



Overview of Competition Amendment Bill, 2018

A NEW DEAL FOR ECONOMIC TRANSFORMATION AND INCLUSION

Presentation to Portfolio Committee

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Minister of Economic Development



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Economic Development Department
REPUBLIC OF SOUTH AFRICA

Executive Summary

The purpose of this presentation is to provide an overview of the Competition Amendment Bill, 2018

- The main focus of the Bill is on economic transformation.
- The amendments provide for an extension of the mandate of the competition authorities and the executive, to help open up the economy to SMEs and firms owned by black South Africans, through addressing high levels of economic concentration, limited transformation in the South African economy and abuse of market power by dominant firms
- The Bill served before Cabinet in November 2017, was gazetted for public comment and extensive discussions took place at Nedlac with business and organized labour.
- The revised Bill, incorporating changes due to public consultation, is submitted for consideration by Parliament.

20 years

of the Competition Act

1998-2018

Session with Portfolio Committee

- Background information
 - The 1998 Act: what was intention (Preamble and Purposes)
 - Twenty years of competition policy in a democratic SA:
 - advances and gains
 - review of impact
- The 2018 Bill - a New Deal for Economic Transformation and Inclusion
 - Policy objectives
 - rationale for changes

Session with Portfolio Committee

–Key changes grouped under 4 headings

- 1. Prohibited Practices**
- 2. Structure of markets, competition and public interest outcomes**
- 3. Mergers and Acquisitions**
- 4. Institutional Improvements**

Background: The Competition Act

- The Competition Act, 1998 (Act 89 of 1998)
 - provides the legislative framework for the competition authorities to investigate and penalise anti-competitive conduct through classifying certain practices as prohibited:
 - Cartels, collusion and price-fixing
 - Abuse of dominance including certain types of price discrimination, excessive pricing and predatory pricing
 - regulates mergers and acquisitions and addresses competition and public interest issues, such as employment and the promotion of small businesses
 - enables market inquiries to be undertaken in specific sectors

Powers of the competition authorities:

- Mergers can be prohibited or conditions imposed on them
- Prohibited acts can result in a penalty of up to 10% of a firm's turnover; and for corporate collusion, a jail sentence of up to 10 years
- Market inquiries can result in recommendation

Background: Preamble of the Act

The Preamble of the 1998 Competition Act states: The people of South Africa recognise:

- That apartheid and other discriminatory laws and practices of the past resulted in **excessive concentrations of ownership and control within the national economy**, inadequate restraints against anticompetitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.
- That the economy must be open to **greater ownership by a greater number of South Africans**.
- That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.
- That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans.

Background: Preamble of the 1998 Act

IN ORDER TO –

- provide all South Africans equal opportunity to participate fairly in the national economy;
- achieve a more effective and efficient economy in South Africa;
- provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
- create greater capability and an environment for South Africans to compete effectively in international markets;
- restrain particular trade practices which undermine a competitive economy;
- regulate the transfer of economic ownership in keeping with the public interest;
- establish independent institutions to monitor economic competition; and
- give effect to the international law obligations of the Republic.

Purposes of the 1998 Act

The purpose of the Act states it is to promote and maintain competition in the Republic in order –

- a) to promote the efficiency, adaptability and development of the economy;
- b) to provide consumers with competitive prices and product choices;
- c) to promote employment and advance the social and economic welfare of South Africans;
- d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- f) to promote a **greater spread of ownership**, in particular to **increase the ownership stakes of historically disadvantaged persons**

20 years of the Competition Act

From 1998 to 2009: laying the foundation

- Putting a modern system of competition regulation in place
- Building the institutions: the Commission, Tribunal and Competition Appeal Court
- Merger administration: providing a competition review of mergers
- Public interest: tentative first steps
- Initial investigations into cartels

From 2010: use the law to the full extent

The Act has provisions dealing with:

- **mergers and acquisitions**, providing for public interest criteria to be used in mergers, including impact on jobs, small business, BEE and industry
 - BUT: no history of interventions from Ministers and limited public interest conditions imposed by competition authorities
 - Since 2010: Active intervention by Executive and new scrutiny of mergers.
- **Corporate collusion**, price-fixing and cartels, providing for punitive action
 - BUT: limited focus by the authorities on these areas
 - Since 2010: stepped-up investigations and actions; and, since 1 May 2016, new criminal sanctions for corporate collusion
- **Abuse of dominance**, eg excessive pricing by monopolies, providing for right to penalise companies
 - BUT: complex investigations and loss of key case by regulators
 - Since 2010: learning from legal cases and improved investigations and prosecutions.

Background: Successes to date - mergers

- Ground-breaking conditions have been included in merger approvals, South Africa is leading the field internationally. These included mergers involving Wal-Mart, Coca-Cola, Anheuser-Busch InBev, Kansai, Edcon, Clicks, Chevron, Old Mutual and others:
- Protection of employment agreements covering more than 65 000 workers (since 2014) and new job creation (7 400 jobs)
- Support for black farmers in supply-chains
- Improving rights of spaza-shop owners to stock competitor products (Coca-Cola, SA Breweries)
- Mandating R4,5 billion in special Funds (since 2010) for jobs, new economic opportunities and small business development
- Commitments to new investment (R6 billion)
- BEE shareholding in companies: multi-billion rand impact
- Local procurement by companies and use of local labour
- Location of African HO in South Africa (4 to date)
- Investing in new industrial capacity in SA

Background: Successes to date - prohibited acts

- **Cartels and monopolies:** investigations into a number of sectors, from fertilisers, poultry, bread, construction, steel, banking, auto-components, telecomms and others, resulting in
 - **Penalties of more than R7 billion on companies (since 2010)**
 - **New capital spending commitments of R4,8 billion**
 - **Some breakup of company operations (SASOL in fertiliser blending plants)**
 - **reduction in prices of products (Pioneer Foods with bread prices)**
 - **Price-limits on monopolies (Arcelor Mittal in steel industry)**
 - **Transformation of ownership and BEE promotion (Arcelor Mittal, Murray & Roberts, WBHO, Raubex, Staffanutti and others)**

20 years

of the Competition Act

- review and preparing for the future

Review of gaps and challenges

- **SONA February 2017** – lays out a commitment to develop legislative intervention to address economic concentration
- **Budget Vote May 2017** – tables the terms of the reference for the amendments to address high levels of economic concentration and racially-skewed ownership profiles, which stunt economic growth, prevent entry of new players, reduce consumer choice, limit the levels of innovation and dynamism in the economy and feed a growing resentment among black South Africans of the failure to realise the vision of the constitution.
- **Cabinet** – (November 2017) approves Competition Bill for public consultation
- **Draft Bill published** – (December 2017) for public comment (60 days)

Public consultation process

- More than 60 submissions were received from public, business and civil society interests, including provincial governments, local and international businesses, the legal fraternity, economic consultants, local and international academics and organised labour.
- Discussions took place with experts, regulators and representatives of the Competition Appeal Court
- Extensive consultations were held, including six formal sessions at Nedlac as well as a number of bilateral meetings with business and labour, between December 2017 and July 2018.
- Broad agreement was achieved in a number of key areas as a result of the consultations. Changes were made in the original Bill to take account of the concerns and the Nedlac parties recognized the 2018 Competition Amendment Bill is an appropriate and effective balance between the interests of the social partners and Government's policy imperatives.

Competition Amendment Bill, 2018: A new deal for economic transformation and inclusion



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Policy objectives of the Bill

- Open up the economy for greater **investment** in new businesses, with a focus on opening up space for **SMEs and black-owned business**
- Provide the competition authorities with the tools to investigate and address high levels of **economic concentration**
- Strengthen the public interest objectives of **economic transformation and inclusion**
- Maintain the basic architecture of the Act, but align the operations with the stated Purpose particular with regards to the **public interest** (employment, small and medium business, ownership by Black South Africans)

Recap: Problem statement

- South Africa's **economic history** and the relatively small size of the economy led to high levels of concentration
- **Concentration** (reflected in high levels of ownership by a handful of foreign and/or domestic companies) leads to negative economic outcomes
- In South Africa, economic concentration results in fewer opportunities for **SMEs** and emerging black entrepreneurs
- Aggravated by abuse of dominance by large firms that effectively excludes smaller, newer entrants and imposes **high cost structures** on the economy.
- **Review of the Act** undertaken by EDD and Competition Commission underscored these challenges.

Economic inclusion

Economic concentration

- **Study** by the Commission analysed over 2150 merger reports to identify product markets with dominant firms for the period 2009 to 2016, using the statutory presumptive threshold requirement of 45% market share.
- The study found there were **294 dominant firms** in defined markets identified in the 31 sectors considered. 70% of the sectors have dominant firms in some of their defined product markets.
- Using a standard index, the study found nine sectors to be **highly concentrated** (index score more than 2 500)

Index: Heirfindahl-Hirschmann (HHI)

Economic concentration (cont.)

Average market share of a dominant firm in a defined product market within each sector

Sector	Average market shares	HHI (a)
Communication Technologies	55.2	3 539
Energy	60.8	2 832
Financial Services	68.8	2 788
Food and agro-processing	60.5	2 861
Infrastructure and construction	52.6	2 859
Intermediate industrial products	63.3	2 958
Mining	62.0	
Pharmaceuticals	59.6	3 003
Transport	67.4	3 254
Total	61.6	

Note: Market shares serve as inputs to producing the HHI index, with market shares:

- *below 1500 deemed to be unconcentrated*
- *between 1500 and 2500 being moderately concentrated*
- *above 2500 classified as highly concentrated*

Economic concentration (cont.)

- Concentrated markets can have significant negative economic effects
 - High prices and lower growth
 - Can stunt innovation and investment
 - Associated with higher levels of inequality
- High levels of market concentration can impact negatively on economic inclusion
- Discourages new investment in the economy
- But concentration may also in some instances be unavoidable
 - Economies of scale to enable lower prices and greater competitiveness
 - To be able to compete in global markets, SA companies may require large operations, which in a small domestic market can lead to concentration
 - Size can be a source of capital to promote innovation and new investment

Economic inclusion

- Concentrated markets that inhibit new entrants effectively exclude large numbers of black South Africans from the opportunity to run successful enterprises
- Racially-skewed ownership harms the economy:
 - Limits the talent pool of entrepreneurs on which the growth potential of the economy relies
 - Research shows that less diverse management and ownership groups are less innovative, creative and effective
 - Exclusion fuels resentment and provides the base for economic populism and unsustainable, damaging interventions,
- The Competition Act sets out a vision of economic transformation in its Preamble and Purposes.

Need to generate a model of empowerment that does not simply expand black ownership in existing companies but opens opportunities for black entrepreneurs to create new enterprises

Economic inclusion

Recap: Review of the Act

Review of the Competition Act pointed to the following areas for change:

1. Focus on the impact of anti-competitive conduct on small businesses and firms owned by black South Africans
 2. Address economic concentration as a structural issue in the economy
 3. Strengthen regulator power to address abuse of dominance by large companies
 4. Align competition-related processes and decisions with other public policies, programmes and interests
 5. Strengthen the role of the Competition Authorities and the Executive in certain competition issues.
- As a key mechanism to achieve these priorities, strengthen the market inquiry system that lays the basis for actions to address high levels of concentration
 - Enhance the administrative capacity and efficacy of the competition regulatory authorities and their processes.

Key provisions of the Competition Amendment Bill, 2018

Reference to 'the Act' means a current provision of the Competition Act

Reference to 'the Bill' refers to a proposed change to the Competition Act.



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Focus 1: Prohibited practices:

- Collusion between firms
- Abuse of dominance by a firm

IMPACT ON PUBLIC INTEREST – NEW ENTRANTS, SMES AND BLACK-OWNED BUSINESS



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- **Market economies** function on the principle of competition between firms. Competition can be undermined in the following circumstances
 - When firms coordinate their prices or decisions (collusion/cartels)
 - When some firms become dominant in a market and use that dominance against the interests of customers and to limit the entry or viability of smaller competitors.
- The Act prohibits certain actions by dominant firms which represents an abuse of their position and size. This is a standard focus of competition law across the world.
- **Dominance:** The Act defines a dominant firm as any firm which has more than 45% market share in the market for particular goods or services, or if it has less than 45% but “market power” (i.e. can control prices in the market independent of customers, suppliers or competitors)

Overview of the Bill on collusion and abuse of dominance

- What does the Bill seek to do?
 - S4 and S5: Provide greater certainty on what is **permitted collaboration** and prohibited collusion between competitors, customers and suppliers
 - S8 Revamp the regime to determine **excessive prices**
 - S8 Clarifies what is **predatory pricing**
 - S8 Formalises the concept of ‘**margin squeeze**’
 - S8 Introduces a monopsony provision to address market power imbalances between **dominant customers** and smaller suppliers
 - S9: Makes changes to the **price discrimination** section affecting SMEs
 - S10: **Exemptions** to introduce greater flexibility
 - S59: Strengthens the **penalties** applicable for all prohibited practices
 - Definitions: Provide **greater clarity** to firms and the public on what is prohibited practices; introduces SMEs and as new concept in the Act.

- **Section 4 and 5 of the Act** deal with agreements, practices or decisions between firms or associations of firms who are
 - Competitors
 - Customers or suppliers
- These sections **prohibit certain practices** and can lead to penalties
- Dominant firms complained that they are **not always clear** about the practices that s4 and s5 prohibits.
- S4 and S5 of the Bill requires the **Commission to publish Guidelines** regarding the application of the section. These Guidelines will provide greater certainty on what is permitted and prohibited collaboration between competitors, customers and suppliers.
- Note: this change is related also to s59 which is dealt with later.
- S4(1)(b) adds the **allocation of 'market shares'** between competitors as a restrictive practice

- **S8(1)(d)(iv) Predatory pricing:** are practices where a dominant firm charges a price below cost to force competitors out of business and is prohibited in the Act– the amendments set out a clearer economic test of what a predatory price is, using two economic terms namely average avoidable cost and average variable cost, both which are defined in the Bill.
- **S8(1)(d)(vi) Margin squeeze:** refer to practices where a vertically-integrated dominant firm uses its position to manipulate prices in upstream and downstream markets to impede competition and have been identified in case-law as prohibited practices – the Bill now explicitly provides for it to be included in prohibited acts
- **Dominant customers** abusing their market power against smaller suppliers: in economics, this is referred to as the problem of monopsony.
 - **S8(1)(d)(vii)** The Bill adds this abuse of dominance to the list of exclusionary acts, particularly where it impedes the ability of SMEs and black-owned firms to participate effectively in a market.
 - **S8(4)** requires the Commission to publish Guidelines setting out the relevant factors and benchmarks for determining
- **S8(3) Distribution of evidentiary burden:** the Bill provide for the Commission to show that the price charged by a dominant firm is excessive and for the firm to carry the obligation to show that it was reasonable. (The monopsony component of the concept has also been included).

- **Excessive price:** An excessive price is a price higher than one that would be charged if there was robust competition in a market. The Act prohibits a dominant firm from charging an excessive price to the detriment of a consumer
- **S8(3) and Definitions:** The Bill removes the old definition of excessive price and replaces it with
 - greater latitude to the CT and CAC to determine an excessive price, by taking into account all relevant factors and any Guidelines published; and
 - Identifying a set of factors for the authorities to consider, which include
 - The profit or return on capital invested
 - The dominant firm's prices in other markets or historically
 - Comparator firms' prices and profits in competitive markets
 - The period that the prices have been charged
 - Structural characteristics of a market, including levels of economic concentration, barriers to entry or advantage a firm has that is not due to its commercial efficiency or investment
- **8(1)(a)** the Bill replaces “consumer” with “customer” as the interest affected by excessive prices, to clarify that it applies to businesses in a supply chain as well

IMPACT ON SMEs AND BLACK-OWNED BUSINESS

- **Price discrimination** is a pricing strategy that charges customers different prices for the same good or service.
- The Act prohibits price discrimination by dominant firms, if the effect is anti-competitive and the goods or service is comparable in terms of grade quality.
- **Anti-competitive test:** The Bill proposes a change to the test for anti-competitive behaviour, (i.e. removal of “substantially”) which will allow small and medium business to also bring cases against dominant firms.
- **Evidentiary burden:** The Bill clarifies that if price discrimination has the effect of impeding a class of small and medium businesses and black-owned business then the dominant firm must show that its actions are justified.
- **Pricing to suppliers:** The Bill clarifies that price discrimination can apply to a dominant firm that is either a supplier or purchaser of goods or services.

s10 Exemptions and s79A Advisory Opinions

CREATING MORE FLEXIBILITY FOR FIRMS; BETTER PUBLIC INTEREST OUTCOMES FOR THE COUNTRY

- **Additional grounds for exemption by the Commission:** The Bill clarifies or proposes new grounds for exemptions under the Act:
 - **s10(3)(b)(ii) Small and medium business:** The Bill clarifies that collaboration which promotes medium as well as small businesses entering into, expanding and sustaining themselves in the market may be exempted
 - **s10(3)(b)(v) Employment and industrial expansion:** The Bill clarifies that pro-competitive collaboration which promotes employment or industrial expansion may be exempted
- **s10(3)(b)(iv) Additional grounds for designation by the Minister:** The Bill proposes new grounds for Minister to designate an industry or purposes of possible exemption from parts of the Act if it promotes economic development, growth or transformation in an industry
- **s10(2A) Enhanced timelines:** The Bill provides for timelines for the Commission to consider exemption applications
- **s10(10) Quasi ‘block exemptions’:** The Bill provides for the Minister to publish regulations which can fast track exemptions for certain types of collaboration
- **s79A Advisory opinions:** The Bill provides for non-binding advisory opinions to be issued by the Commission

PROVIDING CLARITY AND GUIDANCE TO THE FIRMS AND INVESTORS

- **Guidelines:** The Bill provides for the Commission to publish guidelines in a number of sections, and to consult with interested parties prior to publication:
 - Application of sections on restricted horizontal and vertical practices s4(6) and s5(4)
 - Determination of excessive price s8(3)
 - Determination of prohibited pricing to suppliers s8(4)
 - Activities which may be subject to penalties s59(3)(h)
- **New and improved definitions:** The Bill provides for a number of new and improved definitions, including for:
 - Predatory prices, including the benchmarks of average avoidable cost and average variable cost
 - Small and medium businesses
 - Exclusionary act
 - Participation, particularly as it relates to small and medium businesses

A TOUGHER AND CLEARER REGIME IN LINE WITH INTERNATIONAL BEST PRACTICE

- **s59(1)(b) Removal of “yellow-card” provisions:** The Bill removes the so-called yellow-card provision for rule of reason offences and provides for guidelines to be published by the Commission
- **s59(2A) Tougher penalties for repeat offenders:** The Bill provides for a higher penalties for repeat offences up to a maximum of 25% of annual turnover
- **s59(3A) Penalties for controlling companies:** The Bill provides the Tribunal with the power to extend the penalties to companies who control a respondent firm if they knew or reasonably ought to have known about the offence; and introduces joint and several liability
- **s59(3)(d) Aggravating factors:** The impact on small and medium businesses or black-owned business may result in higher penalties
- **s59(3)(h) Mitigating factors:** If the firm is not previously guilty or if the offence was not covered by guidelines, this may be taken into account when determining the appropriate penalty
- **s67(1) Prescription:** The amendment clarifies the wording of the section so that firms cannot argue that the Commission is unable to investigate the matter because it has prescribed.

Focus 2: Structure of markets, competition and public interest outcomes

- Economic concentration
- Impact on SMEs and black-owned firms
- Power to take action

IMPACT ON PUBLIC INTEREST – NEW ENTRANTS, SMEs AND BLACK-OWNED BUSINESS



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Overview of the Bill on structure of markets and competition

- What does the Bill seek to do?
 - S43A: Purpose Of A Market Inquiry
 - S43B: Initiating and conducting a Market Inquiry
 - s43C: Matters to be decided at a Market Inquiry
 - s43D/43E: Outcomes of a Market Inquiry - power to take action
 - s43F: Appeals against decisions of a Market Inquiry
 - 43G: Participation and representation at Market Inquiries

COMPETITION AND ECONOMIC INCLUSION

- **The Act provides for Market Inquiries to be conducted on the general state of competition in a market and to make recommendations to the Minister on its findings.**
- **The Bill expands the use of Market Inquiries most significantly to deal directly with economic inclusion and economic concentration; and it provides the competition authorities with the power to take action to remedy the adverse effects.**

s43A: Purpose Of A Market Inquiry

- A Market Inquiry may be held on the state of competition as well as the levels of concentration and structure of a market to determine if there is an adverse effect on competition as a result of any of the following:
 - **Structure:** including
 - levels of concentration
 - barriers to entry,
 - the regulation of a market including transformation measures and past state support
 - **Outcomes:** such as
 - ownership and concentration,
 - prices and innovation,
 - employment, or
 - the ability of national industries to compete in international markets
 - **Conduct:** in that or any related market by firms or their customers or conscious parallel conduct between firms even when there is no agreement in place

Market structure and outcomes

– S43B: Initiating and conducting a Market Inquiry

- The Commission may initiate a market inquiry if it has reason to believe there are factors which impede, restrict or distort competition, or to achieve the purposes of the Act - s43B(1)(a)
- The Minister may after considering the factors above, require the Commission to conduct an Inquiry and set the timeframe - s43B(1)(b)
- Before setting up a market Inquiry, the Commission must consult with any sector regulator who has jurisdiction over the sector concerned – s43B(2A)
- The Commission appoints the panel conducting a Market Inquiry and it must be chaired by a Deputy Commissioner – s43B(2B)
- The rules of the market Inquiry is set out, drawing from provisions applicable to the Competition Tribunal - s43B(3)
- Provision is made for determining whether information is confidential - s43B(3A)
- The Inquiry must be completed within 18 months or with Ministerial approval, it may be extended - s43B(4)

Market structure and outcomes

s43C & s43D: Matters to be decided at a Market Inquiry and remedies

- The Commission must decide whether any feature, including structure and levels of concentration in a market, impedes competition in that market - s43(1)
- In making the decision, the Commission must have regard to the impact on SMEs and black-owned firms – s43C(2)
- If it finds an adverse effect on competition, it must decide (s43C(3))
 - the action to be taken or
 - Recommendations to be made to any Minister, regulator or firm
- The Commission is given the power to take action to remedy adverse effects on competition, subject only to
 - The provision of any law – s43D(1)
 - Proposals on divestiture being referred to the Tribunal for decision – s43D(2)
 - Rational link between the findings of the Inquiry and the remedy imposed – s43D(3)
 - Proportionality of action - s43D(4)
 - How serious the adverse effects are and the nature of the remedial action
 - Likely impact on competition and less restrictive means available

Market structure and outcomes

s43E/F: Other outcomes of a Market Inquiry and procedural matters, incl appeals

- The Commission may make recommendations
 - on new policy, legislation or regulations - s43E(1)(a)
 - to other regulators on competition matters - s43E(1)(b)
- The Commission may take formal steps on any prohibited practices uncovered during a Market Inquiry - s43E(3)
- The Commission must give affected parties the right to its provisional findings prior to finalising any action or recommendation and must take into account any information or representations they make - s43E(4) and (5)
- Appeals may be made against the decisions:
 - Of the Commission, to the Competition Tribunal
 - Of the Tribunal, to the Competition Appeal Court
- Appeals may be made by
 - Any person materially and adversely affected by a decision
 - The Minister

Market structure and outcomes

s43G: Participation in a Market Inquiry

- Any person may make representations to a Market inquiry – s43G(2)
- The following have the right to participate in a Market Inquiry – s43G(1):
 - Firms in the market affected
 - Trade unions or employees of firms affected by the Inquiry
 - Commission officials, staff and witnesses
 - Any sector regulator in the market concerned
 - The Minister of Economic Development
 - Any Minister responsible for the sector concerned, at the request of the Minister
 - Any person who has a material interest in the Market Inquiry and whose interest is not already represented and who would substantially assist with the work of the Inquiry
- Participants may be required to respond to surveys and requests for information issued by the Commission – s43G(3)

Focus 3: Mergers and

- Competition
- Public interest
- National Security

IMPACT ON PUBLIC INTEREST – NEW ENTRANTS, SMEs AND BLACK-OWNED BUSINESS, WORKERS

IMPACT ON NATIONAL SECURITY



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- What does the Bill seek to do?
 - Clarifies the factors that are relevant to determining the competition effects of a merger – s12A(2)
 - Clarifies the role of competition and public interest matters in a merger - S12A(1)
 - Adds an additional public interest criterion to the law – s12A(3)
 - Provides for a national security provision during mergers in sensitive sectors, where a foreign acquiring firm is involved – s18A

ALIGNING PUBLIC INTEREST WITH THE PURPOSES OF THE ACT

The factors relevant to determining the competition effects of a proposed merger are extended to explicitly include the following:

- The **extent of ownership** by a merger party in a related market (which may not be only the market in which a firm operates, eg the financial market exposure of a furniture company) – s12A(2)(h)
- The relationship between a merger party and firms in a related market, including through **common members or directors** – s12A(2)(i)
- Any **previous mergers engaged in** by a party to the merger for such period as the Commission may stipulate – s12A(2)(j)

Public interest considerations in a merger:

- **Requirement to consider public interest:** The Bill clarifies that the authorities have to consider the public interest impact of a merger (Walmart judgement) – s12A(1)
- **Public interest criteria is expanded to include spread of ownership:**
 - **Four current criteria:** impact on a sector or region; employment; impact on small and medium businesses; and ability of national industries to compete in international markets
 - **Fifth criterion added:** The Bill provides for the promotion of greater economic ownership, particularly by black South Africans, including workers – s12A(3)(e)
- **Small and medium business/black-owned firms:** The Bill clarifies that the authorities should consider impact of a merger on medium businesses (in addition to small businesses); and sets a new test: the ability of SMEs and black-owned firms to effectively enter into, participate in and expand within the market – s12A(3)(c)

- **Currently** there is no provision in SA law that enables the National Executive to consider national security issues in a merger involving a foreign acquiring firm
- **Many legal systems** elsewhere in the world provide for national security reviews of investments by foreign acquiring firms. Government reviewed the systems applicable in countries such as:
 - **United States:** where a Committee on Foreign Investment in the United States (CFIUS) has wide-ranging powers to investigate an acquisition by a foreign firm, with Presidential rights of veto
 - **Canada:** where Ministers can trigger a review on a range of grounds much wider than contemplated in SA
 - **Australia:** where a Cabinet Member has the power to veto a transaction based on a wide range of factors
 - **European Union:** where Member States retain the right to object to a merger on national security grounds
 - **China:** where the National Executive retains the right to intervene in a transaction involving a foreign acquiring firm
- **National Security Veto:** The Bill provides for a national security veto in line with constitutional responsibility of the National Executive for national security (S198 of the Constitution)

- **Committee:** The President must appoint a Committee of Ministers and other suitable public officials to determine if a merger by a foreign firm can be justified on national security grounds
- **Determination of National Security Interests:** The President must publish in the gazette a list of industries, goods or services, sectors or regions which would be subject national security review, taking account of the impact of the merger on:
 - the Republic’s defence capabilities and interests;
 - the use or transfer of sensitive technology or know-how outside of the Republic;
 - the security of infrastructure essential to the health, safety, security or the economic well-being of citizens and the effective functioning of government;
 - the supply of important goods or services to citizens, or the supply of goods or services to Government;
 - the Republic’s international interests, including foreign relationships; and
 - Economic and social stability of the Republic;
 - does it enable foreign surveillance or espionage, or hinder current or future intelligence or law enforcement operations; or
 - does it enable or facilitate the activities of illicit actors, such as terrorists or organised crime.
- The Committee can also consider other relevant factors including if the foreign firm is controlled by a foreign government.

- **Procedures:** The President issues regulations governing the notification, procedures and timeframes to be followed by the Committee, as well as relating to access to information concerning the merger
- **Notification by foreign firm:** A foreign firm acquiring a South African firm falling within a gazetted national security interest must notify the Committee of the merger
- **Timelines:** The Committee has 60 days to determine if the merger can be justified on national security grounds
- **Duties following review:** After the review the Committee may prohibit the acquisition, or approve it with or without conditions. The Minister must publish a notice in the Gazette of the decision of the Committee and submit the Committee's report and decision to the National Assembly.
- **Responsibilities of the competition authorities:** Unless the Committee prohibits the merger, the Competition Commission and Tribunal thereafter consider the merger on competition and public interest grounds in accordance with the Act

Focus 4: institutional changes

- Providing additional capacity
- Clarifying responsibilities and rights

PROVIDING CAPACITY AND FLEXIBILITY FOR THE AUTHORITIES TO FUNCTION



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Overview of the Bill on Institutional Improvements

- What does the Bill seek to do?
 - S21 Clarify the responsibilities of the Commission
 - S21A Provide the Commission with powers to conduct impact studies
 - S22 Provide for a policy to delegate authority of the Commissioner
 - S19 and 23 Provide for designation of a Deputy Commissioner to chair a market inquiry
 - S25 Provide for suitable staff of the Commission to appear in a court of law
 - S49E Provide for the development of a leniency policy by the Commission
 - S26 Provide for acting members and additional capacity for the Tribunal
 - S17 Provide and clarify the right to appeal merger decisions of the Tribunal for the Commission and the Minister
 - S44 and 45 Provide streamlined processes to determine confidential information and clarify the right of access for Ministers or other regulatory authorities
 - S62 and 63 Clarify the jurisdiction of the Constitutional Court over appeals from the Competition Appeal Court
 - S74 Provide for an increase in administrative fines

- **s21 Responsibilities of Commission:** The amendments clarify the new responsibilities of the Commission, including conducting market inquiries undertake impact studies, issue guidelines and advisory opinions, and develop policies and assess applications for leniency
- **s21A Impact studies:** The Bill provides the Commission with powers to study the impact of prior decisions by the competition authorities
 - The studies can provide valuable insights into the impact of the Act on the competitiveness of South African markets and inform future action or approaches, including measures to enhance competition, whether in mergers, market inquiries or enforcement cases
- **s22 Delegations by Commission:** The Bill provides for a policy for delegation of certain responsibilities to allow for operational efficiency
 - The Competition Commissioner has the power to determine delegations of authority
 - Since the Commissioner's statutory powers are provided by appointment by the Minister, a policy on delegation of these powers requires consultation with the Minister

- **s19 and s23 Capacity for Market Inquiries:** The Bill provides for additional part-time or full-time Deputy Commissioners, responsible for conducting market inquiries
 - **s43B(2B) Appointment of Panel:** The Bill provides for the Deputy Commissioner to chair a market inquiry, and to appoint additional suitable persons to a panel
- **s25(2) Appearance in courts of law:** The Bill provides the Commissioner with powers to designate a staff member, with suitable qualifications and experience, to appear in court on behalf of the Commission
- **s49E Leniency:** The amendments require the Commission to publish a policy on leniency, including the criteria and procedures for granting leniency. The current leniency policy has allowed whistle-blowers to come forward in respect of cartel cases

- **s26(2) Appointments to the Tribunal:** The Bill provides for additional capacity to address the workload of the Tribunal:
 - **s26(2)(a) Composition of Tribunal:** The Bill provides for an increase in the number of Tribunal Members from 10 to 14
 - **s26(2)(b) Acting Members of Tribunal:** The Bill provides the Minister with powers to appoint acting members of the Tribunal for a period of time; however no more than one acting member of the Tribunal may form part of a panel for Tribunal proceedings in a matter (s31(2)(b))
- **s17 Right to Appeal Decisions of the Tribunal:** The Bill provides the Commission and, in certain circumstances, the Minister with the right to appeal decisions of the Tribunal with respect to mergers
 - **s17(1)(b) Commission:** granted the right to appeal any merger decision of the Tribunal within 20 days
 - **s17(1)(c) Minister:** provided with the right to appeal a merger decision of the Tribunal relating to public interest considerations within 20 days, if the Minister participated during proceedings with the Commission or Tribunal, or upon application to the Competition Appeal Court
- **s54(dA) Summons issued by the Tribunal:** it may amend or withdraw a summons (or direction) issued

- **s44 and s45 Confidential Information:** the Commission and Tribunal may determine how confidential information is treated
 - **s44 Determination:** The amendments streamline and clarify the determination of confidential information
 - **s45(3)(a) Ministerial access:** The Bill provides the Minister with access to confidential information obtained (e.g. in a merger or during a market inquiry) solely for the purposes of the Act, or if in terms of any other law the Minister is required to disclose the information or if it discloses a potential criminal act
 - **s45(3)(b) Other Ministers and regulatory authorities:** unless the Tribunal determines otherwise, other Ministers and regulators also have a right to confidential information obtained (e.g. in a merger or during a market inquiry) as long as the information is used for the purposes of the Act, or if in terms of any other law the Minister is required to disclose the information
- **s62 and s63 Jurisdiction of courts:** Appeals from a decision of the Competition Appeal Court go straight to the Constitutional Court and not the Supreme Court of Appeal, in line with amendments to the Constitution.
- **s74 Administrative Fines:** The Act provides for administrative fines to be levied against any person convicted of an offence under the Act. The Bill provides for an increase in the fine, which had not changed in 20 years, from R2 000 to R10 000.

Conclusion



economic
development

Economic Development Department
REPUBLIC OF SOUTH AFRICA

Benefits of the proposals in the Bill

The Bill provides the following

1. A boost for SMEs and economic inclusion, opening up the economy to fresh investment and innovation
2. A clear mandate to the competition authorities to address economic concentration in a balanced manner and to promote economic transformation
3. Greater clarity to firms and investors on prohibited practices and what constitutes abuse of dominance
4. Improved administrative efficiencies in the work of the competition authorities and facilitative powers to the Executive

Implementation steps to include..

The Bill will make a significant contribution to promoting transformation and economic inclusion. To maximize its impact, it also requires:

1. A wider policy toolbox, which includes guidelines on state procurement, industrial policy measures, support for small business development and review of the licensing regime. Competition regulation can complement these other measures.
2. Resources to strengthen the competition authorities, including expanding its skills base in economic, industrial and legal analysis.
3. A review of the implementation of the criminalisation provisions in the Act, with possible future amendments to make them more effective
4. A review of the mandate and operations of economic regulators, to identify gaps and duplication and consider possible consolidation

Conclusion

- Concentration and economic exclusion remain core challenges in South Africa – contributing to slower and less dynamic growth, lower employment and greater inequalities, as well as socio-political conflict
- The proposed amendments to the Competition Act:
 - Enable a more effective approach to concentration, with a focus on improving outcomes for small and black-owned business, and
 - Strengthen the institutions involved in managing competition policy and law.
- These changes are in the long-term interest of both business and organised labour: they benefit small to medium-sized companies, bring in a pro-growth, transformation model and can help to lift investment and the structural levels of growth in the economy, whilst spreading the benefits more widely.

20 years of the Competition Act

The 2018 Bill
A New Deal for
Economic
Transformation and
Inclusion