Standards Development and Competition Law – A Delicate Balancing Act

If the outcomes of the development process are correctly applied, it should then also support the desired outcomes of the Competition Act. That is, to prevent the abuse of any form of market dominance by a business or person and promote a wider economic participation in the national economy. National standards can also facilitate the introduction of new technologies and innovations by ensuring that the products, components and services that are supplied by different manufacturers are compatible and interoperable. Standards are also aimed at providing safety and quality assurance to the consumer.

A South African National Standards that is either locally written or created by adopting an international (usually ISO or IEC) standard, and which is properly developed can be a cornerstone in the effort to address the South African economic challenges and many other development challenges in South Africa. Furthermore, standards can play a role in opening up regional trade opportunities and thus help grow the national and regional economy.

Despite the aforementioned benefits, the process to develop standards can often give rise to a number of competition and regulatory challenges. Competition law, fundamentally seeks to prohibit vertical and horizontal practices that have a direct or indirect restrictive impact on economic growth and market participation. These prohibited practices range from collusion, abuses of dominance, price fixing, exclusionary practices.

At its core, standard-setting involves coordinated action between many interested and effected parties in an industry which could include potential competitors – the very antithesis of what the competition regulatory framework espouses. It is at this intersection that the SABS is grappling with how to navigate potential competition law challenge in the standards development process.

Hard Pills To Swallow

The SABS has learned some hard lessons in recent years where cases were referred to the Competition Commission for investigation. Although the commission ruled that no further investigations were warranted, the SABS processes were indeed found wanting and seriously in need of strengthening. The SABS thus accepted that there was a need to create a platform for all parties to debate these cases in order to emerge with new tools for collaborating and cooperating when revising and developing new national standards. This impetus resulted in the SABS hosting Standards and Competition Law Indaba at the end of 2017.

The Indaba was supported and informed by leadership of the Competition Commission, International and Regional Standards Associations (ISO and ARSO) the legal fraternity, as well as Chairpersons and members from a cross-section of SABS Technical Committees. Although these engagements were sometimes difficult, they were always robust and highly informative.

Emerging from the Indaba
Some of the key considerations which emerged from the Indaba were the following:
- The governance challenge of setting new standards is not unique to South Africa. It is something that many National Standards Bodies (NSBs) are grappling with. The increase in internet connectivity and a greater reliance on technology-based platforms has assisted other NSBs to facilitate broader participation in the development of their national standards.
- NSBs and affected interest groups need to consistently interrogate whose interests the Technical Committees (TCs) are serving, and monitor that the national standard achieves its intended purpose.
- As a NSB, the SABS needs to look at the role of technology in creating greater inclusivity and participation of the TCs which are constituted on a voluntary basis. In this regard, access to bandwidth and infrastructure is a challenge in many developing countries.
- We also need to test the objectivity and rational basis for the restrictions that govern our participation criteria and whether the practices and criteria inherited from international counterparts serve the needs of countries in our region.
- At every step and in all our endeavours, NSBs, industry bodies, academia, research institutions, policy makers, consumer advocates, civil society and regulators need to continuously ask and interrogate inclusivity of other role players.

In short, all stakeholders must take responsibility for what happens in the technical committees in which they participate. The SABS committee support teams need to be empowered to monitor and call out any risky behaviour by participants, as well give guidance to members. This must give credibility to the overall process so as to achieve the national benefit for which standards created to achieve.

Charting the road ahead

The SABS is on a drive to re-connect with stakeholders and interested parties in the development of national standards. During February and March 2018, three sector-specific workshops were hosted by the SABS which focused on the energy, construction and agro-processing sectors. The aim was to obtain broad-based inputs on issues affecting and driving these sectors. Sector Development Agreements will now be drafted and agreed with a view to informing standardisation activities in those arenas. These will be rolled out with other strategic sectors key to delivering on national priorities.

The SABS and the Competition Commission have agreed to formally establish a Joint Working Committee that can actively drive capacity building, advocacy and interventions which are aimed at strengthening governance supporting the development of new and existing national standards.

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