BUSINESS LAW & TAX

Firms urged to get reporting house in order

● Most SA companies behind the curve in complying with legislated emissions reporting requirements

KEEP IT DOWN

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The recent signing into law of the Climate Change Bill is an essential step in SA's fight to protect the environment.

However, a greater effort is still needed to get companies to track and report their emissions and improve their broader sustainability reporting practices.

Mitigation through a formalised law has, until now, been lax, as most SA companies are behind the curve in complying with legislated emissions reporting requirements, let alone proactive sustainable reporting measures and practices. Decarbonisation strategies have become increasingly urgent as other jurisdictions, such as the EU, look to impose carbon border mechanisms that account for the embedded carbon content of imports and prevent the relocation of local companies to regions with lax emission regulations.

Late last year, reports warned that SA was on track to miss its binding 2030 emissions target under the Paris Climate Agreement, a legally binding agreement on climate change. Greenpeace has cautioned that mean annual temperatures in SA have increased by twice the global average (0.7°C). Since 1980, there have been 86 weather-related disasters, which have affected more than 22-million people and have cost more than R113bn in losses,the reports said.

THOSE HIGH EMITTERS WHO DO NOT MEET THE NEW CARBON BUDGET REQUIREMENTS WILL BE IN FOR HIGHER TAXES

The SA Reserve Bank, meanwhile, forecasts that the EU's recently introduced Carbon Border Adjustment Mechanism (CBAM) on SA's export market could reduce total exports of aluminium, chemicals, cement, iron and steel to the EU by between 4% to 35% by 2030, with other sectors likely to face similar regulations.

Those exporting to Europe will only remain competitive if they not only start reporting emissions but develop short-term strategies to rapidly decarbonise. It is also clear that based on the new legislation including the National Green House Gas Reporting Regulations, Carbon Tax Act and Pollution Prevention Plan Regulations, it's advisable for all companies — even smaller companies — to start their sustainability reporting journey starting with understanding their carbon footprint now.

Carbon taxes were increased by 16% in the February 2024 budget, and the higher tax rate on emissions exceeding carbon budgets will come into effect after the forestry, fisheries & the environment department gazettes the relevant regulations.

This is another reason companies need to ensure they get their house in order — those high emitters who do not meet the new carbon budget requirements will be in for much higher taxes.

While sustainability reporting is not mandatory in SA, the new Climate Change Bill does establish a national greenhouse gas (GHG) emission trajectory, requiring several ministers to develop and implement measures to address climate change through sectoral emission targets, and mandating major emitting companies to comply with mandatory carbon budgets.

Carbon is only a small piece of the larger sustainability reporting picture. But closer monitoring so that excess emissions can be mitigated is an important start to what essentially needs to be a much broader effort from the public and private sector.

Based on PKF's approach to assisting businesses in getting their sustainability house in order, the first step is to get a carbon baseline and determine your footprint so you can begin proactively reporting to stakeholders. Then, you need to develop a decarbonisation or net-zero strategy.

As not every company can be at net-zero by 2050, they will need to focus on their reduction strategy over time and how they offset their current emissions via alternative energy routes or through carbon credits.

When this begins to happen, the business's optics immediately look better to the public and to trade partners. Another significant benefit is that these companies can qualify for certain tax breaks. At the same time, those who comply could also benefit from the extensive capital available from overseas for emerging businesses that take sustainability seriously. This funding is generally cheaper than commercial funding, so smaller and medium-sized businesses need to seriously consider improving their reporting.

Companies will need to rely on expert consultants to guide and support their journeys, as this space becomes increasingly complex.

Legal exemptions aim to aid ports and rail

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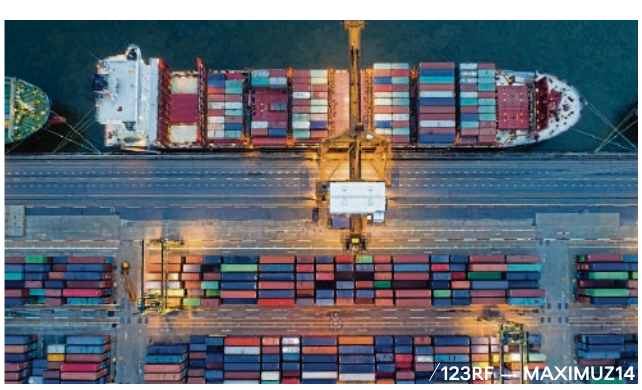

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On June 18 2024, former trade, industry & competition minister Ebrahim Patel published the draft block exemption for ports and rail for public comment.

The regulations effectively relax the competition law rules that typically regulate companies' market conduct. This occurs in limited circumstances and when it is absolutely necessary. The aim is that by permitting companies in the rail and port industries to engage in certain conduct that would otherwise fall foul of the Competition Act, the regulations will serve as a lifeline for SA's failing port and rail network.

SA has the most extensive rail infrastructure in Africa. However, rail (freight and passenger) and port capacity declines remain a severe constraint on domestic and regional trade. Following the collapse of Transnet, which is estimated to have cost the country R1bn a day in economic output, the national logistics crisis committee was established to address the country's transport and logistics crisis, emphasising the need for private sector involvement to drive and control the rehabilitation of SA's ports and rail infrastructure.

The regulations are aimed at lessening the hindrances that the private sector encounters when operating within the ports and rail industry by allowing companies in these industries to collaborate and coordinate activities, without fear of falling foul of the Competition Act.

This is to reduce costs, improve services and minimise losses caused by operational inefficiencies and infrastructure capacity shortages in an effort to mitigate the challenges faced by the rail and port industries.

In particular, the regulations exempt categories of agreements and/or practices among firms in the ports and rail industry from the application of sections 4(1) and 5(1) of the Competition Act, which deal with conduct between competitors and parties in a vertical relationship that has a substantial net anti-competitive effect in a market.

Crucially, the regulations do not allow for companies to engage in cartel conduct (ie price fixing, collusive tendering and market allocation) or the practice of minimum resale price maintenance (which are respectively automatically prohibited).

In the context of the port industry, the regulations exempt conduct relating to:

- Ports and the capacity of a port to accept new cargo and divert cargo between ports;
- The flow of traffic into the ports, including weather forecasts, stack levels, equipment breakdowns and productivity shifts;
- Night runs to ease congestion during peak hours; and
- Management, maintenance and upgrades of port facilities and equipment.

With respect to the rail industry, the following conduct (including agreements) is exempt:

- Co-ordination on the repair and maintenance of rail lines identified by the rail industry;
- Co-ordination on volumes to support a dedicated rail service; and
- Co-ordination on sharing capacity on locomotives.

Given that the regulations do not exempt cartel conduct, engagements that necessitate discussions between actual or potential competitors in relation to prices (including price components), customers, products, markets/territories as well as tenders/joint bidding should be approached with extreme caution to avoid falling foul of the cartel provisions in the Competition Act. Legal advice should be sought before starting such engagements.

Companies in the rail and port industries wishing to enter into agreements or engage in practices covered by the exemption must first seek written confirmation from the Competition Commission to ascertain whether the agreement or practice falls within the scope of the regulations. The commission must revert within 30 business days of receiving the request for confirmation.

It is also prudent for companies engaging in the exempted conduct to keep minutes of meetings held, keep written records of any agreements or practices entered into, maintain all correspondence pertaining to the conduct or agreement and keep records of all exchanges of competitively sensitive information that align with the exempted conduct or agreements.

The public was invited to submit comments in writing on the proposed regulations. Once public comments have been considered by the trade, industry & competition department in consultation with the Competition Commission, it is expected that the regulations will come into force within a reasonable period thereafter.