Competition Laws Amendments: we must not lose sight of the need to reward innovation and hard work

Late in 2018 the Department of Economic Development published two draft sets of regulations for public comment. The regulations seek to promote the ability of small and medium enterprises, especially those owned by previously disadvantaged individuals, to compete on an even playing field with larger enterprises when supplying goods and services. The first set of regulations seeks to do this by preventing large businesses from pushing out competitors by offering goods and services as a supplier at rates which smaller businesses cannot compete with. The logic is that large companies can afford to take a 'hit' and offer goods and services at a rate so low that companies with smaller reserves cannot compete. The second set of regulations is the corollary in that it seeks to prevent companies that buy goods and services from using their position to impose conditions that make it impossible for smaller suppliers to compete for their business, thereby abusing their position as a buyer. Where a dominant supplier or buyer truly abuses its power in bad faith to push smaller competitors out of the market, a compelling argument can be made that some intervention is necessary. One can therefore hardly fault the reasoning, but as always, the devil is in the details and one must be careful not to over-regulate to the extent that innovative and hardworking companies are no longer rewarded for their efforts.

Both sets of draft regulations are intended to provide the detail behind the amendments to the Competition Act which are currently up for debate. As is invariably the case with competition legislation, the proposed amendments seek to introduce prohibitions but uses ambiguous language such as 'unfair', 'material' and 'abusive' to distinguish between conduct that falls foul of the law, and that which is part and parcel of a competitive business world. This is naturally problematic for anyone that needs to assess when their conduct will fall within the bounds of the law and when it will not. To the Department's credit, the draft regulations attempt to do exactly what was asked by so many stakeholders in that it builds on these concepts by providing criteria and factors that must be considered to determine when prices are unfair, abusive or whether the difference is material or not. The specific factors and criteria do require a few comments though.

As per the regulations, differentiating between suppliers on the basis of larger quantities will not be a justification for preferential rates. In practice, special provisions are often afforded to suppliers that can cope with the rigours of supplying large quantities of certain commodities. From the buyer's point of view, the costs of paying slightly more per unit can be offset by the reduced admin costs of having to source from fewer suppliers. This is a tactic often used by organs of state that are required to source their inputs through an open tender

procedure. From a supplier's point of view, it could also be financially viable to receive less per unit if it enables it to sell a higher volume of goods and services to a buyer. It is true that quantity should not be used as a 'trump card' to justify uncompetitive conduct, but the economic benefits of supplying higher quantities should be considered as part of the whole package when assessing a buyer or supplier's behaviour.

The regulations furthermore state that it will not be necessary to prove actual harm or an uneven playing field when allegations of price discrimination or abuse of buyer power is investigated. It may very well be difficult to prove harm or an uneven playing field as these are intangible concepts. However, one should remember that the Amendment Bill makes it an offense to contravene these provisions, and with criminal consequences comes a higher burden of proof. The principle of the Rule of Law requires laws that prohibit certain actions to be clear enough so that companies can know exactly how to avoid breaking the law. When one need not prove actual harm or consequence, it becomes very difficult to know when actions will be deemed unlawful or not. This has legal implications as the courts will not convict someone where it is objectively impossible for that person to know he did wrong. There are complicated constitutional arguments supporting this notion, but at its core it is actually very simple and the legislator should try its utmost to keep it that way. If the law is written in a manner that makes it impossible to apply, then the good intentions behind it may go to waste.

With this being said, these regulations, and indeed the amendments to the Act that underpins it, is still at an early stage of the legislative process. Fortunately, the Department has embarked on an extensive public consultation procedure that goes above and beyond the bare minimum required by law. After receiving comments on the initial draft (Agbiz sent a submission), there will be opportunities for engagement with the Department on public forums followed by the publication of a second draft of the regulations before they are finally enacted. Hopefully these issues can be ironed out in this process and we can end up with a product that prevents unfair competition but still rewards those companies that get ahead through hard work and innovation.