



COMMITTEE REPORT

Report of the Portfolio Committee on Economic Development on the *Competition Amendment Bill* [B23 – 2018], dated

The Portfolio Committee on Economic Development, having considered the subject matter of the *Competition Amendment Bill [B23 – 2018]* (*National Assembly – Sec 75*), referred to it on 11 July 2018 and classified by the Joint Tagging Mechanism (JTM) as a Section 75 Bill, reports the Bill with amendments [B23B - 2018].

1. BACKGROUND AND PROCESS

The Competition Amendment Bill [B23 – 2018] was referred to the Portfolio Committee on Economic Development on 11 July 2018.

Based on the Review of the Competition Act, the Department identified that the following issues needed to be addressed through amendments to legislation:

- The impact of anti-competitive conduct on small and medium businesses (SMEs) and firms owned and controlled by black South Africans
- Economic concentration as a structural issue in the economy and its impact on SMEs and firms owned and controlled by black South Africans
- The powers to address abuse of dominance by large companies, including reviewing the penalty regime
- Alignment of competition-related processes and decisions with other public policies, programmes and interests, including in respect of national security
- Strengthening of the role of the Competition Authorities and the Executive in certain competition issues.

The Committee received its first briefing from the Economic Development Department on the Bill on 17 July 2018 and engaged the Minister on the contents of the Bill. The Committee went on to advertise the Bill for four weeks and invited interested individuals and stakeholders to submit their written submissions. There was a further briefing by the Minister and the

Department on 21 August 2018, where the Minister responded to members' questions on the Bill.

Calls for public comments were made by the Committee from 19 July 2018. The Committee received 32 written submissions before the closing date of 17 August 2018. All interested institutions /organisations/ individuals were given the opportunity to make oral presentations before the Committee at the public hearings which took place on 28-29 August 2018 in Parliament. A total of 20 organisations utilised the opportunity and made oral representations and engaged the Committee on the contents of the Bill.

The following represents the timeline through which the process has taken place, subsequent to the public participation process:

- Deliberation by the Portfolio Committee on issues raised at public hearings on 04-05 September 2018;
- The Minister's response at a session of the Committee to the issues raised by members of the Committee and by stakeholders at public hearings on 11 September 2018;
- The Minister's further written submission on 16 September 2018 to the Committee on issues raised by the Committee and in the public hearings;
- Further deliberation by the Committee on the Bill on 18-19 September 2018;
- The Minister's response at a session of the Committee to the A-List of the Bill on 02 October 2018;
- Further deliberations and consideration by the Committee of the A-List of the Bill;
- The final consideration of the Bill by the Committee on 16 October 2018.

During the process, the Department submitted the following documents to the Committee:

- Overview of the Competition Amendment Bill 2018: Presentation to the Portfolio Committee, dated 17 July 2018
- Response to written and oral submissions to Parliament, dated 11 September 2018
- Report from Economic Development Ministry to the Portfolio Committee on amendment to the Competition Amendment Bill, dated 16 September 2018

- Response from Economic Development Ministry to the Portfolio Committee on Amendments to the Competition Amendment Bill Proposed in the A-List (B 23A-2018), dated 2 October 2018

2. PROPOSED AMENDMENTS

The Bill was amended as follows:

Clause 1

1. On page 2, in line 11, to omit "had not produced" and to substitute "ceased producing".
2. On page 2, in line 12, after "output" to insert ", divided by the quantity of the additional output".
3. On page 3, from line 15, to omit the definition of "**margin squeeze**" and to substitute the following definition:

" **'margin squeeze'** occurs when the margin between the price at which a vertically integrated firm, which is dominant in an input market, sells a downstream product, and the price at which it sells the key input to competitors, is too small to allow downstream competitors to participate effectively."

Clause 3

1. On page 4, from line 9, to omit subsection (6) and to substitute the following subsection:

"(6) The Minister must make regulations in terms of section 78 regarding the application of this section."

Clause 4

1. On page 4, from line 14, to omit subsection (4) and to substitute the following subsection:

"(4) The *Minister* must make regulations in terms of section 78 regarding the application of this section."

Clause 5

1. On page 4, in line 21, to omit "[consumers]" and to substitute "consumers or".
2. On page 4, in line 42, after "competitor;" to insert "or".
3. On page 4, in line 43, to omit "; or" and to substitute a full stop.
4. On page 4, from line 44, to omit subparagraph (vii).
5. On page 4, from line 50, to omit "or required a supplier to sell at a price which impedes the ability of the supplier to *participate effectively*".
6. On page 4, from line 54, to omit "compare that price to a competitive price" and to substitute "determine if that price is higher than a competitive price and whether such difference is unreasonable.".
7. On page 5, from line 14, to omit paragraph (f) and to substitute the following paragraph:

"(f) any regulations made by the *Minister* in terms of section 78 regarding the calculation and determination of an excessive price."
8. On page 5, from line 17, to omit subsection 4 and to substitute the following subsection:

"(4) (a) It is prohibited for a dominant *firm* in a sector designated by the *Minister* in terms of paragraph (d) to directly or indirectly, require from or impose on a supplier that is a *small and medium business* or a *firm* controlled or owned by historically disadvantaged persons, unfair—

(i) prices; or

(ii) other trading conditions.

- (b) It is prohibited for a dominant firm in a sector designated by the Minister in terms of paragraph (d) to avoid purchasing, or refuse to purchase, goods or services from a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons in order to circumvent the operation of paragraph (a).
- (c) If there is a prima facie case of a contravention of paragraph (a) or (b), the dominant firm alleged to be in contravention must show that—
- (i) in the case of paragraph (a), the price or other trading condition is not unfair; and
- (ii) in the case of paragraph (b), it has not avoided purchasing, or refused to purchase, goods or services from a supplier referred to in paragraph (b) in order to circumvent the operation of paragraph (a).
- (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

1. On page 5, after line 24, to insert a new paragraph (a) as follows:
“(a) by the substitution for the heading of the section of the following heading:
‘Price discrimination by dominant firm as seller prohibited’ ”.
2. On page 5, in line 25, to renumber the existing paragraph (a) as paragraph (b).
3. On page 5, from line 27, to omit paragraph (a) and to substitute the following paragraph:

- "(a) it is likely to have the effect of—
- (i) substantially preventing or lessening competition; or
 - (ii) impeding the ability of *small and medium businesses* or *firms* controlled or owned by historically disadvantaged persons, to participate effectively;

4. On page 5, after line 28, to insert the following new paragraphs (c) and (d), respectively:

(c) by the insertion after subsection (1) of the following subsection:

"(1A) It is prohibited for a dominant *firm* to avoid selling, or refuse to sell, *goods or services* to a purchaser that is a *small and medium business* or a *firm* controlled or owned by historically disadvantaged persons in order to circumvent the operation of subsection (1)(a)(ii)."

(d) by the substitution for subsection (2) of the following subsection:

"(2) Despite subsection (1), but subject to subsection (3), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of [that] subsection (1) is not prohibited price discrimination if the dominant *firm* establishes that the differential treatment—

(a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from—

(i) the differing places to which[,] *goods or services* are supplied to different purchasers;

(ii) methods by which[,] *goods or services* are supplied to different purchasers; or

(iii) quantities in which[,] *goods or services* are supplied to different purchasers;

(b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or SEP

(c) is in response to changing conditions affecting the market for the *goods or services* concerned, including— ^[SEP]

(i) any action in response to the actual or imminent deterioration of perishable goods;

(ii) any action in response to the obsolescence of goods;

(iii) a sale pursuant to a liquidation or sequestration procedure; or ^[SEP]

(iv) a sale in good faith in discontinuance of business in the *goods or services* concerned."; and

5. On page 5, in line 29, to renumber the existing paragraph (b) as paragraph (e).
6. On page 5, from line 30, to omit subsections (3) and (4) and to substitute the following subsections, respectively:

"(3) If there is a prima facie case of a contravention of section (1)(a)(ii) —

(a) subsection (2)(a)(iii) is not applicable; and

(b) the dominant firm must, subject to regulations issued under section 9(4), show that its action did not impede the ability of *small and medium businesses* and *firms* controlled or owned by historically disadvantaged persons to *participate* effectively.

(3A) If there is a prima facie case of a contravention of subsection (1A), the dominant firm alleged to be in contravention must show that it has not avoided selling, or refused to sell, *goods or services* to a purchaser referred to in subsection (1A) in order to circumvent the operation of subsection (1)(a)(ii).

(4) The Minister must make regulations in terms of section

- (a) to give effect to this section, including the benchmarks for determining the application of this section to firms owned and 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

1. On page 5, in line 49, to omit "and" and to substitute "or".
2. On page 6, from line 4, to omit "an agreement or practice or" and to substitute "a".

Clause 9

1. On page 6, in line 10, to omit "2009" and to substitute "2000".
2. On page 6, in line 54, to omit "and" and to substitute "or".

Clause 10

Clause rejected.

New Clause

1. That the following be a new clause 10:

Amendment of section 15 of Act 89 of 1998, as amended by section 6 of Act 39 of 2000

10. Section 15 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:

"Revocation of merger approval and enforcement of merger conditions"; and

(b) by the substitution for subsection (1) of the following subsection:

"(1) The Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) and (c) if—

- (a) the decision was based on incorrect information for which a party to a merger is responsible;
- (b) the approval was obtained by deceit; or
- (c) a *firm* concerned has breached an obligation attached to the decision.

Clause 11

Clause rejected.

New Clause

1. That the following be a new clause 11:

Amendment of section 16 of Act 89 of 1998, as amended by section 6 of Act 39 of 2000

11. Section 16 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) Upon application by the Competition Commission, the Competition Tribunal may revoke its own decision to approve or conditionally approve a merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) or (c), and section 15, read with the changes required by the context, applies to a revocation or other decision in terms of this subsection."

New Clause

1. On page 8, in line 1, to insert the following new clause after clause 12, and to renumber the existing clause 13 and subsequent clauses accordingly:

Amendment of section 18 of Act 89 of 1998, as amended by section 6 of Act 39 of 2000

13. Section 18 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) In order to make representations on any public interest ground referred to in section 12A(3), the *Minister* may participate as a party in any **[intermediate or large]** merger proceedings before the Competition Commission, Competition Tribunal or the Competition Appeal Court, in the *prescribed* manner."

Clause 13

1. On page 8, in line 26, to omit "important" and to substitute "critical".
2. On page 8, from line 42, to omit "prior to" and to substitute "at the time of".
3. On page 8, in line 43, to omit "first".
4. On page 8, in line 50, to omit "show" and to substitute "shown".
5. On page 9, from line 1, to omit subsection (10) and to substitute the following subsection:

"(10) The Minister must, within 30 days of the decision contemplated in subsection (7)—

(a) publish a notice in the *Gazette* of the decision to permit, permit with conditions or prohibit the implementation of a merger; and

(b) inform the National Assembly, in appropriate detail, of the decision."

6. On page 9, after line 7, to insert the following new subsection (11), and to renumber the existing subsection (11) as subsection (12):

"(11) The Competition Commission may not consider a merger in terms of section 12A, and the Competition Tribunal may not consider a merger in terms of section 16(2), if the foreign acquiring firm failed to notify the Committee in terms of subsection (6)."

7. On page 9, after line 12, to insert the following new subsections, and to renumber the existing subsection (12) as subsection (15):

"(13) (a) The Committee may revoke its approval of the merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, if—

(i) the approval was based on incorrect information for which a party to the merger is responsible;

(ii) the approval was obtained by deceit; or

(iii) a firm concerned has breached an obligation attached to the approval.

(b) If the Committee revokes its permission in terms of paragraph (a), the Competition Commission's or Competition Tribunal's approval or conditional approval of the merger is deemed to be revoked.

(c) Unless the Committee determines otherwise, the Competition Commission's or Competition Tribunal's approval or conditional approval of a merger involving a foreign acquiring firm is deemed to be revoked if the foreign acquiring firm failed to notify the Committee in terms of subsection (6).

(14) The Competition Tribunal may impose an administrative penalty, in accordance with the provisions of section 59(3), on the parties to a merger involving a foreign acquiring firm for any contravention contemplated in section 59(1)(d), read with the changes required by the context."

Clause 21

1. On page 11, in line 41, to omit "23(2)(b)" and to substitute "26(2)(b)".

Clause 23

1. On page 12, in line 48, to omit "(7)" and to substitute "(6)".
2. On page 13, in line 40, to omit "10" and to substitute "15".
3. On page 13, in line 40, to omit "subsections (1) and (2)" and to substitute "this subsection".

Clause 25

1. On page 14, in line 32, after "section 60(2)(c)", to insert ", and the Competition Tribunal may make an appropriate order in relation thereto".
2. On page 14, in line 49, to omit "**enquiry**" and to substitute "**inquiry**".
4. On page 15, in line 55, after "firms", to insert ", including small and medium businesses".
5. On page 16, after line 14, to insert the following new subsection (2), and to renumber the existing subsection (2) and subsequent subsections accordingly:

"(2) The Competition Commission must take reasonable steps to promote the participation of small and medium businesses, who have a material interest in the inquiry and are, in the opinion of the Competition Commission, not adequately represented."

Clause 32

1. On page 18, in line 36, after "8(1)", to insert ", 8(4)".
2. On page 18, in line 36, to omit "or 9(1)", and to substitute ", 9(1) or 9(1A)".

Clause 34

1. On page 19, from line 49, to omit "Section 62 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection:", and to substitute the following:

"Section 62 of the principal Act is hereby amended—

(a) by the insertion after subsection (2) of the following subsection:

"(2A) Despite subsections (1)(a) and (2)(b), neither the Competition Tribunal nor the Competition Appeal Court has jurisdiction over matters regulated by section 18A, except section 18A(14)."; and

(b) by the substitution for subsection (4) of the following subsection:".

New Clause

1. On page 20, after line 32, to insert the following new clause, and to renumber the subsequent clauses accordingly:

Amendment of section 78 of Act 89 of 1998

39. The following section is hereby substituted for section 78 of the principal Act:

"(1) The *Minister*, by notice in the *Gazette*, may make *regulations* that are required to give effect to the purposes of *this Act*.

(2) Before making the *regulations* referred to in sections 4, 5, 8, and 9, the *Minister* must consult the Competition Commission and publish a notice in the *Gazette*—

(a) stating that draft regulations have been prepared;

(b) specifying the place, which may include a website, where a copy of the draft regulations may be obtained;

(c) inviting interested parties to submit written comments on the draft regulations within a reasonable period; and

(d) consider any comments submitted within the period contemplated in paragraph (c)."

New Clause

1. On page 21, after line 25, to insert the following new clause, and to renumber the subsequent clause accordingly:

Amendment of Arrangement of Sections of Act 89 of 1998

45. The Arrangement of Sections of the principal Act is hereby amended—

(a) by the substitution of item 9 of the following item:

"9. Price discrimination by dominant firm as seller prohibited";

(b) by the substitution of item 15 of the following item:

"15. Revocation of merger approval and enforcement of merger conditions";

(c) by the insertion after item 18 of the following item:

"18A. Intervention in merger proceedings involving foreign acquiring firm";

(d) by the insertion after item 21 of the following item:

"21A. Impact Studies";

(e) by the substitution for item 43B of the following item:

"43B. Initiating and conducting market inquiries";

(f) by the substitution for item 43C of the following item:

"43C. Matters to be decided at market inquiry";

(g) by the insertion after item 43B of the following items:

"43D. Duty to remedy adverse effects on competition

43E. Outcome of market inquiry

43F. Appeals against decisions made under this Chapter

43G. Participation in and representations to market inquiry";

(g) by the insertion after item 49D of the following item:

"49E. Leniency"; and

(h) by the insertion after item 79 of the following item:

"79A. Advisory opinions of Commission".

3 MINORITY VIEW

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4 ACKNOWLEDGEMENTS

The Chairperson wishes to thank and acknowledge the following for their individual and collective efforts towards the important work done over the past few month, which has culminated into this amended Bill as presented to the House:

1. The Minister and Deputy Minister of Economic Development, Mr Ebrahim Patel, MP and Mr Madala Masuku, MP respectively, for their solid leadership and unwavering commitment to the cause;
2. Members of the Portfolio Committee, who put in the extra hours, including the Constituency Period, to work through this crucial instrument that seeks to transform the lives of our people;
3. The Ministry's Parliamentary Staff and Advisor, the State Law Advisors, who have been with us throughout the process and supported our work ever so competently;
4. The Acting Director-General of the Economic Development Department and his team;
5. The leadership of our competition authorities and their respective teams, without whose efforts, albeit under challenging conditions, the need for the amendments would not have come to light;
6. Our own support staff, the Parliamentary Legal Advisor, Researcher, assistants, under the commendable coordination by the Committee Secretary and;
7. The many stakeholders, in the form of organisations and individuals, who contributed to the making of this piece through the public participation process.

5 RECOMMENDATION

The Portfolio Committee on Economic Development recommends that the House adopts this report and approves the second reading of the Bill as amended following introduction by the department.

Report to be considered.

Mrs EM Coleman, MP

Chairperson: PC on Economic Development

Date: _____

