



ICLG

The International Comparative Legal Guide to:

Vertical Agreements and Dominant Firms 2017

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A practical cross-border insight into vertical agreements and dominant firms

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South Africa

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The Competition Commission of South Africa investigates complaints and refers them to the Competition Tribunal, a quasi-judicial body, for adjudication. Appeals lie to the Competition Appeal Court, a specialist appeal court.

1.2 What investigative powers do the responsible competition authorities have?

Once a complaint has been initiated by either the Competition Commission or a third party (s49B), the Commission appoints an inspector to investigate the complaint. The investigation usually commences through a process of correspondence with the respondent and third parties who are able to provide information to the Commission. Under Chapter 5 of the Competition Act, the Commission has the power to obtain a warrant from a judge or magistrate to enter a premises and conduct a search. In exceptional circumstances, where the requirement to obtain a warrant would defeat the object or purpose of the entry and search, a search may be conducted without a warrant, except in the case of a private dwelling. The power to enter and search encompasses, *inter alia*, the power to search the premises, to examine articles and documents, to take extracts, to make copies, to search data on a computer system, and to attach and remove anything that has a bearing on the investigation. The Commission may also summon a person to appear before the Commission for an interrogation or to deliver or produce to the Commission any book, document or other object specified in the summons. No self-incriminating answer is admissible against the person in criminal proceedings, except in proceedings regarding perjury. Vertical prohibited practices do not result in criminal sanctions and the right against self-incrimination therefore does not apply in relation to vertical prohibited practices.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

Once a complaint has been initiated by the Commission or a third party, and the Commission has investigated the complaint by exercising the various powers discussed above, the matter will be referred by the Commission to the Competition Tribunal for a hearing; or it will be non-referred if the Commission decides not to

refer the matter to the Tribunal for a hearing. The complainant may apply to the Tribunal for interim relief after lodging a complaint, which relief, if granted, takes the form of an interim order that does not extend beyond the earlier of the conclusion of the hearing or a period of six months. In the event that the respondent in the complaint wishes to settle the matter, it may negotiate a consent order with the Competition Commission, in which it would typically admit to the conduct and agree to pay an administrative penalty, or agree to behavioural or structural remedies. If the matter is referred to a hearing before the Competition Tribunal, the process of exchanging pleadings and discovery commences, after which a hearing takes place before the Competition Tribunal. When hearing matters, the Competition Tribunal comprises a panel of three members with legal and economic qualifications.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

An interim order may be sought by the complainant after a complaint has been lodged. If the Competition Tribunal finds a party guilty of contravening certain provisions of the Competition Act, an administrative penalty of up to 10% of the firm's annual turnover in the Republic of South Africa may be levied. Available remedies include interdicting the prohibited practice, ordering a party to supply or distribute goods or services to another party on terms reasonably required to end the prohibited practice, ordering divestiture of shares, interests or assets if section 8 (abuse of dominance) has been contravened and the prohibited practice cannot be remedied in terms of another provision of the Act or the conduct is a repeat of conduct previously found by the Tribunal to be a prohibited practice. The Tribunal may also award a cost order against the respondent. In consent order proceedings, a variety of creative remedies may be agreed to by a respondent, such as the creation of funds to support small businesses or the provision of undertakings to reduce prices.

1.5 How are those remedies determined and/or calculated?

An administrative penalty is calculated with reference to a variety of factors specified in section 59 of the Competition Act, such as the nature and gravity of the contravention, the loss or damage suffered as a result of the contravention, the behaviour of the respondent, the level of profit derived from the contravention, the extent to which the respondent has co-operated with the Commission. Within the parameters set out in the Competition Act, the Competition Appeal Court has developed a six-stage procedure for determining the appropriate amount of the penalty.

In the cases of *Southern Pipeline Contractors and Conrite Walls (Pty) Ltd v Commission and Competition Commission v Aveng (Africa) Ltd t/a Steeldale and Others*, the Competition Appeal Court and the Tribunal applied a new approach to penalties: it involves a six-step process of determining the affected turnover and a base amount of up to 30% thereof, which is then multiplied by the duration (in years) of the contravention and adjusted to take into account mitigating or aggravating factors. Ultimately, the administrative penalty is limited to a maximum of 10% of the aggregate annual turnover in the Republic of South Africa of the firm concerned.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

The Competition Act makes provision for the negotiation of consent orders during or after the investigation of a complaint. A consent order is an agreement in terms of which the Commission and a respondent may agree on the terms of an appropriate order which must be confirmed by the Tribunal without the hearing of evidence. The Tribunal may either make the order on the agreed terms or indicate what changes it requires to be made. The consent order may include the award of damages to a complainant. The respondent may also negotiate with the complainant to withdraw the complaint, but where the complainant agrees to withdraw the complaint, the Commission may still proceed on its own account.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

The Competition Tribunal is an administrative Tribunal, which is of a quasi-judicial nature. It must conduct hearings in public in accordance with the principles of natural justice and its hearings are of an inquisitorial nature. It is a Tribunal of record but it is not bound to the same strict evidentiary standards as a court of law; evidence does not need to be given or proven under oath or affirmation. The rules of procedure are determined by the Tribunal, and in contested matters, witnesses are typically cross-examined and their evidence is given under oath. The evidence is weighed on the balance of probabilities.

1.8 What is the appeals process?

Decisions of the Competition Tribunal may be taken on appeal to the Competition Appeal Court or may be taken on review, based on the rules of natural justice, to the Competition Tribunal or High Court. Appeals must be noted within 15 business days after the date of decision by filing a notice of appeal, which must set out the grounds of appeal and the relief sought. An appeal record must be prepared within 40 business days.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

A firm may only refer a matter to the Tribunal for a hearing if, after lodging a complaint, the Commission has non-referred the matter. Furthermore, a person who has suffered loss or damage as a result of a prohibited practice may not commence an action in a civil court if that person has been awarded damages in a consent order. Actions for damages by a person in respect of a prohibited practice may only

be commenced if the Competition Tribunal or Competition Appeal Court has made a finding that the conduct constitutes a prohibited practice. The Competition Tribunal and Appeal Court have exclusive jurisdiction to determine whether conduct constitutes a prohibited practice.

1.10 Describe any immunities, exemptions, or safe harbors that apply.

The Competition Commission may grant an exemption in respect of agreements or practices which would otherwise amount to prohibited practices, if they are necessary for and contribute to attaining the following objectives: (i) the maintenance or promotion of exports; (ii) the promotion of the ability of small businesses, or firms controlled by historically disadvantaged persons, to become competitive; (iii) the change in productive capacity necessary to stop decline in an industry; and (iv) the economic stability of any industry designated by the Minister responsible for that industry. Furthermore, a firm may apply to the Competition Commission to exempt from the application of Chapter 2 (prohibited practices) any agreement or practice that relates to the exercise of intellectual property rights, including a right acquired or protected under various pieces of legislation, specified in section 10.

1.11 Does enforcement vary between industries or businesses?

The Competition Act does not distinguish between various industries or businesses, except to the extent that certain businesses may qualify for exemption. However, the Commission has in the past identified certain priority sectors which it has been focusing on: for example, during 2010 it announced that it was focussing on food, agro-processing and forestry, infrastructure and construction, intermediate industrial products and retail banking.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

When an industry or sector of an industry is subject to the jurisdiction of another regulatory authority, the Competition Act is construed as establishing concurrent jurisdiction. However, there are instances where another industry regulator may oust the jurisdiction of the competition authorities. The regulatory context within which conduct occurs is important since the regulatory environment often creates barriers to entry and determines the structural parameters within which competition occurs.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The institutions established under the Competition Act are independent and are not subject to ministerial direction. However, there are certain instances where exemption may be granted at the instance of the Minister of Trade and Industry. The Minister may also intervene in proceedings, as has happened in the case of high profile mergers. More recently, cartel cases, such as the alleged involvement of South African and international banks in exchange rate collusion, have elicited political commentary. There may therefore be an indirect level of political influence in relation to the anti-trust enforcement, which manifests in high-profile matters.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

The prosecution of cartels and accompanying dawn raids have increased over the last few years. Since May 2016, cartel conduct has been criminalised and this has increased awareness of this type of conduct.

1.15 Describe any notable case law developments in the past year.

The recent case of *Competition Commission and Dawn Consolidated Holdings (Pty) Ltd and others (CR023May15)* dealt with a restraint of trade, contained in a shareholders' agreement, which was found by the Competition Tribunal to be a collusive arrangement constituting market division. The respondents argued that the restraint of trade was permissible in the context of what they argued was a joint venture – the Tribunal found that the parties were not parties to a joint venture but merely shareholders in a company. The matter involved the characterisation of the undertaking and the application of section 4(1)(b), dealing with cartel conduct, in an instance where parties to a restraint of trade were shareholders and potential competitors.

In the case of *Competition Commission and Media 24 Limited (CR154Oct11)*, Media 24 was found guilty of abusing its dominance and engaging in predatory pricing, through the use of a “fighting brand” called Forum. The appropriate legal test for determining predatory pricing formed the subject matter of the case, which the Tribunal indicated was novel. The Tribunal considered the application of the average avoidable cost test in the context of section 8(d)(iv), which refers only to average avoidable costs and marginal costs as the appropriate cost standard. It also considered whether opportunity costs were properly to be included within ACC (it rejected the inclusion of these costs for the purposes of the case). It assessed the factors which would bring predatory pricing within the realms of section 8(c) in circumstances where prices fell below average total costs.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

In South Africa, minimum resale price maintenance cases were among the first cases in which successful consent orders were concluded. Vertical agreements are often scrutinised in the context of abuse of dominance allegations.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

The Competition Act contains the following broad definition of “agreement”: “When used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable.” Similarly, the Act contains the following broad definition of a vertical relationship: “The relationship between a firm and its suppliers, its customers or both.”

2.3 What are the laws governing vertical agreements?

The Competition Act, section 5 prohibits restrictive vertical practices. In terms of section 5(1), a vertical agreement is prohibited if it has the effect of substantially preventing or lessening competition, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect. In terms of section 5(2), the practice of minimum resale price maintenance is prohibited outright.

2.4 Are there any type of vertical agreements or restraints that are absolutely (“per se”) protected?

Resale price maintenance constitutes a *per se* prohibition. However, it is permissible for the supplier or producer to recommend a minimum resale price provided that it is made clear that the recommendation is not binding and the words “recommended price” appear next to the stated price on the product.

2.5 What is the analytical framework for assessing vertical agreements?

Primarily, it must be shown that the vertical agreement results in a substantial prevention or lessening of competition. An analysis of the relevant markets must be conducted and the effect of the alleged conduct on the market must be determined. Vertical agreements are typically prohibited because of their foreclosing effects.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

Markets are defined with reference to substitutability and the SNIPP test is typically applied. In the case of prohibited practices, including those involving vertical agreements, markets are often defined with reference to where the harm is felt.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so called “dual distribution”)? Are these treated as vertical or horizontal agreements?

Relationships in a dual distribution system have horizontal as well as vertical elements. In the matter of *Competition Commission v South African Breweries and others (134/CR/Dec07)*, it was alleged that SAB’s distribution arrangements with its appointed distributors, who engaged in intra-brand competition with SAB, amounted to market allocation (collusion), amongst other contraventions. The Commission’s case in respect of collusion was dismissed by the Tribunal on the basis that the independent distributors were not truly competitors of SAB but were economically dependent and integrated with SAB. On appeal, the Competition Appeal Court upheld the Tribunal decision but emphasised that although economic dependence and integration are important factors in determining whether an agreement is as between competitors, the true economic relationship between the parties is what should be interrogated. The SAB dual distribution system was characterised as being primarily vertical and could therefore not be treated as *per se* collusive. True dual distribution arrangements are likely to be treated as vertical in nature on this basis, but it is important to note that the Competition Appeal Court did not expressly exclude the possibility of similar facts giving rise to an effects-based or *rule of reason* horizontal assessment.

2.8 What is the role of market share in reviewing a vertical agreement?

Market share is an important determinant of the possible anti-competitive effect that may arise from a vertical agreement. Although we do not have safe harbour provisions in South Africa, it is generally accepted that a vertical agreement will not give rise to significant anti-competitive effects if both parties to the vertical agreement are not dominant. In the case of *Natal Wholesale Chemists (Pty) Ltd v Astra Pharmaceuticals (Pty) Ltd and others (98/ir/Dec00)*, it was stated that: “Anti-trust scholarship and jurisprudence conventionally adopts a sceptical attitude to claims of anti-trust harm arising from all species of vertical agreements. In particular it is widely recognised that the diminution of intra-brand competition consequent upon exclusive distribution arrangement is frequently compensated for by pro-competitive benefits that enhance the ability of the producer to compete against its competitors, that is, by strengthening of inter-brand competition. This general approach, which we follow, is recognised by the claimants in the present matter.”

2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis fulfils an important role in analysing the anti-competitive effects and technological, efficiency and pro-competitive benefits that arise from vertical agreements. Our competition authorities have access to economic literature and economists are engaged to give evidence before the Competition Tribunal.

2.10 What is the role of efficiencies in analysing vertical agreements?

The Competition Act requires the anti-competitive effects to be weighed up against the efficiency benefits that arise from vertical agreements. In the context of merger analysis, it was noted in the case of *Trident Steel (Proprietary) Limited and Dorbyl Limited* that dynamic efficiencies (associated with innovation) are the most beneficial since they relate to product or service quality, which is exactly what competition policy seeks to achieve. The least weight is ascribed to pecuniary efficiencies flowing from cost savings (improved bargaining power), while production efficiencies fall somewhere in between.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

Exemption may be granted under section 10 of the Competition Act for agreements or practices that relate to the exercise of intellectual property rights. To the extent that intellectual property rights may foster technological gains, they will be relevant in balancing the technological gains against the anti-competitive effect of the vertical agreement in terms of section 5.

2.12 Does the enforcer have to demonstrate anti-competitive effects?

The enforcer must demonstrate anti-competitive effects. However, actual harm does not need to be demonstrated but merely likely foreclosure.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

As appears from section 5 of the Competition Act, the anti-competitive effects must be weighed up against technological, efficiency or pro-competitive gains.

2.14 What other defences are available to allegations that a vertical agreement is anti-competitive?

To the extent that a vertical agreement may constitute an abuse of dominance, prohibition is subject to a turnover and asset value threshold of R5 million within the Republic of South Africa.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

Guidelines have been issued in relation to franchise agreements.

2.16 How is resale price maintenance treated under the law?

Resale price maintenance constitutes a *per se* prohibition.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealing arrangements can either be viewed as anti-competitive or pro-competitive depending on their economic effect. An exclusive dealing arrangement stands a greater risk of contravening the Competition Act if one of the firms concerned is dominant. Under section 8, dealing with abuses of dominance, subject to an assessment of the effect on competition and the weighing up of efficiencies and other pro-competitive gains, a dominant firm may not require or induce a customer or supplier not to deal with a competitor.

2.18 How do enforcers and courts examine tying/ supplementary obligation claims?

Subject to technological, efficiency or other pro-competitive considerations, a dominant firm may not engage in tying – tying is dealt with under section 8 (abuse of dominance). Tying is defined in section 8(d)(iii) as “selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of the contract or forcing a buyer to accept a condition unrelated to the object of the contract”.

The Tribunal considered tying allegations in the case of *Sappi Fine Papers (Pty) Ltd and the Competition Commission*. The Tribunal determined that dominance must be established in the tying market. Facts must be submitted that the sale is tied to goods or services in unrelated markets. The monopolist uses his market power in the “tying” market to anti-competitively improve his position in the “tied” market.

2.19 How do enforcers and courts examine price discrimination claims?

Section 9(1) of the Act deals with price discrimination. The complainant must show that the pricing practice: (a) is likely to have the effect of substantially preventing or lessening competition; (b) relates to the sale, in equivalent transactions, of goods or services

of like grade and quality to different purchasers; and (c) involves discriminating between those purchasers in terms of (i) the price charged for the goods or services, (ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services, (iii) the provision of services in respect of the goods or services, or (iv) payment for services provided in respect of the goods or services.

Section 9(2) provides a defence to a price discrimination complaint. Conduct involving differential treatment of purchasers, as set out above, is not prohibited price discrimination if the dominant firm can establish that the differential treatment:

- (a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which, goods or services are supplied to different purchasers;
- (b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or
- (c) is in response to changing conditions affecting the market for the goods or services concerned, including:
 - (i) any action in response to the actual or imminent deterioration of perishable goods;
 - (ii) any action in response to the obsolescence of goods;
 - (iii) a sale pursuant to a liquidation or sequestration procedure; or
 - (iv) a sale in good faith in discontinuance of business in the goods or services concerned.

2.20 How do enforcers and courts examine loyalty discount claims?

There are no cases in South Africa dealing with loyalty discounts provided directly to end-customers, but loyalty commissions payable to travel agents have been considered by the Competition authorities.

In *Nationwide Airlines (Pty) Ltd, Comair Ltd v South African Airways (Pty) Ltd*, the Tribunal ruled that South African Airways' (SAA) travel agent incentive schemes (which rewarded loyalty) during the period 1 June 2001 until 31 March 2005 were prohibited practices in contravention of section 8 (d)(i) of the Act. The Tribunal defined two markets, being (1) the purchase of domestic airline ticket sales services from travel agents in South Africa, and (2) the market for domestic airline travel. SAA was dominant in both and abused its position in the first market with an effect in the second market. The Tribunal concluded that it does not require evidence of actual harm, but evidence can be provided that the exclusionary practice is substantial or significant or, expressed differently, has the potential to foreclose the market to competition.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

This type of conduct will be assessed in the context of section 8 (abuse of dominance) and it is likely that the conduct will need to constitute a general exclusionary abuse under section 8(c) or constitute predatory pricing under section 8(d) in order for it to be prohibited.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Discrimination based on Constitutional grounds is governed by

the Consumer Protection Act, and the Consumer Protection Act regulates various aspects of vertical agreements with consumers (individuals and small juristic persons).

2.23 How are MFNs treated under the law?

MFN clauses will typically be assessed under the general provision of sections 5 (vertical prohibited practices) and 8 (abuse of dominant position) of the Competition Act. We do not have reported cases dealing, specifically, with MFN clauses but the Commission has investigated them in certain cases.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

High-profile cases dealing with abuse of dominance have been heard and significant administrative penalties have been levied. The competition authorities therefore treat these matters as serious and they are subjected to proper scrutiny.

3.2 What are the laws governing dominant firms?

Sections 8 and 9 of the Competition Act prohibit various abuses of dominance and price discrimination by dominant firms.

3.3 What is the analytical framework for defining a market in dominant firm cases?

Generally, the recognised principles of substitutability, including the SNIPP test, are used to define a market. The size of the market is determined with reference to turnover or other appropriate proxies (such as number of customers). In the case of *Competition Commission v SAA, (18/CR/Mar01)*, the Tribunal adopted the approach that the market definition must take into account the theory of harm that is advanced and the area where foreclosure is experienced.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

Firms are irrefutably deemed to be dominant if they have a market share of 45%; firms with 35% market share are presumed dominant unless they can prove an absence of market power. A firm with less than 35% market share is also considered dominant if it has market power. Market power is defined in the Competition Act as the power of a firm to control prices or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Being dominant is not in and of itself problematic, but higher standards of behaviour are expected of dominant firms. Sections 8 and 9 of the Act relate to conduct which dominant firms may not engage in.

3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis forms the basis of assessing market dominance.

3.7 What is the role of market share in assessing market dominance?

The Competition Act has reference to market shares in determining whether a firm is dominant. Market share is utilised as a proxy for dominance, but actual market power remains an important consideration.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

Many of the provisions of section 8 of the Competition Act employ a test that balances technological, efficiency and pro-competitive gains against the anti-competitive effect of conduct.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Efficiencies are weighed against the anti-competitive effects of conduct in determining whether a firm has abused its dominance.

3.10 Do the governing laws apply to “collective” dominance?

The Competition Act does not provide for collective dominance.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Section 8 of the Competition Act does not apply explicitly to dominant purchasers and the section has not been applied by the competition authorities to dominant purchasers.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Excessive pricing: Section 8(a) of the Act prohibits excessive pricing. A price is excessive if it bears no relation to the economic value of the good or service concerned.

Access to an essential facility: In terms of section 8(b), a dominant firm may not refuse to give a competitor access to an essential facility, when it is economically feasible to do so.

Exclusionary Acts – section 8(c): This section deals with all potential exclusionary behaviour not captured in section 8(d) of the Act. In terms of this section, the complainant will have to prove that the practice is exclusionary (impedes a firm from entering into or expanding within a market), show an anti-competitive effect and that the anti-competitive effect outweighs any pro-competitive, technological or efficiency gains.

In terms of section 8(d): Subject to a “rule of reason” assessment, it is an abuse of dominance for a dominant firm:

- (i) to require or induce a supplier or customer not to deal with a competitor;

- (ii) to refuse to supply scarce goods to a competitor when supplying goods is economically feasible;
- (iii) to sell goods or services on condition that the buyer purchases separate goods or services unrelated to the object of the contract, or forcing a buyer to accept a condition unrelated to the object of the contract;
- (iv) to sell goods or services below their marginal or average variable cost; and
- (v) to buy-up a scarce supply of intermediate goods or resources required by a competitor.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

Certain of the abuse of dominance provisions provide that anti-competitive harm must be weighed against technological gains. The protection of intellectual property within the context of achieving technological gains may be recognised in the interpretation of these provisions.

3.14 Do enforcers and/or legal tribunals consider “direct effects” evidence of market power?

Evidence of actual harm is not required, but evidence that the exclusionary practice is substantial or significant or, expressed differently, has the potential to foreclose the market to competition (by impeding entry or expansion) will be relevant.

3.15 How is “platform dominance” assessed in your jurisdiction?

There is no specific provision in the Competition Act dealing with platform dominance, particularly in the context of technologically sophisticated industries. However, the general principles are able to accommodate the concepts of platform dominance.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

It is an abuse of dominance for a dominant firm *to refuse to supply scarce goods to a competitor when supplying goods is economically feasible and to refuse of provide access to an essential facilities, when it is economically feasible to do so.*

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regards to vertical agreements and dominant firms.

The Competition Act makes reference to the interests of small business and historically disadvantaged persons, in various contexts, which is unique to the history of South Africa. Although more pertinently so in merger control, the competition regime generally takes public factors into account to a more significant extent than is the case internationally.

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Andries has been a practising attorney for more than 20 years and has extensive experience advising clients on all aspects of competition law. He has acted for South African Airways (SAA) in the Competition Tribunal hearings between Comair, Nationwide and SAA. He acted for Senwes in hearing before the Competition Tribunal in the first "margin squeeze" case in South Africa, which was taken on appeal to the Constitutional Court. He recently acted for the SABC in a dispute regarding the question of whether a channel distribution agreement between SABC and Multichoice constituted a merger. He regularly represents clients in merger proceedings before the competition authorities.

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Albert is a Director of CDH where he began his career as a candidate attorney. He practises as a competition law specialist appointed in the firm's competition department. He has significant experience in obtaining merger approval for complex transactions across various industries, including the non-alcoholic beverages, security, pharmaceutical, telecommunication, property, logistics and mining sectors. He represents clients in prohibited practice investigations, including corporate leniency applications and dawn raid representation. He also has extensive experience in advising on the competition regulatory regimes of other African jurisdictions and regional regulatory bodies.



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