

# Key Competition Amendment Act provisions are now in force...

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31 Jul 2019

An extensive set of competition law amendments has been in the making since December 2017 when the Competition Amendment Bill (Bill) was initially gazetted for public comment. After robust public participation and commentary, the key features of the Bill have predominantly made their way into the Competition Amendment Act (Amendment Act), which, on 13 February 2019, received the requisite presidential assent. All that remained was a proclamation of a commencement date from which the Amendment Act would find application. On 12 July 2019, a notice was published in the Government Gazette, bringing into force some of the provisions of the Amendment Act. The Economic Development Department has noted that further amendments of the Amendment Act will likely come into effect from November 2019, after the publishing of draft regulations and public consultations.



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Some of the key new provisions that are now in force are outlined below:

## Abuse of dominance

The history of South African antitrust jurisprudence demonstrates a dearth of successful abuse of dominance prosecutions relative to cartel prosecutions. The Amendment Act appears to render the prosecution of abuse cases easier for the Commission.

In particular, the provisions of the Amendment Act that have come into force include:

- The introduction of a reverse onus in relation to excessive pricing prosecutions, requiring the allegedly dominant firm to refute the *prima facie* case against it by showing that prices charged are reasonable;
- There are now specific factors introduced to test whether the price charged by a dominant firm is excessive;
- The excessive pricing provisions also now relate to pricing in respect of both consumers and customers (i.e. intermediate buyers of product) as opposed to just consumers (which was the case prior to the amendments);
- The amendments codify the cost benchmarks in relation to predatory pricing provisions, which is in line with the development of case law on the subject of price predation;

- The amendments formally introduce the concept of margin squeeze into the list of specific abuses of dominance. Margin squeeze occurs when the margin between the price at which a vertically integrated firm (which is dominant in the input market) sells a downstream product and the price at which it sells the key input to competitors does not allow downstream competitors to participate effectively; and
- It is also now an abuse of dominance to refuse to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible to do so. Under the previous dispensation, the provision only applied in relation to a refusal by a dominant firm to supply only scarce goods (and not services) to a competitor (and not customer).

## Merger control

The competition authorities' public interest mandate has been extended by the newly implemented provisions of the Amendment Act. The provisions include an additional public interest factor, namely the "*promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market*".

In addition, one of the existing public interest factors has been tweaked to enable the authorities to take into account the "*ability of small and medium businesses or firms controlled by historically disadvantaged persons to effectively enter into, participate in or expand*" within a market.

Separately, when determining whether a proposed transaction is to be approved (conditionally or otherwise) or prohibited, the authorities must also consider the following three additional factors:

- the extent of ownership by a party to a merger in other firms in a related market;
- the extent to which a party to the merger is related to other firms in related markets, including through common members or directors; and
- any other mergers engaged in by a party to a merger for a period to be stipulated by the Commission.

## Administrative penalties

In the pre-amendment dispensation, there were "yellow card" offences, which evidently did not attract a penalty on a first-time offence and "red card" offences, which did. In terms of the newly implemented provisions of the Amendment Act, all first-time offences now attract a penalty of up to 10% of a respondent's annual turnover. In relation to repeat offences, the Amendment Act introduces an administrative penalty of up to 25%, which can be levied against offending firms.

Predictably, when determining an appropriate penalty, the impact of a contravention on small and medium business or businesses owned by previously disadvantaged groups will be taken into account in mitigation or aggravation.

Importantly, controlling firms can now be jointly and severally liable for the payment of an administrative penalty imposed on controlled firms.

## Market inquiries

The newly implemented market inquiry provisions will be the key conduit through which the Commission will be empowered to analyse and address perceived structural concerns in a market. Notably, the amendments lower the threshold for intervention by the competition authorities by establishing an “adverse effects” test. In other words, the competition authorities will be able to conduct a market inquiry if any feature or combination of features in a market adversely affects competition in that market even if that impact is not substantial. The Amendment Act now provides guidance in relation to what is a “feature” of a market.

Following a market enquiry, the Commission may take any action to remedy, mitigate or prevent an alleged adverse effect on competition, including a recommendation to the Competition Tribunal for the Competition Tribunal to make an appropriate order in relation to such adverse effect on competition.

Upon completing a market inquiry, the Commission can make recommendations for a change of policy, legislations and regulations to the Minister of Trade and Industry as well as recommendations to other regulatory authorities in respect of competition authorities.

## Exemptions

There is an increasing focus on promoting and ensuring the competitive viability and sustainability of small and medium enterprises in the South African market by the competition authorities. Given this, the Amendment Act supplements the existing grounds for exemption by making provision for the exemption of an agreement or practice that would otherwise be prohibited if it can be shown that the main objective of such agreement or practice is to, *inter alia*:

- promote entry into, participation in or expansion within a market of medium businesses as well as small business;
- economic development, growth, transformation or stability in a designated industry; and
- promote employment or industrial expansion

It is noteworthy that these new provisions are akin to the public interest grounds that can be made in the context of mergers.

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