

COMPETITION BREAKING NEWS

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Observations on the Revised South African Competition Bill

by the anti-trust/competition department

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On 1 December 2017, the Minister of Economic Development announced the release of the Competition Amendment Bill, 2017 (the “**Competition Bill**”) for public comment. Following the closure of the period for public comments in the first quarter of 2018, a revised Competition Bill (the “**Revised Competition Bill**”) was tabled before Parliament on 11 July 2018.

As with its predecessor, the stated objective of the Revised Competition Bill is to remedy structural defects present in the South African economy (including the high levels of economic concentration in various markets) by amending the Competition Act, 1998 (“**Competition Act**”). The Revised Competition Bill also introduces additional objectives, which include:

- a strengthening of the penalty regime;
- the introduction of greater flexibility in the granting of exemptions that promote transformation and growth; intervention by the National Executive in relation to mergers that affect the national security interests of South Africa; and
- providing the Competition Commission (the “**Commission**”) with powers to conduct impact studies.

Penalty provisions

The Revised Competition Bill proposes a number of amendments to give effect to the objective of strengthening the penalty regime of the Competition Act, including an increase to the maximum administrative penalty payable from 10% to 25% of a firm’s turnover in South Africa and its exports from South Africa during the preceding financial year **if the conduct constitutes a repeat offence**. The quantum of a penalty may be further amplified by the turnover of any firm that **controls** the firm found to have engaged in the repeat offence. The controlling firm will be jointly and severally liable for the prohibited practice carried out by the controlled firm. The purpose of this inclusion is to encourage parent companies to ensure that subsidiaries are competition law compliant.

Abuse of dominance and price discrimination

The Revised Competition Bill proposes a number of changes to the provisions of the Competition Act that regulate abuse of dominance. These amendments include replacing references in the provision to “consumers” with “customers”. According to the Memorandum on the Objects of the Competition Bill, 2018 (the “**Memorandum**”), the rationale for this change is that all customers involved in commercial transactions should be protected from excessive prices, as opposed to consumers only. Moreover, the Revised Competition Bill proposes amendments that will (i) prevent a dominant firm from requiring a supplier to sell at a price that impedes that supplier’s ability to participate in a market and (ii) make specific reference to the prohibition of “margin squeeze” (effectively codifying the case law to this effect).

As regards price discrimination, the current Competition Act requires the complainant to prove, *inter alia*, that the price discrimination is likely to have the effect of “substantially preventing or lessening competition”. The Revised Competition Bill proposes the removal of the qualifier “substantially”, which serves to lower the burden of proof required for such a contravention. According to the Memorandum, this deletion will be to the benefit of small and medium businesses falling victim to price discrimination in circumstances where they cannot demonstrate a “substantial” prevention or lessening of competition.

Merger regulation and “national security interests”

The role of public interest considerations in the context of the merger control regime is elevated under the Revised Competition Bill. Specifically, section 12A will potentially be amended such that the competition authorities must still consider public interest issues relating to a merger, even if the proposed transaction will not result in the substantial prevention or lessening of competition.

The Revised Competition Bill also calls for consideration to be given to cross-ownership and cross-directorships of the merging parties and the merged entity. Previous mergers engaged in by one or more of the merging parties must also be considered. According to the Memorandum, these mechanisms will serve to monitor creeping concentrations which, if left unmonitored, may allow merging parties to establish strategic barriers to entry.

In circumstances where an acquiring party is a **foreign-owned company** (including any firm that is incorporated or effectively managed outside of South Africa), the president is empowered to constitute a committee comprised of ministers and officials with the power to intervene when the proposed merger may adversely affect the country’s national security interests. “National security interests” is broadly defined to include, among others, defence capabilities, the use or transfer of sensitive technology outside of South Africa, the supply of important goods/services to citizens or the government, enabling or facilitating the activities of illicit actors (eg, terrorists) and the economic and social stability of South Africa. Under this new section 18A, a foreign acquiring firm will be required to first notify the committee of any intended mergers. The committee will be granted the power to either prohibit the transaction or to permit subsequent notification to the Commission. Importantly, the Commission may not consider the proposed transaction until after it has received the decision from the

committee. The committee is afforded 60 days to complete its assessment (which may be extended by the president on good cause shown).

The Revised Competition Bill gives the Commission greater powers to police merger conditions by empowering the Commission to make any appropriate decision regarding any condition relating to a small or intermediate merger.

Market inquiries

The Revised Competition Bill proposes that the Commission be required to consider specific issues, such as whether there are structural features of a market that have an adverse effect on competition (including levels of concentration and barriers to entry for small and medium businesses and firms owned by historically disadvantaged persons). Following a market inquiry, the Commission has a **duty** to remedy structural features identified as having an adverse effect on competition in the market, which includes remedies such as divestiture.

The Commission's findings and orders pursuant to a market inquiry (excluding findings on divestiture) are binding on the parties involved, unless challenged before the Competition Tribunal (the "**Tribunal**"). Orders as to divestiture may only be imposed by the Tribunal on the recommendation of the Commission. Notably, the Revised Competition Bill allows for an appeal (rather than a review) to be brought to the Tribunal against any decision taken by the Commission pursuant to a market inquiry.

Other notable amendments

In addition to the above, the Revised Competition Bill proposes:

- a revised approach to predatory pricing engaged in by a dominant firm which seeks to clarify the economic considerations used to establish predation;
- that the Commission will be required to publish guidelines relating to the application of the provisions on horizontal and vertical restrictive practices, respectively. This is intended to provide clarity and promote consistent application of the relevant sections in the Competition Act;
- the introduction of additional grounds that must be considered when granting exemptions, including (i) the ability of small and medium businesses and firms owned or controlled by historically disadvantaged persons to enter and participate in a market; and (ii) competition and efficiency gains that promote employment or industrial expansion;
- the repeal of Chapter 2A of the Competition Act, which deals with complex monopolies; and
- empowering the Commission to study the impact of decisions by the South African competition authorities with the aim of enhancing the Commission's advocacy powers and facilitating meaningful assessment of the impact of those decisions on the competitive landscape in South Africa.

For more information on the Revised Competition Bill, please contact ENSafrica's anti-trust/competition team.



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