In general, the concept of competition involves the striving of two or more persons endeavouring to obtain the same end. “It may be said to exist whenever there is potential diversion of trade from one to another. For competition to exist the articles or services of the competitors should be related to the same purpose or must satisfy the same need.”

It is accepted that some companies may lag behind and disappear, provided that the loser in the competitive struggle is in fact the company who has delivered the performance weakest in respect of price or quality. The position is, however, clearly different when the victorious competitor has relied not on the merit of his or her performance but on conduct which deprived his or her better performing rival of victory. Some legal restriction on the freedom of competitive behaviour has therefore proved to be inevitable.

The law of competition consists of two distinguishable but related spheres, namely the legal rules:

- aimed, in the public interest, at the maintenance and promotion of competition in the national economy and the elimination of harmful restrictive trade practices; and
- concerned with the lawfulness of a company’s competitive conduct a probe his or her rivals in the market.

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2 Van Heerden and Neethling, Unlawful Competition.
3 William Grant & Sons Ltd v Cape Wine & Distillers Ltd 1990 3 SA 897 (C) 915; Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd 1991 2 SA 455 (W) 473; Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd (t) 1988 2 SA 350 (W) 358.
The Competition Act

The Competition Act, Number 89 of 1998, as amended (the “Act”) provides for the establishment of inter alia a Competition Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers; for the establishment of a Competition Tribunal responsible to adjudicate such matters; and for the establishment of a Competition Appeal Court.

The Act prohibits a number of restrictive horizontal practices and restrictive vertical practices as well as the abuse of a dominant position, and introduces a mechanism for the control of mergers. It also confers on the Competition Commission and Competition Tribunal extensive powers designed to prevent anti-competitive conduct.

Horizontal Practices

Practices that restrict competition can be divided into two categories. The first type of category is that relating to horizontal relationships. A horizontal relationship is a relationship between competitors in a market.

A horizontal relationship is presumed to exist between two firms if:

- any one of those firms owns a significant interest in the other;
- the firms have at least one director in common; or
- the firms have at least one substantial shareholder in common;

The above presumptions do not apply to a company and its wholly owned subsidiaries or to an economic entity having a similar structure.

The following horizontal practices are prohibited:

- directly or indirectly fixing a purchase or selling price or any other trading condition;
- dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
- collusive tendering.
In addition, an agreement between firms is prohibited if the agreement has the effect of substantially preventing, or lessening, competition in a market unless it can be proven that a technological, efficiency or other pro-competitive gain outweighs the anti-competitive effect of that agreement.

**Vertical Practices**

A vertical relationship is a relationship between a firm and its suppliers or customers or both (such a relationship does not extend to a relationship between competitors).

This part of the Act prohibits the practice of resale price maintenance outright. There is no defence to this practice. In other words, any practice that attempts to hinder or prevent proper price competition for products or services in a market is prohibited.

In addition, any agreement that has the effect of substantially preventing or lessening competition in a market is prohibited unless it is proven that a technological, efficiency or other pro-competitive gain outweighs the anti-competitive effect of that agreement.

**Abuse of a Dominant Position**

In general terms, a firm is dominant if it possesses the ability to act independently of its customers, suppliers or competitors. More specifically, a firm is dominant in a market if it has:

- at least 45% of that market;
- at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or
- less than 35% of that market, but has market power.

If a firm is dominant, it may not:

- charge an excessive price to the detriment of consumers;
- refuse to give a competitor access to an essential facility when it is economically feasible to do so;
- engage in any of the following acts that impede or prevent a firm from entering into or expanding within a market unless the competitive effect is on balance pro-competitive:
  - require or induce a supplier or customer to not deal with a competitor;
o refuse to supply scarce goods to a competitor when supplying those goods is economically feasible;
o engage in conditional selling unrelated to the object of a contract;
o force a buyer to accept conditions unrelated to the object of a contract;
o sell goods or services at below their marginal or average variable cost;
o buy up a scarce supply of intermediate goods or resources required by a competitor; or
o engage in any act other than those listed above, that impedes or prevents a firm from entering into, or expanding within a market and which act on balance has a provable anti-competitive effect (complainant must prove anti-competitive effects).

Price Discrimination

The action of a dominant supplier, as a seller of goods or services is prohibited if:

- it is likely to have the effect of substantially preventing or lessening competition;
- it relates to the sale of goods or services of like grade and quality, in equivalent transactions, to different purchasers; and
- it involves discriminating between those purchasers by way of price, discount, allowance, rebate or credit, the provision of services or payment for services provided in connection with the goods or services sold.
- However, conduct involving differential treatment of purchasers is not prohibited price discrimination if the dominant firm establishes that the differential treatment:
  - makes only reasonable allowance for differences in cost or the likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which or quantities in which the goods or services are supplied to different purchasers;
  - is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or
  - is in response to changing conditions affecting the market for the goods or services including things such as:
    - responses to actual or imminent deterioration of perishable goods;
    - responses to the obsolescence of goods;
• liquidation sales; or
• sales in good faith as a consequence of the cessation of the business in that good or service.

Orders

The Competition Tribunal may make an appropriate order in relation to a prohibited practice, including, inter alia:

• interdicting any prohibited practice;
• ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;
• imposing an administrative penalty. An administrative penalty may not exceed 10 % of the firm's annual turnover in the Republic during the firm's preceding financial year;
• ordering divestiture to wit ordering the sale any shares, interest or assets of the firm;
• declaring conduct of a firm to be a prohibited practice;
• declaring the whole or any part of an agreement to be void; and/or
• confirm a consent agreement.

Competition Law in the Insurance Industry

With the advent of insurance came the need for supervisory measures to regulate insurers and the insurance business. Some of the reasons put forward for state intervention in the insurance industry include, inter alia:

• insurance business attracts vast sums of money from the public;
• investment in insurance is often on a long-term basis;
• insurance is inherently a hazardous business; and
• a larger extent persons insured or to be insured depend on the good faith of their insurers.

In general the Long-Term Insurance Act, Number 52 of 1998, as amended, and the Short Term insurance Act, Number 53 of 1998, as amended, regulate the business practices of the insurances industry.
However as the economy has evolved, the insurance markets have become more diversified, more efficient, and more accurate in assessing risk. Today, consumers have a wide variety of options when shopping for insurance, which has become a major industry in South Africa. Where allowed, competition has generated the results that would be expected in any competitive market—lower prices, a wider variety of goods and services, and more fully informed producers and consumers who can make more knowledgeable decisions about the insurance products they need.

**Competition Policy**

The Composition of competition policy is complex – it consists of, amongst other things, economic objectives, certain legislative instruments and the economic environments, and even the political environment.

In South Africa Competition law is regulated by the Act. The Act provides for the establishment of a competition Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position and mergers; and for the establishment of a Competition Tribunal responsible to adjudicate such matters; and for the establishment of a Competition Appeal Court; and related matters.

From an economic point of view, economists distinguish between a perfect competition and pure monopoly as two opposite poles. In practice however neither the one nor the other exists in its pure form. The real world is characterised by imperfect competition, of which oligopoly is the best known form. An oligopoly is defined as a market dominated by a few large producers of a homogeneous or differentiated product. Because of their “fewness”, oligopolists have considerable control over their prices, but each must consider the possible re-action of rivals to its own pricing, output, and advertising decisions.

Some oligopolies have emerged mainly through the growth of the dominant firms in a given industry, but for other industries the route to oligopoly has been through mergers. The merging or combining of two or more competing firms may substantially increase their market share, and this in turn may allow the new firm to achieve greater economies of scale. Another motive underlying the “urge to merge” is the desire for monopoly power. The larger firm that results from a merger has greater control over market supply and thus price of its products.
We hope the above is of interest to you.

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