

Response from Economic Development Ministry to the Portfolio Committee on Amendments to the Competition Amendment Bill Proposed in the A-List (B 23A – 2018)

2 October 2018

INTRODUCTION

The Competition Amendment Bill was introduced in Parliament on 11 July 2018, with a detailed explanation provided by the Minister to the Portfolio Committee (PC).

Following public hearings on the Bill and discussion within the PC, on 11 September 2018 the Minister of Economic Development provided the PC with a detailed response to the various matters identified by the Secretary to the PC following these processes.

A further report from the Economic Development Ministry was made available to the PC on 16 September 2016 providing explanations and options that the PC may wish to consider and suggested wording where appropriate. This report has been attached for reference to this response document.

Following the clause-by-clause deliberation of the PC on 18 and 19 September 2018, and consideration of the issues raised in public submissions and by the Department, the Ministry was furnished with an A-list by the Parliamentary Legal Advisor and State Law Advisor, reflecting the proposed amendments to the Bill introduced to Parliament on 11 July 2018.

The Economic Development Ministry has considered the A-list against the original purposes of the Bill and the discussion with the PC. The Ministry has further conducted a review of the clauses in the Bill to ensure that they are full, accurate and complete.

While the Ministry is in agreement with the amendments proposed in the A-List, the review of language has resulted in a few areas where further amendments may be required to give effect to the purposes of the Bill. These instances are detailed and highlighted below.

RESPONSE TO AMENDMENTS PROPOSED IN THE A-LIST

Note: the reference to a clause in this document refers to a clause of the Competition Amendment Bill as introduced to Parliament on 11 July 2018. It is noted that this document refers therefore only to those clauses of the Bill that have been affected by the changes set out in the A-list document submitted by the Portfolio Committee to the Ministry.

Clause 1 (Section 1 of the Act - Definitions)

Points 1 and 2 amend the definition for average avoidable cost. The Ministry is in agreement with the proposed change.

Point 3 amends the definition for margin squeeze. The Ministry is in agreement with the proposed change.

Clause 3 (Section 4 - Restrictive horizontal practices prohibited)

Point 1 replaces the use of guidelines issued by the Commission with regulations made by the Minister. The Ministry is in agreement with the proposed change.

For the information of the Portfolio Committee, we advise that the Ministry is in the process of constituting a Ministerial Advisory Panel which will provide advice on regulations which must be published by the Minister in terms of this section, as well as sections 5, 8 and 9.

Clause 4 (Section 5 - Restrictive vertical practices prohibited)

Point 1 replaces the use of guidelines issued by the Commission with regulations made by the Minister.

The Ministry is in agreement with the proposed change.

Clause 5 (Section 8 - Abuse of dominance prohibited)

Point 1 clarifies that the excessive price provisions apply to both end consumers and industrial customers. The Ministry is in agreement with the proposed change.

Points 2, 3, 4 and 5 reflect the deletion of the buyer power provision in 8(1)(d)(vii). As the amended provisions on buyer power have now been included in a standalone subsection 8(4), the Ministry is in agreement with the proposed changes.

Point 6 reflects the inclusion of a materiality threshold of “reasonableness” in determining excessive price. As it is likely that the authorities and courts would, in applying the provisions of the Bill, read into the determination of excessive price a “reasonableness test”, the Ministry is in agreement with the proposed change.

Point 7 replaces the use of guidelines issued by the Commission with regulations made by the Minister. The Ministry is in agreement with the proposed change.

Point 8 introduces the new subsection 8(4) dealing with buyer power, reflecting the discussion in the Portfolio Committee and the engagement with the Executive. The Ministry is in agreement with the proposed inclusion.

The Ministry has been advised that the new wording proposed by the PC will enable regulations to be made setting out the factors and benchmarks to determine those firms owned or controlled by historically disadvantaged persons (HDPs) covered by subsection 8(4)(d)(ii).

For the information of the PC, it is noted that it is the intention of the Minister to effect such regulations setting out the size of firms owned by HDPs (whether based on market share, turnover or employment) to which the section applies, to ensure that firms that are both owned and controlled by HDPs and at the same time are dominant firms, do not unfairly access the rights contained in this section.

The PC may wish to consider whether, for the avoidance of doubt, it is necessary to explicitly provide for this matter to be addressed through regulation. Should this be the approach of the PC, a change would need to be effected to subsection 8(4)(d) as follows (text in red is the possible change):

" (d) The Minister must, in terms of section 78, make regulations—

- (i) designating the sectors, and in respect of firms owned or controlled by historically disadvantaged persons, the benchmarks for determining the firms, to which this subsection will apply; and
- (ii) setting out the relevant factors and benchmarks in those sectors for determining whether prices and other trading conditions contemplated in paragraph (a) are unfair."

Clause 6 (Section 9 - Price discrimination by dominant firm prohibited)

Points 1 and 2 clarify that the provisions for price discrimination deal with the dominant firm as seller. As buyer power has now been included in a standalone subsection 8(4), the Ministry is in agreement with the proposed changes.

Point 3 re-introduces the 'substantiality' threshold for price discrimination against large and dominant firms, and introduces a new test for price discrimination against SMEs and HDPs. The Ministry is in agreement with the proposed changes.

Point 4 introduces an anti-avoidance clause for dominant firms who avoid dealing with SMEs and HDPs in order to circumvent the operations of this section. The Ministry is in agreement with the proposed changes.

Point 4 also amends subsection 9(2), to enable appropriate referencing of the amendments in sections 9(3) to targeted sections. The Ministry is in agreement with the proposed changes.

Point 5 proposes a consequential renumbering of provisions. The Ministry is in agreement with the proposed changes.

Point 6 deletes the current subsection 9(3) and 9(4) in the Bill. With respect to

- s9(3), the provision has been reformulated in a new s9(3); and
- s9(4) which deals with buyer power, has now been included in a standalone subsection 8(4).

The Ministry is thus in agreement with the proposed changes.

Point 6 also introduces a new section 9(3) and 9(3A) which deals with the onus on dominant firms when there is a prima facie case of either price discrimination against SMEs and HDPs or refusal to sell to SMEs and HDPs to avoid operation of the section. The Ministry is in agreement with the proposed changes.

Point 6 finally provides for regulation by the Minister, setting out the factors and benchmarks to determine whether a dominant firm's action is prohibited price discrimination against SMEs and HDPs; and to give effect to this section. The Ministry is in agreement with the proposed changes.

The Ministry has been advised that the new wording proposed by the PC will enable regulations to be made setting out the factors and benchmarks to determine those firms owned or controlled by historically disadvantaged persons covered by subsection 9(4)(b).

For the information of the PC, it is noted that it is the intention of the Minister to effect such regulations setting out the size of firms owned by HDPs (whether based on market share, turnover or employment) to which the section applies, to ensure that firms that are both owned

and controlled by HDPs and at the same time are dominant firms, do not unfairly access the rights contained in this section.

The PC may wish to consider whether, for the avoidance of doubt, it is necessary to explicitly provide for this matter to be addressed through regulation. Should this be the approach of the PC, a change would need to be effected to subsection 9(4)(a) as follows:

"(4) The *Minister* must make regulations in terms of section 78—

(a) to give effect to this section, [including the benchmarks for determining the application of this section to firms owned or controlled by historically disadvantaged persons](#); and

(b) setting out the relevant factors and benchmarks for determining whether a dominant firm's action is price discrimination that impedes the *participation of small and medium businesses and firms* controlled or owned by historically disadvantaged persons."

Clause 7 (Section 10 - Exemption)

Point 1 clarifies that an exemption may be granted if the agreement or practice promotes either the effective entry, participation in or expansion in a market by SMEs and HDPs. The Ministry is in agreement with the proposed changes.

Point 2 clarifies that the Minister may make regulation regarding the exemption of a category of agreements or practices, rather than a single agreement or practice. The Ministry is in agreement with the proposed changes.

Clause 9 (Section 12A - Consideration of Mergers)

Point 1 reflects an error in the Bill introduced to parliament, in that it refers to Act 39 of 2009, instead of the correct reference to Act 39 of 2000. The Ministry is in agreement with the proposed change.

Point 2 clarifies that when considering a merger the Commission and Tribunal must also consider the impact of the merger on either the effective entry, participation in or expansion in a market by SMEs and HDPs. The Ministry is in agreement with the proposed changes.

Clause 10 (Section 15 - Revocation of merger approval and enforcement of merger conditions)

The amendment clarifies the grounds on which the Commission may make any appropriate decision in terms of merger conditions relating to employment and the ability of SMEs and HDPs to effectively enter into, participate in or expand within a market. The Ministry is in agreement with the proposed changes.

Clause 11 (Section 16 - Competition Tribunal merger proceedings)

The amendment clarifies the grounds on which the Tribunal may make any appropriate decision in terms of merger conditions relating to employment and the ability of SMEs and HDPs to effectively enter into, participate in or expand within a market. The Ministry is in agreement with the proposed changes.

New Clause 13 (Section 18 - Intervention in merger proceedings)

Point 1 clarifies that the Minister may participate in all mergers in order to make representation on public interest matters. The Ministry is in agreement with the proposed changes.

Old Clause 13 (New Section 18A - Intervention in merger proceedings involving foreign acquiring firm)

Point 1 substitutes the word “important” for “critical” in subsection 18A(4)(d). The Ministry is in agreement with the proposed changes.

Points 2 and 3 provide for notification of mergers to the Section 18A Committee at the same time as notification to the Commission. The Ministry is in agreement with the proposed change.

Point 4 reflects a grammatical error in the Bill. The Ministry is in agreement with the proposed change.

Point 5 now sets out a statutory period of 30 days in which the Minister must publish the decision in the Gazette and inform parliament. The Ministry is in agreement with the proposal.

Point 6 clarifies that the Commission and Tribunal may not consider a merger which should be notified to the Committee under this section, until the Committee has been notified. The Ministry is in agreement with the proposed changes.

Point 7 introduces a new subsection 18A(13) providing for grounds for the Committee to revoke any approval or conditional approval of a merger; including failure to notify the committee, if the approval was based on incorrect information, if the approval was obtained by deceit, or if a firm has breached any obligation attached to an approval. It further clarifies that if the Committee revokes its approval, the Commission’s and Tribunal’s approval is deemed to be revoked. The Ministry is in agreement with the proposed changes.

Point 7 also introduces a new subsection 18A(14) clarifying that the Tribunal may impose a penalty for any implementation of a merger without appropriate approval or for failure to notify, consistent with provisions for other mergers in the Act. The Ministry is in agreement with the proposed changes.

Point 7 further renumbers the old subsection (12) as the new subsection (15), which is a consequential change. The Ministry is in agreement with the proposed change.

Clause 21 (Section 31 - Competition Tribunal proceedings)

Point 1 corrects a drafting error in the Bill, referencing the incorrect paragraph. The Ministry is in agreement with the proposed change.

Clause 23 (Section 43B – Initiating and conducting market inquiries)

Point 1 amends the period in which an aggrieved person may appeal any determination of the Commission regarding confidential information. The period has been amended from 10 days to 15 days. The Ministry is in agreement with the proposed change.

However, following the review of the language in the Bill, it is recommended that the PC makes a further amendment in subsection 43B(3A)(d) to ensure the appropriate cross reference to relevant subsections, as provided for below:

"(d) any person aggrieved by the determination of the Competition Commission in terms of ~~this subsections (1) or (2)~~ may within 15 business days of the determination, appeal against the determination to the Competition Tribunal."

Following the review of the language in the Bill, it is recommended that the PC makes a further amendment in subsection 43B(1)(a) to ensure the appropriate cross reference to relevant subsections, as provided for below:

"(1) (a) The Competition Commission, acting within its functions set out in section 21(1), **[and on its own initiative, or in response to a request from the Minister,]** may conduct a market inquiry at any time, subject to subsections (2) to **[(4)] ~~(7)(6)~~**—"

Clause 25 (Section 43D, 43E, 43F and 43G in market inquiries)

Point 1 clarifies that the Tribunal has the power to make an appropriate order in respect of divestiture once it has received a recommendation from the Commission in terms of subsection 43D(2). The Ministry is in agreement with the proposed change.

Point 2 amends a spelling error in the title of section 43E. The Ministry is in agreement with the proposed change.

Point 3 clarifies that SMEs falling within the scope of the market inquiry may also participate in such market inquiry. The Ministry is in agreement with the proposed change.

Point 4 provides for the Commission to take reasonable steps to promote the participation of SMEs at the market inquiry. The Ministry is in agreement with the proposed change.

Clause 32 (Section 59 – Administrative penalties)

Point 1 clarifies that abuse of buyer power is a prohibited act which can attract a penalty. This is a consequential change from the inclusion of the buyer power provisions in subsection 8(4). The Ministry is in agreement with the proposed change.

Point 2 clarifies that refusal to deal with SMEs in order to circumvent the price discrimination provisions is a prohibited act which can attract a penalty. This is a consequential change from the inclusion of the anti-avoidance clause in section 9. The Ministry is in agreement with the proposed change.

Clause 34 (Section 62 – Appellate jurisdiction)

Point 1 introduces a provision which clarifies that the Tribunal and Competition Appeal Court do not have jurisdiction over matters in section 18A dealing with national security, except in respect of penalties which the Tribunal may levy for failure to notify. The Ministry is in agreement with the proposed change.

New Clause 39 (Section 78 – Regulations)

Point 1 amends the section on regulation, providing that when making regulations, referred to in sections 4, 5, 8 and 9, the Minister must consult with the Commission and publish a notice in the Gazette allowing for public comment. The Ministry is in agreement with the proposed changes.

As indicated earlier, we advise that the Ministry is in the process of constituting a Ministerial Advisory Panel which will provide guidance on regulations which must be published by the Minister. There is merit in the setting up of a Standing Advisory Committee, and this is also being considered. No changes would be required to the Bill to give effect to this.

New Clause 45 (Amendment of Arrangements of Sections of Act 89 of 1998)

Point 1 amends the arrangement of sections in the Act to take account of the provisions in the Bill. The Ministry does not have any specific comment on this and will leave to the State Law Advisor and Parliamentary Legal Advisor to determine the appropriate approach.