



Implementation of the Competition Amendment Act  
No.18 of 2018  
to the Portfolio Committee on Trade and Industry  
**20 OCTOBER 2020**



**competition commission**  
south africa

# OUTLINE

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# INTRODUCTION

Competition Act first passed into law 1998 to address the Apartheid legacy of legal cartels, monopolies, highly concentrated markets and exclusion of black people from the mainstream economy.

Competition Authorities became operational in 1999.

On 13 February 2019, the Competition Amendment Act No.18 of 2018 was signed into law by President Cyril Ramaphosa.

On 12 July 2019 and 13 February 2020, the President published notices in the Government Gazette which brought into force certain provisions of the Competition Amendment Act.

For the past 20 years, competition authorities have successfully dismantled cartels in many markets such as cement, construction, steel and food, levying fines of over R7 billion and establishing funds to support firms in some of the affected markets.

# INTRODUCTION (CONT..)

Besides successes in cartel enforcement, the competition authorities have not been successful in tackling abuse of market power by monopolies, especially those privately owned.

Commission's study (2018), as well as the World Bank Study (2016) on Competition in Africa found that markets in South Africa are still highly concentrated with high entry barriers, exclusion of Small Medium Enterprises (SMEs) from participation in the mainstream economy.

2019 Amendments seek to address the pervasive market concentration and barriers to entry in markets by enhancing the mandate of the competition authorities.

# OBJECTIVE OF THE AMENDMENTS

In terms of the **Memorandum on the objects of the Competition Amendment Bill, 2018**, the main objectives of the amendments to the Competition Act was to address two persistent structural constraints on the South African economy, namely:

- The high levels of economic concentration in the economy; and
- The skewed ownership profile of the economy.

In order to achieve the above objectives, the amendments:

- strengthen / clarify the provisions of the Act relating to prohibited practices, restricted horizontal and vertical practices, abuse of dominance and price discrimination and mergers;
- pay special attention to the impact of anti-competitive conduct on small and medium businesses and firms owned or controlled by historically disadvantaged persons;
- strengthen the provisions relating to market inquiries so that—
  - ✓ the outcomes of market inquiries result in action that promotes competition;

# OBJECTIVE OF THE AMENDMENTS (CONT..)

- ✓ there is guidance on how to evaluate the adverse features of a market; and
  - ✓ pay special attention to small and medium businesses and firms owned by historically disadvantaged persons;
- 
- provide the national executive with effective means of participating in competition related proceedings and the power to initiate market inquiries into a sector and to intervene in mergers that affect the national security interests of the Republic; and
  
  - promote the administrative efficacy of the Competition Commission, market inquiries and the Competition Tribunal.

# SUBSTANTIVE PROVISIONS

The amendments introduce significant changes and have a strategic impact on all areas of the Commission's functions –

- Cartels
- Vertical restrictive practices
- Abuse of dominance
- Price discrimination
- Mergers
- Exemptions
- Market inquiries
- Various procedural aspects



# CARTELS

Section 4(1)(a) – Focus has been on hard-core cartels. Even for a first-time offender, penalty can be imposed (thus “Yellow card” removed) (section 33 of the Amendments, in operation).

Market division expanded by adding allocating market shares (not in operation) (section 3 of the Amendments).

A new leniency policy must be published (section 30 of the Amendments). Current policy remains in effect until publication of a new leniency policy (section 43 of the Amendments).

Two caps for an administrative penalty – 10% for first contravention (section 59(2) of Principal Act), and 25% for repeat conduct (section 33(c) of the Amendments). Applies to all prohibited practices.

# CARTELS (CONT..)

Previous time bar provision in section 67(1) barred initiation of a complaint if initiated more than 3 years after cessation of conduct. New amendment bars referral of a complaint.

If prohibited practice ceased more than 3 years before complaint was initiated (section 37 of the Amendments), thus enables the investigation of date of cessation of prohibited practice. Applies to all prohibited practices.

Fines for criminal offences in Chapter 7 of the Principal Act (e.g. failure to appear when summonsed) increased from R2000.00 to R10 000.00, or maximum 6 months imprisonment, or both, except the section 73A offence which remains R500 000.00 or a maximum 10 year sentence, or both.

# VERTICAL RESTRICTIVE PRACTICES

A first-time offender found in contravention of section 5(1) – subject to administrative penalty. Thus “yellow card” for section 5(1) removed (section 33 of the Amendments, in operation).

Scope of the application of section 5 subject to Ministerial regulation (not in operation) (section 4 of the Amendments). The making of the regulations by the Minister is peremptory - “must make”.

# ABUSE OF DOMINANCE

## *Excessive pricing*

Deletion of the definition of excessive price and addition to detriment to customers (section 1 read with 5 of the Amendments).

Shift in the burden of proof on the dominant firm to show that a price is “*reasonable*”, if there is a prima facie case of excessive pricing (section 8(2)).

New analytical framework for assessing excessive pricing in section 8(3) – requires determination whether price is higher than a “competitive price” and whether the difference is “unreasonable” by taking into account “all relevant factors”, which may include factors set out in (a) – (f). Section 8(3)(f) contemplates Ministerial regulations in terms of s 78 regarding the calculation and determination of an “excessive price”.

# ABUSE OF DOMINANCE (CONT..)

## ***Exclusionary conduct***

Expansion of an “exclusionary act” to include “*participating in*”, and insertion of the definition of “*participate*” (ability or opportunity for firms to sustain themselves in a market). Not confined to entry and expansion.

First-time offenders of general exclusionary conduct, subject to penalty (section 33 of the Amendments, in operation) “Yellow card” removed

Expansion of refusal to supply scarce “goods” to include “services” and extension to refusal to supply scarce goods or services to “customers” not only competitors (section 5 of the Amendments).

Predation as a specified exclusionary act limited to average avoidable cost or average variable cost (section 5 read with section 1 of the Amendments).

Margin squeeze expressly recognized as an exclusionary act (section 5 of the Amendments).

# ABUSE OF DOMINANCE (CONT..)

## ***Unfair prices or other trading conditions***

New prohibition of unfair prices or unfair trading conditions required or imposed by a dominant firm in Ministerial designated sectors on small and medium businesses or firms owned or controlled by HDI's (s 8(4)(a)) Test not defined.

Avoidance of purchasing or refusal to purchase from on small and medium businesses or firms owned or controlled by HDI's in order to circumvent s 8(4)(a) also prohibited (section 8(4)(b)).

Shift in the burden of proof to the dominant firm if a *prima facie* case under s 8(4)(a) and (b) is established.

# ABUSE OF DOMINANCE (CONT..)

## *Unfair prices or other trading conditions*

Section 8(4)(d)(i) and (ii) contemplates Ministerial regulations in terms of section 78 designating sectors and firms which section 8(4) will apply, and factors and benchmarks in those sectors for determining whether prices and other trading conditions are unfair.

# PRICE DISCRIMINATION

The heading of section 9 has been changed to “**Price discrimination by the dominant firm as seller prohibited.**”(section 6(a) of the Amendments), suggesting that the scope of price discrimination does not extend to a dominant firm as a purchaser of goods or services.

The first part of the current s 9(1) which limits price discrimination to action by a dominant firm as the seller of goods or services has not been changed.

The likely effect of *Substantial Lessening of Competition* (SLC) test has been retained.

New species of price discrimination in the form of “likely effect of impeding the ability” of small and medium businesses or firms controlled or owned by HDI’s to “*participate effectively*” in s 9(1)(a)(ii). No likely SLC is required (section 6 of the Amendments).



# PRICE DISCRIMINATION (CONT..)

The requirement in section 9(1)(b) of the current Act relating to the sale in equivalent transactions of goods or services of like grade and quality has been retained for both the new and the existing price discrimination.

The target of price discrimination in section 9(1)(c) as targeting both the price itself and other price-related terms has not changed.

New prohibition in the form of avoidance of selling or refusing to sell goods or services to a purchaser that is a small and medium business or firm controlled or owned by HDI's in order to circumvent section 9(1)(a)(ii).

# PRICE DISCRIMINATION (CONT..)

If there is a prima facie case of price discrimination against small and medium businesses or firms controlled or owned by HDI's, the quantity defence is not applicable, and the burden of proof, subject to Ministerial regulations, shift to the dominant firm to show that its action did not impede the ability of small and medium business and firms controlled or owned by HDI's to participate effectively (section 9(3)).

There is a similar shift in the burden of proof if there is a prima facie case of a contravention s 9(1A), the dominant firm must show that it has not avoided selling or refused to sell to small and medium businesses or firms owned or controlled by HDI's in order to circumvent section 9(1)(a)(ii) (section 9(3A)).

# PRICE DISCRIMINATION (CONT..)

Section 9(4) contemplates Ministerial regulations made in terms of section 78 to give effect to the section including benchmarks for the application of the section and factors and benchmarks for determining whether a dominant firm's action is price discrimination that impedes the participation of small and medium sized business and firms controlled or owned by HDI's.

# EXEMPTIONS

Introduction of 1 year time limit, which may be extended by agreement for exemptions investigations (section 7(a) of the Amendments, not yet in operation).

Section 10(3)(b)(ii) amended – promotion of effective entry, participation and expansion of small and medium businesses or firms controlled or owned by HDI's (section 7(b)) .

Section 10(3)(iv) amended – economic development, growth, transformation or stability of an industry designated by the Minister (section 7(c)).

- New ground for exemption: competitiveness and efficiency gains that promote employment or industrial expansion (section 7(d)).
- Ministerial regulations may grant block exemptions (section 7(e)).

# MERGERS

Section 18A – new provision regulating mergers involving “foreign acquiring firms” (FAF) (not yet in operation), defined as “an acquiring firm (a) which was incorporated, established or formed under laws of a country other than the Republic; or (b) whose place of effective management is outside the Republic.”

Responsibility of the Presidential Committee consisting of Cabinet Members and other public officials appointed by the President.

Test “*adverse effect on national security interests (“NSI”) of the Republic.*”

NSI, including markets, industries, sectors or regions in which mergers involving a FAF must be notified to the Presidential Committee to be gazette by the President.

## MERGERS (CONT..)

Presidential regulations to regulate procedure and processes, and access to confidential information still have to be gazetted.

Compulsory dual notification to the Commission and the Presidential Committee if merger falls within the jurisdiction of the Presidential Committee.

Presidential Committee has 60 days, which may be extended by the President.

The Minister must within 30 days of the decision, publish the decision of the Committee in the gazette and inform the National Assembly, in appropriate detail, of the decision.

# MERGERS (CONT..)

Commission and Tribunal barred from considering a merger falling with the jurisdiction of the Committee if there is failure to notify the Committee. Similarly, Commission and Tribunal barred from making a decision, if the Committee has prohibited the implementation of the merger on national security grounds.

The Tribunal retains jurisdiction to impose administrative penalties for contravention of section 59(1)(d) on the parties to a merger involving a FAF.

Jurisdiction of the Tribunal and the Competition Appeal Court (CAC) ousted over matters regulated by section 18A except 18A(14) i.e. administrative penalty. Matters regulated by section 18A will be litigated in the High Court.

# MARKET INQUIRIES

Section 43A(1) – general state of competition, levels of concentration and structure of a market.

Test – adverse effect on competition – any feature or combination of features of a market restricts or distorts competition.

Amendment of section 43B – regulates the initiation and procedures for the establishment of market inquiries.

Section 43C – matters to be decided at a market inquiry.

Section 43D – duty to remedy adverse effects on competition.

Section 43E – outcome of market inquiry.

Section 43F – appeals against Commission's decision.

Section 43G – participation and representation in market inquiries.



# SECTIONS NOW IN EFFECT

<b>AMENDMENT ACT</b>	<b>CORRESPONDING SECTIONS OF PRINCIPAL ACT</b>
Sections 1, except for paragraph (d)	Section 1 - Definitions, except for the definition of a foreign acquiring firm.
Section 2	Purpose of the Act. Section 2(g) – change in the purpose of the Act
Section 5	Section 8 amendments. Change in the economic and legal test for excessive pricing, refusal to supply, predation and inclusion of buyer power provisions. Margin squeeze made an express contravention
Section 6	Section 9. Price discrimination by dominant firm as seller prohibited
Sections 7(b) to (e)	Section 10 Exemptions – additional grounds included
Section 8	Repeal of Chapter 2A
Sections 9 to 11	Mergers - expansion of the scope of section 12A Section 15 and 16 - revocation of merger approval and enforcement of merger conditions
Section 12	Section 17 - Commission and Minister's right of appeal in mergers
Section 13	Section 18 - Clarifying the right of the Minister to participate in any merger as a party

# SECTIONS NOW IN EFFECT (CONT..)

<b>AMENDMENT ACT</b>	<b>CORRESPONDING SECTIONS OF PRINCIPAL ACT</b>
Section 15	Section 19 - Increase of quorum for Commission Meeting from 2 to 3.
Section 16	Section 21 - Functions of the Commission expanded
Section 17	Section 21A - Impact studies conducted by the Commission
Section 18	Section 22 - Delegation of functions in Commission
Section 19	Section 23 - Minister designates Deputy Commissioner who is responsible for conducting market inquiries
Section 20	Section 25 - Designation of staff of Commission to appear in court of law
Sections 21 and 22	Section 26 and 31 - Number of Tribunal members and number of Tribunal acting members
Sections 23 to 26	Sections 43A – G – market inquiries
Section 27 to 28	Section 44 and 45. Confidential information and disclosure of information
Section 29 to 32	Section 49D - Consent orders in respect of market inquiries
Section 30 and 43	Section 17 - Commission and Minister's right of appeal in mergers
Sections 31 and 32	Section 49E and Section 83 - Corporate Leniency Policy update. Current CLP remains in effect until a new policy is published in government gazette

# SECTIONS NOW IN EFFECT (CONT..)

<b>AMENDMENT ACT</b>	<b>CORRESPONDING SECTIONS OF PRINCIPAL ACT</b>
Section 33	Section 59 - Administrative penalties
Section 34	Section 60 - Divestiture order by Tribunal
Sections 35(b) and 36	Section 62 and 63- Removal of jurisdiction of the Supreme Court of Appeal
Section 37	Section 67 - Limitation on bringing actions
Section 38	Section 74 - Fine increase for summons
Section 39	Section 78 - Regulations by Minister
Section 40	Section 79 – Guidelines (non-binding)
Section 41	Section 79A - Ministerial regulations in respect of advisory opinions
Section 42	Section 82 – Expansion of MOUs to matters that may be the subject of market inquiries
Section 45	Rearrangement of various sections of the Act.
Section 46	Short title and commencement.

# IMPLEMENTATION OF PROVISIONS IN EFFECT

PROVISION	PROGRESS MADE IN IMPLEMENTATION
Abuse of dominance	<ul style="list-style-type: none"><li>• New excessive pricing complaints are assessed in line with the new amendments</li><li>• Covid19 price gouging cases are prosecuted in terms of the new excessive pricing provision</li><li>• Published Buyer Bower Enforcement Guidelines</li></ul>
Price discrimination	<ul style="list-style-type: none"><li>• Published draft guidelines on the price discrimination provision of the Act</li></ul>
Exemptions	<ul style="list-style-type: none"><li>• The Commission assisted the Minister in granting block exemptions to healthcare sector, banking sector, retail property industry, hotel industry and liquid fuel wholesalers association in response to the Covid-19 pandemic</li><li>• Updated exemption forms to provide for detailed explanations - Awaiting Ministerial approval</li></ul>

# IMPLEMENTATION OF PROVISIONS IN EFFECT

<b>PROVISION</b>	<b>PROGRESS MADE IN IMPLEMENTATION</b>
Consideration of Mergers	<ul style="list-style-type: none"><li>• The Commission’s framework for assessing mergers follows the new amendments.</li><li>• For example in Simba (PepsiCo)/Pioneer merger:<ul style="list-style-type: none"><li>✓ in line with the new provision relating to the “promotion of a greater spread of ownership” the merged entity was required to create an employee share scheme with an unencumbered share of 12.9% in the merged entity and employees will be able to appoint at least one non-executive director to the board of Pioneer; and</li><li>✓ in line with the new provision relating the “ability of SMMEs or firm owned by HDIs to enter into, participate in or expand” the merged entity was required to establish a supplier development fund of R400 million to favor entry of farmers and SMMEs into their value chain</li></ul></li><li>• Updated merger notification forms - Awaiting Ministerial approval</li></ul>

# IMPLEMENTATION OF PROVISIONS IN EFFECT

PROVISION	PROGRESS MADE IN IMPLEMENTATION
Market Inquiries	<ul style="list-style-type: none"> <li>• Confirmation of Vodacom and MTN consent agreement on the reduction of data prices (arising from market inquiries) in terms of the new market inquiry provisions</li> <li>• Structures in place to conduct the next market inquiry in terms of the amended provisions of the Act.</li> </ul>
Impact Studies	<ul style="list-style-type: none"> <li>• Published forestry sector impact assessment study for public comment</li> </ul>
Confidentiality and disclosure of information	<ul style="list-style-type: none"> <li>• Amended Commission rules to provide a procedure for access to confidential information. Including new CC form for notice. - Awaiting Ministerial approval</li> </ul>
Ministerial regulations for advisory opinions	<ul style="list-style-type: none"> <li>• Draft advisory opinion regulations being drafted</li> </ul>
Delegation of functions in Commission	<ul style="list-style-type: none"> <li>• Draft delegation policy being drafted</li> </ul>
Cartel	<ul style="list-style-type: none"> <li>• Current Corporate leniency Policy remains in effect until new policy is gazzetted.</li> </ul>

# SECTIONS NOT IN EFFECT

<b>AMENDMENT ACT</b>	<b>CORRESPONDING SECTIONS OF PRINCIPAL ACT</b>
Sections 1 (d)	Section 1 - The definition of a foreign acquiring firm.
Section 3	Section 4(1)(b)(ii) inclusion of market shares.
Section 3	Section 4(6) Minister must make regulations in terms of section 78 regarding application of section 4.
Section 4	Section 5(4) Minister must make regulations in terms of section 78 regarding application of section 5.
Section 7(a)	Section 10(2A) Exemptions- Commission has one year to grant or refuse an exemption or period prescribe in terms of section 78
Section 14	Section 18A Intervention in merger proceedings involving foreign acquiring firm, Presidential determination of national security interests list, Presidential regulations
Section 35(a)	Commission and Tribunal have no jurisdiction over section 18A matters except for section 18A(14) dealing with Tribunal imposing admin penalties

# IMPACT OF THE EXPANDED MANDATE ON OPERATIONS

These amendments, including the previous amendments have introduced changes to the Commission's operations.

These have resulted in an expanded mandate with significant impact on workload and expenditure vs budget.

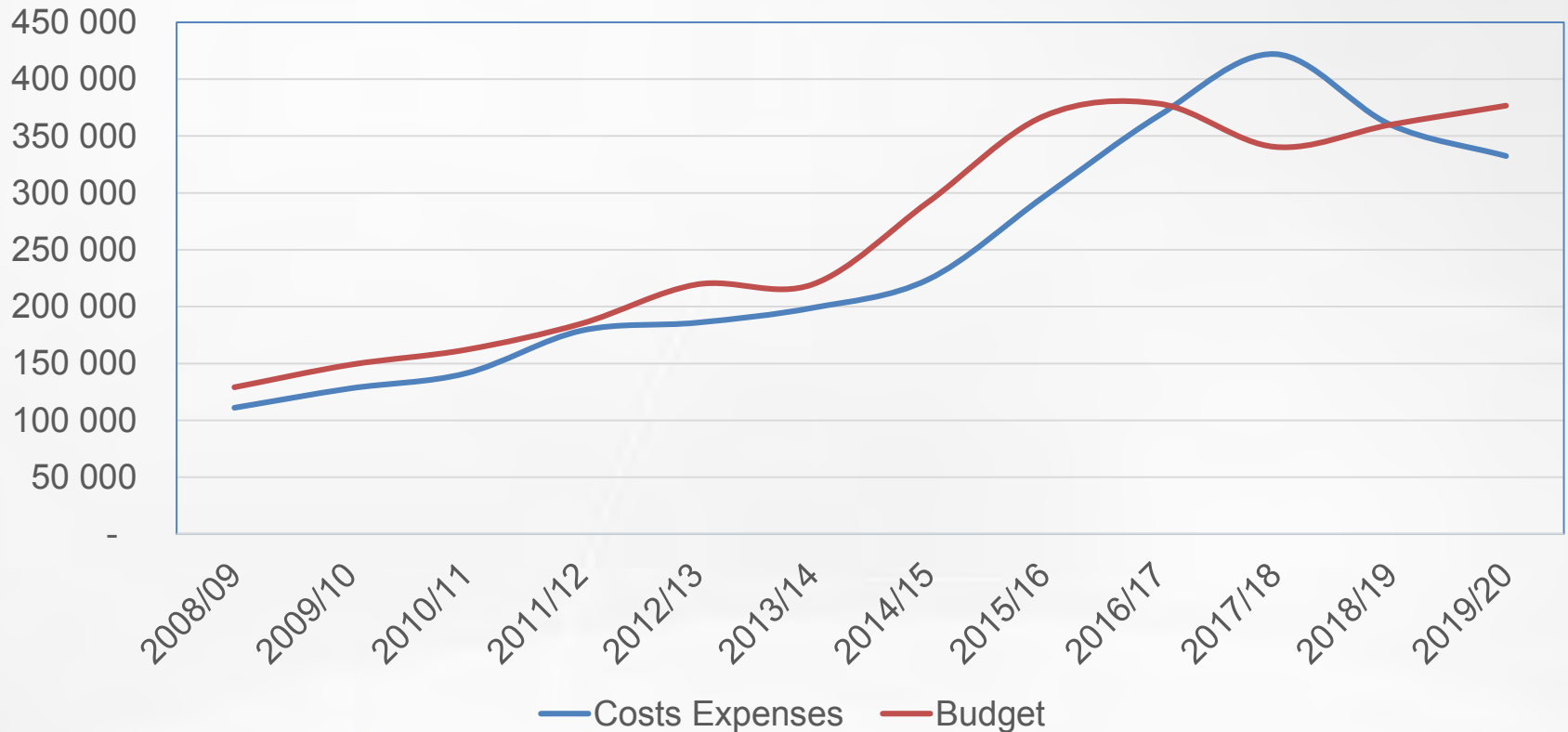
We continue to receive an increasing number of cases, despite prioritized areas of focus.

The implication of the new expanded mandated may further impact our workload meaning that some of the work pertaining to the amendments might not be fully realised.



# IMPACT OF THE EXPANDED MANDATE ON OPERATIONS

Expenditure vs Budget



# CONCLUSION

The amendments have introduced far reaching changes to the Competition Act which have given competition authorities a greater scope to advance the objectives of the Competition Act.

This includes the promotion of competition and economic transformation through addressing, *inter alia*, the structures and deconcentrating of markets, also greater participation by SMEs and HDIs.

The new provisions have also been timely in enabling competition authorities to respond to:

- The need for exemptions required by certain sectors such as healthcare and banking sector in order to respond to the Covid-19 pandemic;
- Price gouging in respect of essential goods such as hand sanitizers and masks, and unjustified inflation of prices of essential goods in public procurement.

Progress has been made in the implementation of the sections which have been brought into effect.

**THANK YOU!**

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