

Business Law & Tax Review

COMPETITIVE EDGE

Team effort could pay off in tough trading conditions



Jocelyn Katz

Businesses may wish to turn to joint purchasing agreements to help them stay afloat in the economic downturn

GIVEN the state of relative infancy in which South African competition law currently exists, even though great strides have been made in terms of certain issues, a constant challenge for competition lawyers and regulators alike is the assessment of commercial activity for which there is little or no precedent.

The practice of joint procurement is a case in point. Also referred to as joint purchasing or joint buying, the term loosely alludes to a variety of arrangements in terms of which various purchasers come together to collaborate in sourcing either the whole or part of their requirements, which typically include anything from raw material to equipment.

Joint procurement agreements are generally aimed at combining demand in order to obtain better prices and purchase larger volumes on more favourable terms and conditions.

In light of the downturn in the global economy, it is acknowledged that these agreements could have positive benefits for companies experiencing financial difficulty.

In many instances small and medium enterprises would not only be able to achieve economies of scale and match buying power of their larger competitors but would also be able to cut back significantly on costs.

Accordingly, it is not implausible that businesses may wish to turn to joint purchasing agreements to alleviate their plight and assist them to stay afloat during these troubled times.

European law offers some guidance on the general competition law

principles relating to joint purchasing agreements. The European guidelines on the applicability of Article 81 of the Treaty Establishing the European Community to horizontal co-operation agreements set out how joint purchasing agreements should be assessed. The European competition authorities tend to view joint purchasing agreements between small and medium-sized enterprises, that enable them to purchase larger volumes and obtain greater discounts similar to their bigger competitors, as being pro-competitive.

The European Union (EU) guidelines provide that joint purchasing agreements need to be analysed in their legal and economic contexts, beginning with an examination of the parties' buying power.

Buying power is assumed where the purchasing agreement accounts for a sufficiently large proportion of the total volume of a purchasing market so that prices can be driven down to below the competitive level.

The EU guidelines also provide that the lower purchasing costs resulting from the exercise of buying power cannot be seen as pro-competitive if the purchasers together have power on the selling markets. There is no absolute threshold in the EU which indicates that a joint purchasing agreement creates some degree of market power; however, in most cases it is unlikely that market power will exist if the parties to the joint purchasing agreement have a combined market share of below 15% in the purchasing and selling markets.

In the EU authorities use a factual

analysis to strike a balance between allowing those pro-competitive arrangements that objectively meet these criteria, weighed against the potential harm of allowing competitors to collaborate on purchasing.

Notwithstanding potential benefits, joint procurement agreements are not without concerns in the context of South African competition law.

One concern associated with a joint procurement agreement is the effect of the increased buying power of the co-operating companies. Buying power can lead to the foreclosure of access to efficient supplies of products, equipment or services by competing purchasers. There is also the potential for an increase in costs for the competitors of the co-operating firms since suppliers may endeavour to recover price reductions achieved through the buying power of the co-operating parties by increasing prices for other customers.

In addition, apart from the concern that lower costs will not be passed down to the consumers, there is always the risk that the parties to the agreement may collude.

In South African competition law there is no directive relating to joint purchasing arrangements. Article 81(1) of the Treaty is similar in substance to the provisions of sections 4 and 5 of the Competition Act. One would expect, therefore, that EU guidelines will play a role in informing the approach to be adopted by the South African competition authorities should this issue be challenged.

A crucial distinction between the view taken in the EU and the content of

the South African Competition Act is that in the EU a joint purchasing agreement is subject to the legal analysis set out above. In SA, even though a joint purchasing agreement may be able to pass muster through legal analysis and justification under section 4(1)(a) of the Competition Act, it would appear such agreements would fall within the per se prohibition of section 4(1)(b)(i) which prohibits conduct that falls within its ambit and permits of no justification.

The wording of section 4(1)(b)(i), namely, that an agreement is prohibited if it involves the direct or indirect fixing of a purchase or selling price or any other trading condition, would seem to capture the act of joint purchasing. Thus, from a South African point of view, it would appear that joint procurement would be per se prohibited insofar as such arrangement amounted to price fixing.

For some small and medium enterprises, the savings arising out of joint purchasing arrangements may mean the difference between survival and bankruptcy in uncertain times.

While a blanket exemption is clearly not the answer because of the potential for abuse, in light of the economic climate, parties wishing to enter into a joint purchasing may have a remedy in approaching the Competition Commission for a specific exemption on grounds that it would constitute an agreement necessary to stop decline in an industry.

■ *Jocelyn Katz is a director in the anti-trust and competition division of Edward Nathan Sonnenbergs.*