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COMPETITION ALERT

IN THIS ISSUE

COMPETITION AMENDMENT BILL INTRODUCED IN PARLIAMENT

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The Minister of Economic Development has introduced the Competition Amendment Bill [B 23–2018] into Parliament. This is the second iteration of the Bill – the first was released in December 2017.

The proposed amendments are designed to address ongoing concerns about high concentration and high barriers to entry in South African markets, which are believed to impede the ability of small and medium business, and those owned by historically disadvantaged persons to compete effectively or to operate sustainably. Therefore, amendments to the market inquiry provisions and abuse of dominance provisions are some of the key proposed changes.

Numerous written comments were submitted to the 2017 Cabinet version of the Bill, and it is understood that the Minister also consulted extensively with business and labour in producing this version. The fact that many of these comments have been taken on board is evident – some of the problematic proposals contained in the 2017 Bill (such as those allowing the Commission to review “creeping mergers”) have been removed.

There are also significant new proposals which were not contained in the previous draft, such as a higher administrative penalty to be imposed on repeat offenders, as well as the introduction of provisions addressing acquisitions by foreign entities which adversely to effect national security.

Another notable aspect of the Bill is the proposed expansion of the Minister's role in competition regulation. For instance, the proposed amendments envisage providing the Minister with powers to issue regulations exempting an agreement or practice from the application of the Act; an entitlement to appeal Tribunal decisions which affect public interest issues that the Minister raised in the course of the Commission or Tribunal proceedings; as well as powers of appointment of acting part-time members of the Tribunal.



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In this version of the Bill, a more prescriptive test for excessive pricing has been laid out.



The proposed amendments are extensive, so, in addition to the proposals identified above, we set out here only the most notable:

- A significant new proposal is the introduction of s18A, which provides for the prospect of the prohibition of transactions which have an adverse impact on national security interests. A committee (to be constituted by the President) will be entitled to consider whether any acquisition by a foreign firm may have an adverse effect on the national security interests if the transaction impacts markets, industries, goods or services, sectors or regions that will be identified on a list to be published.
- Another new change is the proposed increase of the maximum administrative penalty from 10% of a firm's annual turnover in South Africa to 25%, in circumstances where that firm is found to have engaged in a repeat offence of the Act. In addition, in determining the extent of the administrative penalty to be imposed, the proposals would allow for the Competition Tribunal to extend the administrative penalty to firms that control the respondent that contravened the Act, where the controlling firm/s knew or should reasonably have known that the respondent was engaging in the prohibited conduct.
- There are notable proposed changes to the excessive pricing provision. The proposals retain the "reverse onus" from the 2017 version of the Bill, in terms of which a prima facie case of excessive pricing has to be shown to be "reasonable" by a respondent. More significantly, in this version of the Bill, a more prescriptive test for excessive pricing has been laid out. Instead of considering the "economic value" of a product, and whether the price is "reasonably related" to such economic value, the Bill identifies factors that must be considered when determining if a price is excessive. Such factors include the respondent's price-cost margin, internal rate of return, return on capital invested or profit history; the respondent's prices for the goods or services; comparative prices and profits; duration of that level of pricing; the market characteristics; and the Commission's guidelines on excessive pricing (which the Commission would be required to publish in terms of the amendments).
- The proposals retain the extensive changes to the market inquiry provisions and build further on those proposals. The 2018 Bill adds factors that the Commission must consider when deciding what action to take pursuant to a market inquiry. In addition, the Commission would be required, before the completion of

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Dates for submitting comments on the Bill have not yet been advertised by the Parliamentary Committee.



the market inquiry, to take appropriate steps to communicate findings, decisions and remedial action to any materially affected party and call for their comments.

- The Commission is officially granted powers which it has previously exercised without express legislative basis, including the right to grant or refuse leniency; to issue advisory opinions and to conduct impact studies. The Commission would also be mandated, by the proposed amendments, to issue guidelines on the application of s4 (restrictive horizontal practices prohibited) and s5 (restrictive vertical practices prohibited).

- Another welcome change is the final death knell, through the repeal, of the complex monopoly provisions. These were changes contained in the 2009 amendments to the Act, but which were never implemented. The 2018 Bill does however address "conscious parallel or coordinated conduct by two or more firms in a concentrated market" as one of the features that may be considered in the course of a market inquiry.

Dates for submitting comments on the Bill have not yet been advertised by the Parliamentary Committee, but it is understood that the Minister is anxious to have the legislation enacted by the end of the year.

Craig Thomas and Lara Granville

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