S.A. considers non-binding advisory opinions (again)

The South African Competition Act and the re-emergence of non-binding advisory opinions: Draft regulations published for comment

By Jemma Muller and Estelle Naude

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After the suspension of the Competition Commission's ("Commission") advisory service in 2018, following the Constitutional Court's decision in *Hosken Consolidated Investments Limited v The Competition Commission*, the regulation of non-binding advisory opinions is once again on the Commission's agenda.

On the 23rd of March 2021, the Proposed Regulations on Non-Binding Advisory Opinions ("**Proposed Regulations**") were published for comment by the Department of Trade, Industry and Competition ("**DTIC**") in Gazette 44310 GoN 248. The public have been afforded until 23 April 2021 to provide their comment on the Proposed Regulations.

These Draft Regulations are centered around three important aspects of non-binding advisory opinions, namely:

- How one can request a non-binding advisory opinion from the Commission;
- The legal status of a non-binding advisory opinion; and
- The fees payable if one requests a non-binding advisory opinion.

When requesting a non-binding advisory opinion, the requesting party will have to provide the Commission with a fairly comprehensive set of information, including, *inter alia*, the requesting party's name, the market(s) in which it operates, the reasons for seeking a non-binding advisory opinion, the nature of the legal advice requested, appropriate information to allow the Commission to determine whether the requesting party falls within one of the entities exempt from paying a fee, and any other facts, information and

John Oxenham
Director
South Africa

j.oxenham@primerio.international

Cell +27 (0)83 233 0484

Jemma Muller
Candidate Attorney
South Africa

j.muller@primerio.international

Contact details

Johannesburg, South Africa
John Oxenham, Michael-James Currie
j.oxenham@primerio.international
m.currie@primerio.international
135 Daisy Street Sandton, Johannesburg, 2031

Nairobi, Kenya
Ruth Mosoti, Fidel Mwaki
r.mosoti@primerio.international
f.mwaki@primerio.international
Kalson Towers, 2nd Floor, The Crescent,
Off Parklands Road, Nairobi

Port Louis, Mauritius
Gilbert Noël
g.noel@primerio.international
Suite 401, St James Court, St Denis Street, Port Louis

Email: info@primerio.international
Tel: +27 (0) 11 083 2411

documents which would enable to the Commission to provide a non-binding advisory opinion.

The Proposed Regulations serve as a vital tool for parties to receive guidance from the Commission pertaining to their compliance with the Competition Act No. 89 of 1998, as amended (the "**Act**"). Obtaining guidance from the Commission, for example on whether a proposed merger is notifiable, could not only prevent the party concerned from facing penalties for contravening the Act, but also save time and resources and negate the need for paying a filing fee (although requesting a non-binding advisory opinion does attract a fee in certain circumstances, which is discussed more fully below).

Notwithstanding the above, the information that the requesting party is required to disclose to the Commission may have the unintended consequence of discouraging parties from utilizing the advisory function for fear of confidentiality concerns. In this respect, section 44 of the Act is relevant and states the following:

"*1(a) A person, when submitting information to the Competition Commission or the Competition Tribunal, may identity information that the person claims to be confidential information.*

…

(2) The Competition Commission is bound by that a claim contemplated in subsection (1), but may at any time during its proceedings refer the claim to the Competition Tribunal to determine whether or not the information is confidential information" (our emphasis)

On the 23rd of March 2021, the DTIC also published for comment and amendment to forms, rules and regulations fo the Commission in Gazette 44309 GoN 247 which deals with, *inter alia*, an amended Rule 15A which pertains to access to confidential information submitted to the Commission. Rule 15A states:

"(1) Before the Commission makes the determination contemplated in section 44(3) of the Act in respect of information submitted to the Commission under a confidentiality claim, the Commission must:

(a) issue a Notice of intention to make a determination in Form CC 23 to the claimant and the Respondent; and

(b) allow the claimant and the Respondent 5 business days to make representations to the Commission.

(2) Within 5 business days after the Commission makes its determination in terms of section 44(3), an aggrieved person may refer the Commission's decision to the Tribunal in accordance with the Tribunal's rules." (our emphasis)

According to the Proposed Regulations, the Commission is permitted, upon receipt of a request for a non-binding advisory opinion, to determine whether the issues subject to the request should be dealt with in an investigation or any other process under the Act. Additionally, a non-binding advisory opinion cannot fetter the discretion of the Commission while it exercises its functions in terms of the Act. As with the information the requesting party is required to disclose to the Commission, this provision may serve to deter businesses from utilizing this advisory function for fear that information disclosed may later be used by the Commission in an investigation. In this regard, section 45A of the Act states:

"*1(a) When making any decision in terms of this Act, the Competition Commission, subject to paragraph (b), may take confidential information into account in making its decision."*

This also raises the question on the status of confidential information submitted to the Commission pursuant to a non-binding advisory opinion, which the Commission later declines to issue an opinion on. According to the Proposed Regulations, if the Commission declines to issue an opinion, it must refund the fee paid by the requesting party if it appears the issues underpinning the advisory opinion will undermine the objectives of the Act.
Importantly, a request by medium enterprises and other market participants for a non-binding advisory opinion must be accompanied by a fee of R20 000 and R50 000 respectively. This is a notable increase from the fees the Commission previously charged under Rule 10.4 of the Conduct of Proceeding in the Competition Commission, which was a fee of R2500 payable by the requesting party.

While the proposed fee structure is a noticeable increase from the fees previously payable under Rule 10.4, the penalties for contravening the Act as well as

merger filing fees prescribed by the Act can be far more costly than the cost of requesting a non-binding advisory opinion. It is also noteworthy that the Proposed Regulations expressly exclude certain entities from paying a fee, namely:

- Constitutional institutions;
- Departments;
- Major public entities;
- Micro enterprises;
- Non-profit organizations;
- Other public entities; and
- Small enterprises.

It could be argued that the exclusion of the abovementioned entities from paying a fee may open the floodgates for requests for non-binding advisory opinions to the Commission, which could overburden an already inundated Commission.

In terms of the legal status of non-binding advisory opinions, the Proposed Regulations make it clear that the opinion has no binding legal effect on the Commission, the Competition Tribunal or the Competition Appeal Court.

The Proposed Regulations, while still in draft form, represent an important competition law development in South Africa and provide parties with much needed guidance, particularly in light of the complexities and legal nuances brought about by the recent amendments to the Act. Furthermore, the Proposed Regulations are largely in line with recent trends in promoting competition law compliance through competition advocacy as opposed to enforcement mechanisms.

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