

COMMUNICATION FROM SOUTH AFRICA

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**HOW THE PRINCIPLES OF TRANSPARENCY, NON-DISCRIMINATION
AND PROCEDURAL FAIRNESS ARE REFLECTED
IN SOUTH AFRICAN COMPETITION LAW**

I. INTRODUCTION AND SUMMARY

This document outlines how the principles of transparency, non-discrimination and procedural fairness are reflected in South African competition law. The South African Constitution and related legislation require that the principles of transparency, non-discrimination and procedural fairness be reflected in all administrative practice. In order to pass the test of constitutionality, the Competition Act and the practices of the authorities must accord with these core constitutional principles. The Competition Act does require that regard be had to the promotion of small and medium-sized enterprises and to support for securing a more equitable and less racially skewed spread of ownership. This may be construed as a form of positive discrimination in favour of small and medium-sized enterprise and firms owned by people historically disadvantaged by the system of apartheid. However, this is compatible with the Constitution which explicitly provides that equality before the law includes laws or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

II. SUPREMACY OF THE CONSTITUTION

Section 2 of the Constitution of the Republic of South Africa states that the constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. Its application to juristic persons (corporations and companies) is expressly stated in **Section 8**. Clearly then, the Competition Act ("the Act") and the enforcement thereof must ultimately pass the test of constitutionality.

Not only does the Constitution protect the bare dominion of the principles of transparency, non-discrimination and procedural fairness, in some instances it also provides for the adoption of specific legislation to provide weight and clear direction to ensure protection of these principles.

As public bodies the competition authorities must ensure that no action or decision in pursuance of competition law and policy infringes upon the fundamental principles of the Constitution and that the rights protected by the Constitution are given effect to in so far as these are relevant to the pursuit of competition policy. While there are specific provisions in the Act, which give express effect to these principles, they are in fact a tacit or implicit part of all administrative provisions or the Act and must be adhered to in all proceedings.

It is worth noting too, that given South Africa's peculiar history - riddled with the very antithesis of transparency, non-discrimination and procedural fairness - it is not surprising that South Africans, in general, are particularly vigilant in their insistence upon adherence to these principles by both public and private bodies.

III. TRANSPARENCY

- (a) South Africa's effort to create a constitutional democracy based on the principles of openness and transparency permeates the Constitution. Essentially these principles translate into enabling meaningful participation and ensuring that all public bodies are accountable to the governed.
- (b) In respect of competition law, the traditional concept of a separation of powers between the relevant government department (the Department of Trade and Industry) and the competition authorities and between the respective competition bodies themselves, is most notable. The Act specifically provides the Competition Commission with investigative powers, the Tribunal with adjudicative and decision making powers and the Competition Appeal Court with the power to review or overturn decisions of both the Commission and the Tribunal. The authorities are therefore independent of each other and of government and operate as such. Section 20 of the Act specifically provides that the Competition Commission is independent and subject only to the Constitution and the law. This provision also applies to the Tribunal whilst the Court's independence is guaranteed by the Constitution.

Accountability

Section 33(2) of the Constitution states that anyone whose rights have been adversely affected by administrative action has the right to be provided with reasons in writing for the decision.

Section 16(4) of the Competition Act provides that the Tribunal must publish its decisions regarding merger activity in the Government Gazette and must issue reasons for *any such decision*. Unlike the practice in many other jurisdictions, the Competition Tribunal must give reasons even where the decision is to approve a merger. It is clear that the Act goes beyond the demands of the Constitution and ensures that parties are given reasons for all decisions, irrespective of whether their rights have been adversely affected or not. Similar provisions apply to complaints of anti-competitive behaviour.

Public hearings

Section 34 of the Constitution provides for any dispute to be resolved in a fair public hearing by an independent and impartial tribunal or forum.

In keeping with this, all hearings of the Tribunal are open to public, except where protection of confidentiality is of the essence. In addition, **Rule 57** of the Tribunal Rules requires that records of all hearings be kept, including transcripts of oral evidence.

Access to information

Section 32 of Constitution deals with the right of access to information: (1) Everyone has the right of access to:

- (a) any information held by the state; and
- (b) any information that is held by another person and that is required for the exercise or protection of any rights.

In addition, legislation to give effect to this right has been enacted. **The Promotion of Access to Information Act 2 of 2000** ("AIA") provides for access to records held by public and private bodies, sets out grounds for non-disclosure and the manner in which such grounds may be overruled by the public interest and provides mechanisms for dispute resolution. Section 5 of the AIA states that the AIA applies to the exclusion of any other legislative provisions that prohibit or restrict disclosure and that are materially inconsistent with the AIA, that is, if provisions of the Competition Act are inconsistent with the AIA, the provisions of the AIA apply. There does not appear to be inconsistency between the Competition Act and the AIA - the Competition Act is a relatively recent piece of legislation and incorporates all constitutional aspects.

Sections 44 of the Act provides for confidentiality to be claimed in respect of information submitted to the Competition Authorities, requiring an explanation as to why the information should not be in the public domain. Nonetheless, the right to claim confidentiality is balanced against the right of access to information in Section 45. It allows for the Tribunal to make an order as to appropriate access to confidential material.

IV. NON - DISCRIMINATION

Section 9 of the Constitution enshrines the right to equality and the right not to be unfairly discriminated against. Everyone is equal before the law and has the right to equal protection and benefit of the law. However, **subsection 9(2) of the Constitution** states that in order to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken.

Section 3(1) of the Competition Act applies to all economic activity within or having an effect within SA. To the extent that there is no differential treatment of any specific sector or industry, and that all firms irrespective of their size or origin must comply with the Act equally, the application of the Act is non-discriminatory. The comprehensive sweep of **Section 3(1)** also means that export cartels, legal/accepted in other international jurisdictions, whose economic activity has an effect in South Africa, fall within the jurisdiction of the South African competition authorities, who may act against such a cartel. See **The Competition Commission of SA & Botswana Ash (Pty) Ltd vs American Natural Soda Ash Corp (Botash/Ansac 87/CR/Sep00)**.

Section 53 of the Act allows *any person* who has a material interest in a matter being heard by the Tribunal to participate in that hearing. This provides a mechanism for persons who may not be in a position to initiate proceedings, to ensure that their rights and interests are considered or not unfairly infringed.

Section 81 of the Act binds the State, thus the application of the Act is extended to include public/state owned enterprises. **Section 3(1A)** provides that where a sectoral regulator has jurisdiction over competition matters pertaining in that sector, the competition authorities shall enjoy concurrent jurisdiction.

However, the Act does allow for a degree of differential treatment. It does this, firstly, by seeking to promote the viability of small and medium sized enterprises. Secondly, by seeking to promote black economic empowerment, that is, by seeking to promote ownership and control of firms by persons historically disadvantaged by apartheid.

Reconciling the apparent contradiction between the principle of non-discrimination and certain of the public interest provisions of the Competition Act

According to Constitutional Principle V, equality before the law includes laws or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.¹ Clearly the Constitution envisages the role of the equality provision as a good in itself but, further, as a powerful tool of national reconstruction and development. Therefore it is constitutionally acceptable to balance the right to equal treatment before the law against other national objectives such as those specified in the public interest provisions of the Competition Act because their purpose is to advance the interests of those disadvantaged by past acts of discrimination.

Those public interest objectives whose realization may compromise the principles of equal treatment/non-discrimination are encapsulated in **section 2** of the Competition Act, most notably 2(e) and (f) - respectively "to ensure that small and medium-sized enterprises have an **equitable** opportunity to participate in the economy", and "to increase the ownership stakes of previously disadvantaged persons." This approach recognizes that the inequality embedded in the South African economy and society cannot be tackled simply by treating all in exactly the same way. Hence, the Competition Act, in common with most other major social and economic statutes, recognizes these structural inequalities and, in the form of the public interest objectives, provides mechanisms designed to contribute to their amelioration.

Nor are the public interest objectives specified above left at the level of general principle. Hence Section 10 of the Act provides that a practice or agreement that is otherwise proscribed by the Act may nevertheless be exempted from the application of the Act provided that the authorities are satisfied that the practice of agreement contributes to the realization of a specified set of objectives including, "promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive". Section 12A of the Act specifies that when the authorities evaluate a merger they must, after first determining whether or not the transaction contributes to a substantial lessening of competition, determine the impact of the transaction on a number of specified public interest factors that again include "the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive". In the final decision, a positive assessment of the transaction's impact on public interest may permit an anti-competitive transaction to proceed; a negative assessment of the impact on public interest may result in the prohibition or conditional approval of a transaction that has been determined to be competition-neutral or even pro-competitive.

In summary, the Act specifically permits discrimination *in favour of* small and medium-sized enterprises and firms owned by historically disadvantaged persons. It does not, however, countenance discrimination *against* any class of business or person. A transaction involving a foreign-owned firm or firms will be evaluated against the same set of criteria, including its impact on public interest, as that used when one or both of the firms in question are South African owned. If, however, a South African owned firm involved in a transaction is also owned by historically disadvantaged South Africans then that fact may influence the outcome of the overall evaluation - negatively, if the transaction undermines the ownership stake of historically disadvantaged persons, positively if it promotes that interest. By the same token, a firm owned by historically disadvantaged persons may

¹ Constitutional law of SA, Chaskalson et al, Chapter on "Equality" by Kentridge, J. 1999. Juta.

apply for an exemption from the application of the Act on the grounds that the exemption is required to promote its competitive position - if the authorities are persuaded of this then they may grant the exemption. A foreign owned firm or a firm owned by white South Africans may argue for an exemption on the grounds that the anti-competitive practice in which they intend to engage is required to promote the competitiveness of suppliers or distributors or otherwise associated firms that are owned by historically disadvantaged persons. Note that since few small and medium-sized enterprises or firms owned by historically disadvantaged persons are likely to be dominant in their respective markets their conduct is unlikely to fall foul of the provisions of the Act that proscribe anti-competitive. Nor are mergers in which these firms participate likely to lead to a substantial lessening of competition.

The public interest provisions designed to promote the competitiveness of small and medium-sized enterprises appear compatible with the objective of **Paragraph 25 of the Doha Declaration which** provides that "...full account should be taken of the needs of developing & least developed country participants and appropriate flexibility provided to address them". Note that the Aristotelian adage, that equality is a matter of treating like cases alike and unlike cases differently in proportion to their likeness or difference, that, in other words, equality is not merely a matter of likeness but also a matter of difference, has been accepted by the International Court of Justice in numerous cases.²

V. PROCEDURAL FAIRNESS

The principles of procedural fairness and natural justice are manifest in the protection of the following rights:

Section 33 of the Constitution deals with just administrative action:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

In terms of **Section 52(2)** of the Competition Act the Tribunal must conduct its hearings as expeditiously as possible and in accordance with the principles of natural justice. The essential and fundamental principles of natural justice, for example the *audi alteram partem* rule (hear the other side), are given substantive effect by the application of the Tribunal's Rules for the Conduct of Proceedings, which supplement the provisions of the Act.

Standard rules of South African civil procedure are followed, which dictate that a party has the right to respond to the submissions of its opponent. In particular, our rules of "discovery" provide that parties must produce all documents reasonably required by the other side or by the Tribunal. The Act and the Rules of Procedure determine the maximum time frames that govern all proceedings, including the provision of documents.

The Act and the Rules also provide for pre-hearing conferences. These allow for consultation and agreement between the parties and the Tribunal as to the procedural aspects of any matter. Not only does this advance procedural fairness, it also reinforces the principles of openness and transparency.

Sections 61 and 62 of the Competition Act give parties the right to take decisions of the Tribunal on review or appeal to the Competition Appeal Court. Although the Competition Tribunal

² Constitutional law of SA, Chaskalson et al, Chapter on "Equality" by Kentridge, J. 1999. Juta.

and Competition Appeal Court have exclusive jurisdiction in all competition matters, parties may elect to proceed to the High Court (rather than the Competition Appeal Court) in respect of procedural reviews. The Constitutional Court naturally has final jurisdiction over all constitutional matters.

VI. CONCLUSION

South African competition law and practice accords with the highest standards of transparency, non-discrimination and procedural fairness. This has substantially enhanced the credibility of the competition authorities, both those charged with investigative and advocacy functions and those charged with adjudicative responsibility.

Adherence to the principle of transparency has also enhanced the credibility of the competition authorities and it has helped promote a competition culture in South Africa. It has ensured a high degree of participation in competition proceedings including considerable media coverage and public comment.

The principle of non-discrimination has not operated at the expense of pursuit of key national industrial and social policy objectives, where those objectives are manifestly designed to address the consequences of past discrimination.
