppliers and local supply chains | Share information publicly or within the Forum that is not disaggregated so that firm-specific information can be inferred from the information, bearing in mind: <ul style="list-style-type: none"> • The salient features of a market including products homogeneity, levels of market concentration, symmetry and stability of market shares of competitors, barriers to entry • The type of data and information shared must carry the lowest risks to competition and be indispensable for creating any efficiency gains resulting from the exchange |
| Firms who seek to cooperation in a manner that contravenes section 4 of the Act may apply to the Competition Commission for an exemption to the application of the Act in terms of section 10 (or the new provisions under the Amendment Act when they come into effect) | |

Conclusion

- The purpose of the Competition Act is to promote efficiency, increase consumer choice, advance employment, expand opportunities for South African firms to compete in the world and build an inclusive economy through the spread of ownership and greater participation of SMMEs
- The scope and depth of the collaboration envisaged by the OEMs and Multinationals must speak to this purpose and ensure that the cooperation falls within the “bright lines” of the provisions of the Competition Act

IF IN DOUBT

- Request a non-binding opinion from the Competition Commission
- Apply for an Exemption in terms of section 10 of the Competition

Thank you

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