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COMPETITION ALERT

IN THIS
ISSUE

BREAKING NEWS

COMPETITION AMENDMENT BILL SIGNED INTO LAW

The Competition Amendment Bill was signed into law today, 13 February 2019, by President Cyril Ramaphosa. The Amendment Act introduces a new era of competition law enforcement in South Africa, focusing on economic inclusiveness and participation by Small, Medium and Micro-sized Enterprises (SMMEs) and businesses owned or controlled by historically disadvantaged persons (HDPs).

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COMPETITION AMENDMENT BILL SIGNED INTO LAW

The Commission and Tribunal must consider the impact on SMMEs and HDP firms and the promotion of a greater spread of ownership.

In deciding whether any feature of a market impedes competition, the Commission must have regard to the impact of the adverse effect on competition on SMMEs and HDPs.



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Significant changes brought in by the amendments include:

- **Buyer Power:** A prohibition on dominant firms in designated sectors from imposing unfair prices or trading terms on SMMEs or HDP firms.
- **Price Discrimination:** While in general, differential pricing remains an infringement only if it "substantially prevents or lessens competition", a different standard is applied if the differential pricing is to SMMEs or HDPs. Such pricing will be an infringement if it impedes "effective participation" by SMMEs or HDPs.
- **Mergers:** Additional considerations have been added in the assessment of whether a merger will substantially prevent or lessen competition, including: the extent of common ownership and common directorship in competing firms and other mergers undertaken by the merging parties within a recent period. In addition, the Competition Commission (Commission) and

Competition Tribunal (Tribunal) must consider the impact on SMMEs and HDP firms and the promotion of a greater spread of ownership.

- **Foreign mergers and national security:** The acquisition of a South African business by a foreign acquiring firm can be blocked by a Government Committee (to be constituted) if the merger may have an adverse effect on the national security interests of the Republic.
- **Market Inquiries:** An expansion of the market inquiries provision and the powers of the Commission in the context of market inquiries, including the ability to make binding decisions arising out of market inquiries. There are additional factors for the Commission to consider when deciding what action to take pursuant to a market inquiry. In deciding whether any feature of a market impedes competition, the Commission must have regard to the impact of the adverse effect on competition on SMMEs and HDPs.

CHAMBERS GLOBAL 2011–2018 ranked us in Band 2 for competition/antitrust.

Chris Charter ranked by CHAMBERS GLOBAL 2018 in Band 1 for competition/antitrust.

Andries le Grange ranked by CHAMBERS GLOBAL 2014–2018 in Band 4 for competition/antitrust.



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How these reverse onuses will actually operate and whether they will in fact make the Commission's job easier is still to be seen.

- Penalties: The maximum penalties for repeat offenders of the Act have increased from 10% to 25%. In addition, the Tribunal can impose the penalty on controlling firms if they had knowledge of the prohibited conduct. All prohibited practices are now subject to a penalty for a contravention – the “yellow card” warning is now removed for infringements of s4(1)(a), 5(1) 8(c) or 9(1).

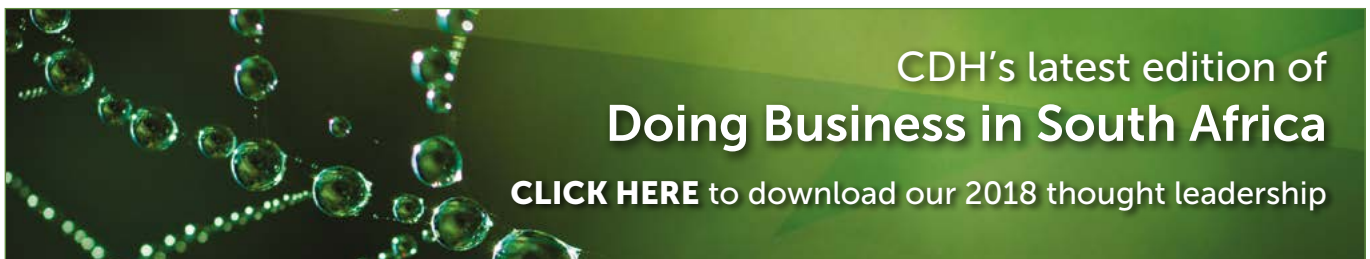
The Amendment Act allows for greater participation by the Minister for Economic Development through the potential for intervention in mergers on public interest grounds; through the ability to appeal merger decisions; and through being able to require the initiation of market inquiries. Moreover, the Minister is given extensive opportunity to direct the enforcement of provisions through issuing regulations on a range of issues including: the “application” of s4 (restrictive horizontal practices) and s5 (restrictive vertical practices); concerning the “calculation and determination” of an excessive price; designating sectors to which the buyer power provisions apply and dealing with the “relevant factors and benchmarks” to be applied in determining if prices or conditions are unfair; and setting out factors and benchmarks for determining whether a dominant firm’s pricing impedes the participation of SMMEs or HDPs.

The Act also tries to make it easier for the Commission to prosecute prohibited practices by imposing reverse onuses, for example, requiring dominant firms to show, in the case of a “*prima facie*” case of price discrimination that the differential pricing does not impede effective participation of SMMEs and HDPs; in the case of a “*prima facie*” case of contravening the buyer power provision that its purchase prices or trading conditions are fair; and in the case of “*prima facie*” excessive pricing that its price is reasonable. How these reverse onuses will actually operate and whether they in fact will make the Commission’s job easier is still to be seen.

In general, the amendments call on South Africa businesses to purchase and to price and to conduct themselves in a manner that ensures inclusive participation in the economy and does not impede the ability of SMMEs and HDPs to participate in the economy in order to facilitate better competitive outcomes and a transformed economy.

There is a lot to get to grips with in the new law, so CDH will continue to provide insight to you on the key changes and how they impact your business.

Lara Granville



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Doing Business in South Africa
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