

Update on the Implementation of the Competition Amendment Act, 2018

Presentation to Portfolio Committee on Trade and Industry

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Trade, Industry and Competition
REPUBLIC OF SOUTH AFRICA

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Competition Amendment Act Problem statement

The Competition Act, 1998 (Act No. 89 of 1998) was substantially amended in 2018 with the promulgation of The Competition Amendment Act, 2018 (Act No. 18 of 2018) in Feb 2019

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.

Policy objectives:

- 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 particularly with regards to the **public interest** (employment, small and medium business, ownership by Black South Africans)



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Benefits of Competition Amendment Act, 2018

- Clarifies and broadens the mandate of the Competition Authorities to address economic concentration in a balanced manner and to promote economic transformation
- Provides greater clarity to firms and investors on prohibited practices and what constitutes abuse of dominance
- Enhances administrative efficiencies in the work of the Competition Authorities
- Clarifies and structures Executive engagement in merger proceedings



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Process

- Feb 2017 President announcement in SONA
- May 2017 Ministerial announcement
- May 2017 TOR published & Expert Panel appointed
- Nov 2017 Cabinet approves a draft Bill for public comment
- More than 60 written submissions received from public, business and civil society
- Discussions with a range of experts, regulators and the Competition Appeal Court; and government including MECs
- Consultations held through Nedlac including 6 formal meetings and a number of bilaterals with business and labour
- Broad agreement achieved in a number of key areas. 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”
- Public consultation in the National Assembly and National Council of Provinces received 49 written submissions, and hearings were held with oral presentations
- Changes were made to the Bill on the basis of the Parliamentary consultation process
- Dec 2018 Announcement in the National Assembly that the Bill had been approved by both houses and was being passed to the President for assent
- Feb 2019 President signs the Competition Amendment Act into law



Implementation Highlights

- The Competition Act, 1998 (Act No. 89 of 1998) was substantially amended in 2018 with the promulgation of The Competition Amendment Act, 2018 (Act No. 18 of 2018)
- Subsequent to the promulgation,
 - various sections of the Amendment Act were promulgated on 12 July 2019 and 13 Feb 2020, respectively (Various sections)
 - Buyer Power (Sec: 8) Regulations
 - Price Discrimination (Sec: 9) Regulations
 - COVID Block Exemptions (Sec: 10(10))
 - Foreign Acquiring Firms (Sec: 18A)
 - Institutional Readiness was determined



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Buyer Power Regulations

- Promulgated on 13 Feb 2020 in Government Gazette No. 43018
- S8(4)(a): Prohibits a dominant buyer to impose unfair prices or trading conditions on SMEs and HDP firms
 - Supports fair participation in the economy by SMEs and HDP firms
 - Prohibits powerful buyers to unfairly suppress prices or impose trading conditions, which unfairly transfer costs or risks onto SME or HDP suppliers
 - Only applies to sectors designated by the Minister, currently:
 - Grocery wholesale and retail sector
 - Agro-processing sector
 - Ecommerce and online services sector
- Competition Commission issued draft Guidelines Oct 2019 and final Guidelines May 2020



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Price Discrimination Regulations

- Promulgated on 13 February 2020 in Government Gazette No. 43018
- S9(1)(a)(ii): Prohibits price discrimination by dominant sellers if it is likely to have the effect of impeding the effective participation of SMEs and HDP firms
 - Supports fair participation in the economy by SMEs and HDP firms
 - Prevents SME/HDP firms being charged higher prices than larger firms for critical inputs just because they are small
 - Standard for demonstrating impact is now lower (previously: *substantially* harmed, now *likely* to be harmed)
 - Complainants must fall with the SME/HDP firm categories that purchase less than 20% of the relevant good or service supplied by the dominant seller over the same period as the discrimination



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COVID Block Exemptions

- DTIC Minister, in consultation with the Competition and Trade Authorities, published the following government notices – relates to Block Exemptions:
 - Consumer and Customer Protection and National Disaster Management Regulations and Directions
 - Enabled the joint work on Price Gouging between the CC and the NCC
 - COVID-19 Block Exemption for the Healthcare Sector, 2020
 - COVID-19 Block Exemption for the banking sector, 2020
 - COVID-19 Block Exemption for the retail property sector, 2020
 - COVID-19 Block exemption for the hotel industry, 2020



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Section 18A

(merger proceedings involving foreign acquiring firms)

- S18A requires the President to constitute a Committee
 - to consider whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic
 - must consist of such Cabinet Members and other public officials as may be determined and appointed by the President
- President to also publish in Government Gazette a list of national security interests
- Even though section 18A was enacted and became law, it requires a Presidential Proclamation in terms of section 46 of the Competition Amendment Act, 2018 (Act No. 18 of 2018), to become operative.
 - the commencement of section 18A necessitates the coming into operation of certain other sections directly related to section 18A - section 1(d), 35(a) and 45(c) of the Competition Amendment Act, 2018.
- Necessary to have technical and secretariat background capabilities.



Institutional Readiness

- Expert Panel was established to advise on the Institutional Requirements of the Competition Authorities to deal with the expansion of their regulatory mandate and scope.
 - Terms of Reference included:
 - Changes to the Competition Act and its impact on the financial, human resource and systems requirements of the Competition Commission (“the Commission”) and the Competition Tribunal (“the Tribunal”)
 - budgetary challenges facing the Commission in light of its expanded workload and mandate, including its funding model, scope to improve efficiencies and procedures that will assist with the work of the Commission
 - Protocols on confidentiality requirements



Institutional Readiness: Some Key Findings

- Standard Operating Procedures:
 - institutional model/structure with combination of analytical, investigative and litigation skills - skills to match that of opponents
- Outsourcing of legal and other services
 - consider establishment of expert panels e.g. economists, cyber/IT/investigators
- Confidentiality
 - Secure record-keeping
 - Transmission of Institutional Memory
 - Cultivate internal DTIC Intellectual Capacity to provide in-depth analysis
- Delegation of Authority Framework in terms of Section 22 of the Principal Act:
 - Separation legislative mandate from operations.
 - A Deputy Commissioner responsible for operational matters
 - Another Deputy Commissioner responsible for conducting market inquires



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Next Steps

- Implementation of Section 18A – as well as aligned sections
- Continued engagements with Competition Authorities on internal implementation of State of Readiness recommendations
- Continued funding optimisation
- Continued Implementation of DTIC Institutional Memory and Intellectual Capacity