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COMPETITION ACT AMENDMENTS - RISKS FOR COMPANIES AND DIRECTORS

Amendments to the Competition Act expected to come into effect later this year will create significant new areas of risk for companies and their directors and managers. This paper provides an overview of the provisions proposed to introduce criminal liability for cartel conduct, analyses the risks they pose to companies and management, and suggest ways to mitigate these risks, particularly in the context of mergers and acquisitions.

Criminal Liability

Perhaps the most significant proposed amendment to the Competition Act is the introduction of criminal sanctions against individuals who participate in cartel conduct.

Competition authorities in a number of jurisdictions - including Canada, France, Ireland, Norway, Germany, Austria, Japan, the United Kingdom and the United States - have successfully turned to criminal liability in the fight against cartels. South Africa followed this trend in February this year, when Parliament passed the Competition Amendment Act. It should be noted that although the Act has been passed by Parliament it has not been signed by the President and has accordingly not yet come into force.

The Act will introduce jail sentences of up to 10 years, or fines of R500 000 or both, for directors and managers who are responsible for - or knowingly acquiesce in cartel conduct as regulated by section 4(1)(b) of the Competition Act. This specifically includes:

- the fixing of prices and trading conditions,
- market division, or
- collusive tendering.

This sanction will apply to any person *"engaged or purporting to be engaged by a firm in a position having management authority within the firm"*, who either *"caused"* the firm to engage in such a prohibited practice, or who *"knowingly acquiesced in"* contravening this section of the Act. It is not sure at this stage how wide our authorities will interpret the term *"caused"*. There is a risk that this term can have a wide application. After some amendments to the original proposed amendment to the Act, *"knowingly acquiesced"* will be limited to '*having actual knowledge of the relevant conduct by the firm*'. However, as "*management authority"* is not defined, staff members at all levels in the management chain are potentially at risk of prosecution.

An individual can only be charged if the company involved has been found to have contravened the Act by the Competition Tribunal, or it has admitted a contravention in a formal consent order.

When the Amendments come into effect, individuals will be able to seek leniency from the competition authorities in the same way that companies can at present. The leniency policy allows the competition authorities to grant the first party to approach them with information which could lead to the successful prosecution of a cartel, immunity from prosecution. Ultimately, however, enforcement of this offence will be handled by the Department of Public Prosecutions and the criminal courts, so immunity from the competition authorities may not be enough to shield managers from prosecutions.

The Amendment Act will prohibit companies from directly or indirectly paying any fine imposed on a manager or director who is convicted of this offence, or from indemnifying them from fines of this nature. Companies may only pay the legal costs incurred by employees if the prosecution is eventually abandoned, or the director is acquitted.

A number of stakeholders, including the competition authorities themselves, have written to the President asking him to refer these provisions to the Constitutional Court for adjudication because of concerns that they will not pass constitutional muster. If however, the President signs these amendments into law, there is little doubt that they will be tested in the Constitutional Court in due course.

Even if some of the provisions are found to be unconstitutional, however, we have no doubt that some form of personal liability for contraventions of section 4 of the Competition Act will be introduced in due course.

Risk

This amendment poses a risk in the context of mergers and acquisitions, because directors or managers appointed to target companies may find themselves caught in the very wide net these amendments cast – if, for example, a target company is engaging in price fixing or market division and the new management continue this practice (even if they don't realise it), they may be liable for "causing" a contravention of section 4(1)(b). If new management perceive that there is a contravention, but fail to act to stop it immediately upon acquiring control of the business, they are potentially liable for having "*knowingly acquiesced in"* a violation of section 4(1)(b). Because the scope of the prohibition contained in section 4(1)(b) has not yet been decided by the Tribunal, these risks could potentially also arise in a number of scenarios, for example, where the target firm is a party to a joint venture that appears commercially legitimate, but which the Tribunal may later find to be a vehicle for price fixing, market division or collusive tendering.

Mitigating the Risks

It essential to manage the increased risk of exposure to liability, as well as to protracted and costly competition litigation, created by these new provisions in the context of mergers and acquisitions.

Most importantly, a competition law review should be conducted as part of the due diligence investigation prior to merger agreements being signed. The recent Sasol wax case illustrates the value of this kind of inquiry. For the purchaser's perspective, it may be wise to require that appropriate warranties and indemnities pertaining to competition law contraventions be built into the merger agreement.

In addition, a number of measures should be taken as a standard part of integration planning:

- A suitable competition law compliance programme should be implemented to provide an early warning system to detect potential contraventions and safeguard against contraventions in future. Such a programme should include ongoing sessions to educate staff about the principles of competition law. In particular, since the Commission has tended to focus on collusion by competitors, all staff – but particularly those in sales and marketing - should be warned not to exchange competitively sensitive information with competitors, which would include information on pricing, discounts and the identity of customers.

- In particular, staff should be educated to exercise care when responding to requests for information from the Commission, both in the context of formal market inquiries and in the course of investigations involving cartel conduct, abuses of dominance and complex monopoly conduct. The Competition Commission is also increasingly using merger investigations as a means to gather information on sectors identified as priorities for investigation.

- Reporting procedures need to be established so that staff know who to report a possible contravention of the Act to, and what procedure to follow.

- Since search and seizure proceedings are increasingly a favourite weapon in the Commission's arsenal, staff need to be trained on how to react to a dawn raid.

- Procedures should also be established for the regular internal review of all agreements entered into by your business units, as well as their business practices, particularly in the context of industry associations where your staff interact with their competitors.

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