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COMPETITION ALERT

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The Namibian Competition Commission has issued enforcement guidelines setting out the framework for the investigation, prosecution and exemption of restrictive business practices under the Namibian Competition Act, No 2 of 2003.

CLIFFE DEKKER HOFMEYR

RESTRAINTS OF TRADE IN SALE OF BUSINESS AGREEMENTS

Competition authorities acknowledge that restraints of trade are a necessary feature in commercial transactions.

As a general rule, it is lawful for parties to enter into very limited restraints of trade or non-compete arrangements when it is necessary to protect the goodwill of a business being sold. This is provided that the non-compete clause is reasonably limited in terms of duration, product scope and geographic market. Restraints not meeting these requirements, have been termed 'naked market division' arrangements, which are *per se* prohibited in terms of the Competition Act, No 89 of 1998.

According to the merging parties, the rationale for the restraint was that in instances where unsecured credit is granted, a credit provider may require a customer to take out credit life insurance in order to protect the underlying debt.

Typically, a new purchaser of a business would seek comfort in knowing that the seller will not compete with it for a limited period of time, protecting the value of the business being sold and often allowing the purchaser to establish itself as a new entrant in a market, thereby encouraging competition should the seller re-enter the market after the restraint has come to an end.

Competition authorities acknowledge that restraints of trade are a necessary feature in commercial transactions and their flexible approach towards these types of restraints was illustrated in the matter between *RCS Cards (Pty) Ltd and The Consumer Finance Business of the JD Group Limited* (Competition Tribunal Case Number LM/193/Feb15/020644).

RCS, a provider of unsecured credit, sought to acquire the consumer finance business of JD Group, a provider of secured and unsecured credit. Although the transaction did not include an acquisition of the JD Group insurance business, the sale of business agreement contained a restraint of trade clause, restricting the JD Group from offering credit life insurance to customers, in competition with RCS, for a period of three years after the date of the merger. The Competition Tribunal (Tribunal) considered the following factors in determining whether the restraint was reasonable:

- the rationale for including a restraint of trade;
- whether the transaction could be concluded without the restraint;
- the duration of the restraint;
- the ambit of the restraint;
- whether the restraint was an attempt to preserve a cartel; and
- whether competitors were entering into the restraint.

According to the merging parties, the rationale for the restraint was that in instances where unsecured credit is granted, a credit provider may require a customer to take out credit life insurance in order to protect the underlying debt. Although the provision of credit life insurance was considered ancillary to the consumer finance business, it constituted a meaningful sales opportunity for RCS.

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RESTRAINTS OF TRADE IN SALE OF BUSINESS AGREEMENTS

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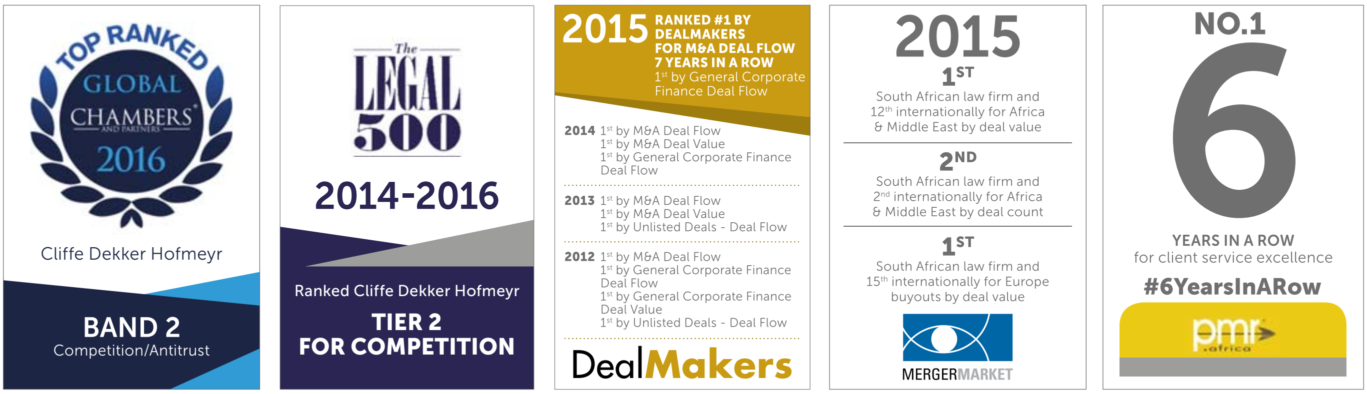
Restraints serving a legitimate commercial purpose, and underpinned by sound commercial reasoning will pass competition law muster.

The Tribunal considered the Commission's assessment of the restraint and concluded that the restraint was reasonable and justifiable. By implication it agreed that the restraint was necessary to protect the investment that RCS had made through the purchase of the consumer finance division of JD Group.

Restraints serving a legitimate commercial purpose, and underpinned by sound commercial reasoning will pass competition law muster. If there is any doubt about whether a restraint clause is potentially anti-competitive, parties should check these with their competition law advisors.

Albert Aukema and Nazeera Mia



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COMPETITION COMMISSION SIGNS ACCORD WITH FELLOW BRICS NATIONS

The lack of harmony between regulatory approaches across jurisdictions remains a challenge that sharing of best practice can help to alleviate.

A hallmark of the current global competition law environment is the extent to which national authorities seek to cooperate and share knowledge, experience and best practice. Bodies such as the International Competition Network (ICN) where regulators interact at conferences around the world have allowed fledging regulators to rapidly develop the skills needed to become meaningful enforcers in their jurisdiction – that should sound as a warning to those who might ignore new regulations in the hope that teeth will only be bared in years to come.

Although arguably the poor cousin in some ways, from a competition law perspective South Africa is arguably a cut above the other BRICS regulators and will no doubt contribute meaningfully to the alliance.

While increased cooperation among regulators means there is less room to hide from competition regulation, there are also advantages to be gained. In particular, the lack of harmony between regulatory approaches across jurisdictions remains a challenge that sharing of best practice can help to alleviate. In multi-jurisdictional notifications, cooperation between regulators can be a double-edged sword: if done sensibly, time tables can be better managed and key issues addressed consistently; but if managed badly, issues or peculiar policies in one jurisdiction can contaminate the process in another.

Either way, the world of competition regulation is getting smaller by the day and the latest development for South Africa (already a well-regarded voice on the ICN stage) is the conclusion of a Memorandum of Understanding (MOU) between the competition regulators in Brazil, Russia, India, China and South Africa (BRICS). Although South Africa is in some ways the poor cousin, from a competition perspective the country is arguably a cut above the other BRICS regulators and will no doubt contribute meaningfully to the alliance.

Some key provisions of the BRICS MOU are the following:

- The MOU aims to promote and strengthen cooperation in law and policy through the exchange of information and best practice, as well as through capacity-building. This will likely mean secondments between the relevant authorities, so one might expect to find the Commission's investigatory teams to be more cosmopolitan with Chinese, Russians, Indians and Brazilians in the line-up.
- Joint studies into competition issues common across the respective markets might be organised. Although the economies of the respective countries are different, it will be interesting to see what is identified as a worthy joint study.

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COMPETITION COMMISSION SIGNS ACCORD WITH FELLOW BRICS NATIONS

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- Some cooperation in investigations that straddle the relevant jurisdictions is envisaged. It is not clear whether this extends to merger investigations or only competition law violations. Either way, the MOU is at pains to record that any confidentiality regime will need to be respected, so merging parties, or respondents to investigations, in South Africa should not be concerned that their confidential submissions will be shared without their knowledge and consent. More generally, learnings from investigations by one regulator into an industry could be shared with the others – so that, for instance, a cartel uncovered in India among companies also active in South Africa, Russia or China could expect some scrutiny in those jurisdictions, and vice versa.
- The MOU envisages a BRICS International Competition Conference every two years. The first was held in Durban in 2015.

It remains to be seen how simpatico the BRICS regulators will ultimately be, given the geographic disparity and differing development imperatives, but the conclusion of the MOU does provide opportunities for the development of policy and best practice across all five jurisdictions involved. This may also have ramifications among Southern African regulators, where the South African Commission has a strong voice.

Chris Charter

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NEW GUIDELINES SIGNAL NAMIBIAN AUTHORITY'S INTENTION TO FOCUS ON ENFORCING RESTRICTIVE PRACTICE PROVISIONS

It is also noteworthy that the Namibian Commission sees monitoring of competition related media reports as an important source of information.

The Namibian Competition Commission has issued enforcement guidelines setting out the framework for the investigation, prosecution and exemption of restrictive business practices under the Namibian Competition Act, No 2 of 2003.

Restrictive business practices are described in the guidelines as those which cause competitive harm to competitors and other market participants. Examples include the abuse of dominance, price fixing, collusive tendering, excessive pricing and minimum resale price maintenance.

The Namibian regulator's new priority appears to now be restrictive practice enforcement.

The guidelines signal a new phase in Namibian competition law. Historically focussed on merger regulation, the Namibian regulator's new priority appears to now be restrictive practice enforcement.

It is also noteworthy that the Namibian Commission sees monitoring of competition related media reports as an important source of information and that it may even decide to initiate a complaint based on information published in the media.

Albert Aukema and Kitso Tlhabanelo

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