Supplier terms and pricing issues under South African competition law

What is the basic position under South African competition law regarding resale price maintenance (RPM)?

The practice of minimum RPM (i.e. where an upstream supplier attempts to control or maintain the minimum price at which a product is resold to its customer) is considered to be a vertical variant of price fixing, which is generally construed as the most anti-competitive of business practices, and is accordingly per se prohibited under Section 5(2) of the Competition Act 89 (the Act) i.e. no pro-competitive defences may be raised. In addition, the Act provides for the imposition of administrative penalties on first-time offenders.

A minimum resale price may include a prescribed minimum price, maximum discount or maximum margin from which a reseller is prohibited from deviating.

Section 5(3) of the Act provides that a supplier may recommend a resale price to the reseller provided that (i) the supplier or producer makes it clear to the reseller that the recommendation is not binding; and (ii) if the product has its price stated on it, the words "recommended price" appear next to the stated price.

Although not specifically prohibited, the imposition of a maximum resale price may be assessed under section 5(1) of the Act which provides for a rule of reason assessment i.e. pro-competitive justifications may be raised in defence.

What do recent cases and investigations tell us about the Commission's position on RPM?

The Act does not require an agreement between the supplier and the reseller before a finding of minimum RPM can be made. The unilateral implementation of a minimum resale price by the seller of the relevant product is sufficient for a contravention of the Act. It is therefore sufficient to produce evidence that a supplier has imposed on its resellers a price at which its goods are to be resold and the resellers are thereby induced to comply with this minimum price on pain of a sanction for non-compliance (*Federal-Mogul Aftermarket Southern Africa Limited v the Competition Commission and another*). The threat and imposition of a sanction for non-compliance with a request to increase prices was confirmed as a requirement for RPM in the recent case involving SBS Household Appliances t/a SMEG (Pty) Ltd.

SMEG ultimately entered into a settlement agreement with the Commission, which was confirmed as an order of the Tribunal. The Tribunal departed from its normal practice of not providing reasons when confirming a settlement agreement, in order to emphasize the nature and severity of minimum RPM, as well as to enhance the general awareness of minimum RPM as a *per se* prohibition in terms of section 5(2) of the Act.

Although not decided by the Tribunal or the Competition Appeal Court, the Commission alleged that the co-ordination of advertised prices may constitute prohibited minimum RPM. In 2016, the Commission concluded a settlement agreement with Premium Brand Distributors wherein Premium Brand admitted that it co-ordinated the advertisement of the Nikon Brand by, *inter alia*, co-ordinating the prices at which the Nikon brand was advertised by Premium Brand's retailers. However, Premium Brand did not admit that co-ordinating the advertisement of the Nikon Brand constituted minimum RPM. This was a rare instance of a settlement without admission of liability.

How are online sales restrictions treated?

Neither the Act nor case law deals with online sales restrictions. The basic principles set out in respect of RPM would apply.

As mentioned above, the Commission viewed the co-ordination of online advertised prices as a potential form of minimum RPM, but

Premium Brand did not admit nor did the Tribunal find that this was the case. As a result, the Premium Brand settlement cannot be regarded in the same light as legal precedent.

What is the approach to discounts and rebates under South African competition law?

A dominant firm ought to exercise caution in relation to its discount and rebate policies in order to avoid allegations of prohibited price discrimination in contravention of section 9 of the Act; general exclusionary conduct under section 8(c)of the Act, specific exclusionary conduct of inducing a supplier or customer not to deal with a competitor under section 8(d)(i) or (iv) of the Act, or specific exclusionary conduct of selling goods or services below their marginal or average variable cost under section 8(d)(iv) of the Act.

Price discrimination by a dominant firm is prohibited, if:

- it is likely to have the effect of substantially preventing or lessening competition;
- it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and
- it involves discrimination between those purchasers in terms of prices charged; any discount, allowance, rebate or credit given; provision of services; or payment for services.

A dominant firm may raise certain justifications including that the price differential:

- makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the different places to which, methods by which, or quantities in which, 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 concerned.

Whether or not price differentials by a dominant firm amount to prohibited price discrimination depends on the market context. The Competition Tribunal previously found that:

- a 15% difference in price between firms who received the smallest discount and firms who received the largest was significant; and
- in a market characterised my low margins, an imposition of an additional 3-4% on a firm's cost structure is not inconsequential.

Discount and rebate schemes by dominant firms may result in exclusionary conduct, for example, in circumstances where it results in foreclosure of the dominant firm's competitors or potential competitors because they are unable to match the dominant firm's rebates or it induces the dominant firm's customers to procure all or most of their requirements from the dominant firm.

Have there been any recent developments in this area of competition law?

In *Nationwide Airlines (Pty) Ltd, Comair Ltd v South African Airways (Pty) Ltd* the Tribunal dealt with target rebates where SAA offered override payments to travel agents for the achievement of certain targets, as well as retroactive rebates calculated back to rand one.

The Tribunal found that the rebate system was exclusionary in contravention of section 8(d)(i) of the Act.

The Tribunal confirmed the principles that the firm offering the rebate must be dominant; the rebate must induce customers not to deal with competitors (i.e. have an exclusionary effect); and the exclusionary effect must be anti-competitive.

The Tribunal further confirmed that it does not require evidence of actual harm, but evidence can be provided that the exclusionary practice is substantial or significant or, has the potential to foreclose the market to competition.

In 2005, the Commission initiated an investigation into alleged contraventions of section 8(c) or 8 (d)(i) or 5(1) of the Act on the part of Rooibos Limited.

Pursuant to its investigation, the Commission found that *inter alia* Rooibos used a system of volume discounts, based on targets, which had the effect of inducing customers not to deal with Rooibos' competitors.

The Commission and Rooibos concluded a settlement agreement which stipulated on what basis discounts and rebates may be offered by Rooibos, including that:

- the discounts or rebates must be available on equivalent terms to all customers
- the discounts or rebates should not be determined on individualised targets
- the discounts or rebates on sales above a pre-determined threshold should not be calculated to include sales below the threshold
- the net price for the incremental sales, after the discounts or rebates are taken into account, must not be below marginal or average variable cost of the product

It should however be noted that the settlement agreement between the Commission and Rooibos cannot be regarded in the same light as legal precedent.

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