



PRESENTATION TO PC: IMPLEMENTATION OF COMPETITION AMENDMENT ACT

29 October 2019



**economic
development**

Economic Development Department
REPUBLIC OF SOUTH AFRICA



Key Terms

Reference to 'the Act' means the Competition Act, 1998 (Act 98 of 1998)

Reference to 'the Amendment Act' refers to the Competition Amendment Act, 2018 (Act 18 of 2018).



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- 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.

1. Background to the Competition Act, 1998 (Act 98 of 1998)

Background: The Competition Act, 1998

- The Competition Act, 1998 (Act 89 of 1998)
 - provides the legislative framework for the competition authorities to investigate and penalise anti-competitive conduct through classifying certain practices as prohibited:
 - Cartels, collusion and price-fixing
 - Abuse of dominance including certain types of price discrimination, excessive pricing and predatory pricing
 - regulates mergers and acquisitions and addresses competition and public interest issues, such as employment and the promotion of small businesses
 - enables market inquiries to be undertaken in specific sectors

Powers of the competition authorities:

- Mergers can be prohibited or conditions imposed on them
- Prohibited acts can result in a penalty of up to 10% of a firm's turnover; and for corporate collusion, a jail sentence of up to 10 years
- Market inquiries can result in recommendation

Background: Preamble of the 1998 Act

The Preamble of the 1998 Competition Act states: The people of South Africa recognise:

- That apartheid and other discriminatory laws and practices of the past resulted in **excessive concentrations of ownership and control within the national economy**, inadequate restraints against anticompetitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.
- That the economy must be open to **greater ownership by a greater number of South Africans**.
- That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.
- That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans, in order to:

Background: Preamble of the 1998 Act Conti...

- To provide all South Africans equal opportunity to participate fairly in the national economy;
- To achieve a more effective and efficient economy in South Africa;
- To provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
- To create greater capability and an environment for South Africans to compete effectively in international markets;
- To restrain particular trade practices which undermine a competitive economy;
- To regulate the transfer of economic ownership in keeping with the public interest;
- To establish independent institutions to monitor economic competition; and
- To give effect to the international law obligations of the Republic.

Purposes of the Competition Act of 1998

The purpose of the Act states it is to promote and maintain competition in the Republic in order –

- a) to promote the efficiency, adaptability and development of the economy;
- b) to provide consumers with competitive prices and product choices;
- c) to promote employment and advance the social and economic welfare of South Africans;
- d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- f) to promote a **greater spread of ownership**, in particular to **increase the ownership stakes of historically disadvantaged persons**

2. Review of the Competition Act, 1998 (Act 98 of 1998)

Review of the Principal Act: Competition Act

The review of the Act undertaken by EDD and Competition Commission underscored the following areas for change:

1. Focus on the impact of anti-competitive conduct on small businesses and firms owned by black South Africans
2. Address economic concentration as a structural issue in the economy
3. Strengthen regulator power to address abuse of dominance by large companies
4. Align competition-related processes and decisions with other public entity policies, programmes and interests
5. Strengthen the role of the Competition Authorities and the Executive in certain competition issues.
 - As a key mechanism to achieve these priorities, strengthen the market inquiry system, that lays the basis for actions, to address high levels of concentration
 - Enhance the administrative capacity and efficacy of the competition regulatory authorities and their processes.

Purposes of the Amendment Act, 2018

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

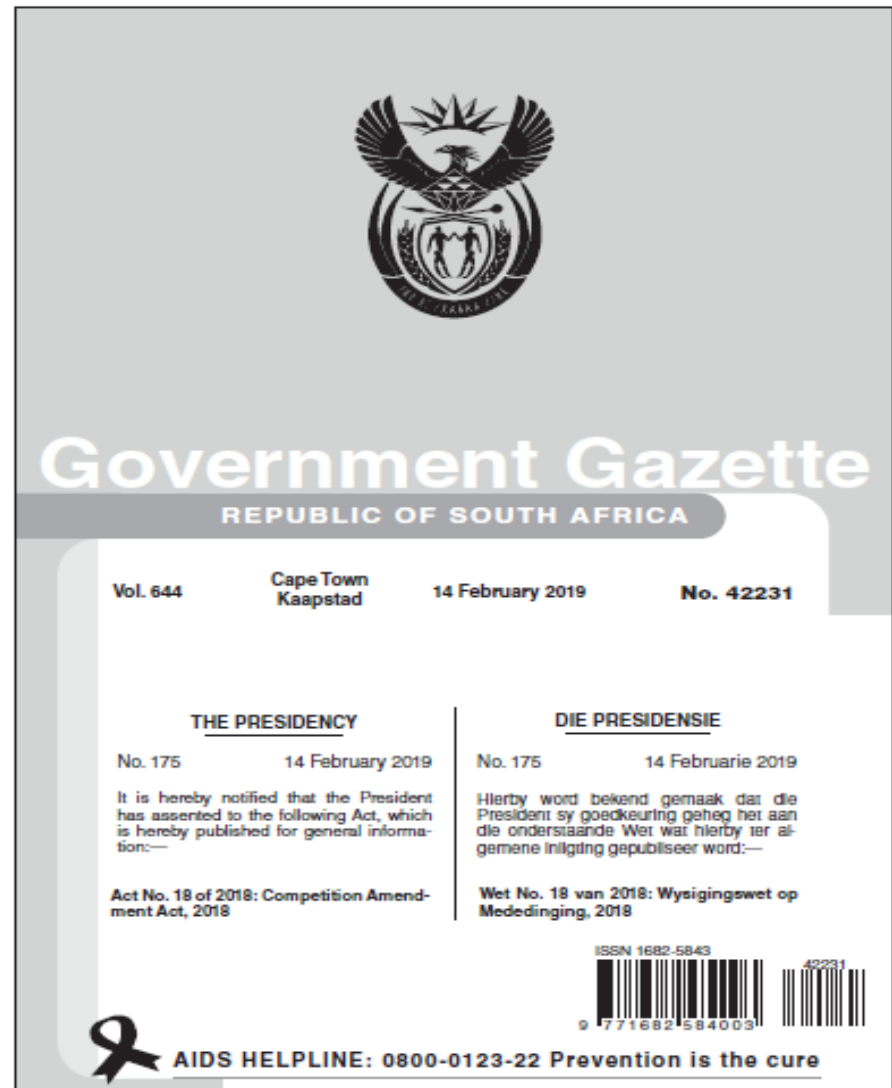
Benefits of the Amendment Act, 2018

The Amendment Act:

1. Provides a boost for SMEs and economic inclusion, opening up the economy to fresh investment and innovation
2. Provides a clear mandate to the competition authorities to address economic concentration in a balanced manner and to promote economic transformation
3. Provides a greater clarity to firms and investors on prohibited practices and what constitutes abuse of dominance
4. Provides an improved administrative efficiencies in the work of the competition authorities and facilitative powers to the Executive

February 2019 Presidential Approval

On the 14th of February 2019 the President approved the Competition Amendment Act



July 2019 Presidential Promulgation



PROCLAMATION

by the

President of the Republic of South Africa

No. R. , 2019

COMMENCEMENT OF CERTAIN SECTIONS OF THE COMPETITION

AMENDMENT ACT, 2018 (ACT NO. 18 OF 2018)

In terms of Section 46 of the Competition Amendment Act, 2018 (Act No. 18 of 2018), I hereby fix the date of publication of this Proclamation in the *Gazette* as the date on which the sections of the Act specified in the Schedule hereto shall come into operation.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria
this 06th day of July Two thousand and nineteen.

PRESIDENT


MINISTER OF THE CABINET

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SCHEDULE

COMMENCEMENT OF CERTAIN SECTIONS OF THE COMPETITION

AMENDMENT ACT, 2018 (ACT NO. 18 OF 2018)

Sections specified in the following table take effect on the date of publication of the accompanying Proclamation in the *Gazette*:

Sections 1, except for paragraph (d)
Section 2
Section 5, other than section 8(4) of the Competition Act, 1998
Section 7(b) to (e)
Sections 8 to 13
Sections 15 to 26
Sections 29 to 32
Section 33, other than in so far as paragraph (a) thereof relates to section 8(4) and 9(1A) of the Competition Act, 1998
Section 34
Section 35(b)
Sections 36 to 44
Section 45 (b) and (d) to (i)
Section 46

3. Internal Departmental Processes for the Implementation

Recommendations of the Independent Expert Panel

To strengthen efficacy of competition authority and the administrative capacity and their processes:

- The Minister established a temporary Expert Panel to advise him on the Institutional Requirements associated with the Amendment of the Act; Phase 1 Report submitted May 2019 (Phase 2 Report – Forensic Report - being finalised). The highlight of the report are the following:

Resource and System Requirements

- The panel considered the current organisational structure of the Commission and various iterations to address the changes flowing from the Amendment Act.
- The Panel's recommendation is that re-structuring plans are necessary and need to be done by an organisational design expert, on the basis of a skills audit.
- There should be a balancing act relating to insourcing and outsourcing models. Caution must be taken against an exponential increase in the headcount of the Commission.
- A need for a Deputy Commissioner (COO) responsible for administrative, management and operational functions.
- The Minister and the Commissioner will finalise a delegation of authority framework for the COO.

Recommendations of the Independent Expert Panel

Funding Model

- The panel, after considering models in other jurisdictions, concurs that current model be retained, which is made up of three revenue streams: government grant as a primary source of funding; merger filing fees; and interest earned on penalties levied.

Ministerial Protocols: Confidentiality and Merger Participation

- Within Department: Implementation of Confidentiality Protocols, Document Management Systems, In-depth Analysis of Merger Records with detailed recommendations to Minister, Merger Participation Standard Operating Procedures, targeted Merger Participation

Caseload Bottlenecks

- The caseload management system be revised to optimise functioning.
- The Commission has a case management committee that manages the case pipeline.
- The Committee will serve as an internal review mechanism of the efficiencies of cases that are being investigated and those that are at litigation stage; and also guide recommendations to the Commission.

Institutional Arrangement of the Competition Function: NMOG

- National Macro Organisation of Government in process - merging of DTI and EDD to create Department of Trade, Industry and Competition (ditc)
- Key Programme will be Competition Policy and Economic Planning Branch:
 - Purpose: To develop and roll out policy interventions that promote competition issues, through effective economic planning, spatial implementation and aligned investment and development policy tools
 - Function:
 1. **Exercise oversight on the activities of the Competition Authorities**
 2. Participate in competition authority and legislative processes in line with the Competition Policy priorities to promote synergy between competition economic development policy development and functioning of regulators
 3. Develop and roll out competition policy based on economic policy planning aligned to improved development outcomes
 4. Coordinate the implementation of competition policy recommendations and commitments (mergers and acquisitions, market inquiries, public interest commitments), through Spatial Economic Development Action Plans and Frameworks implemented by various sectors, including coordination with provincial administrations
 5. Lead the development and implementation of practical investment and development support mechanisms to support spatial economic implementation, including promoting synergy with associated financial institutions and building capacity of social partners
 6. **Provide technical and administrative support to, and liaison with the Competition Authorities on behalf of, the Presidential Committee on foreign interest in mergers (Section 18A)**

4. Significant Implementation Actions

Ministerial Regulations



4 No. 42760

GOVERNMENT GAZETTE, 10 OCTOBER 2019

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

ECONOMIC DEVELOPMENT DEPARTMENT

NO. 1316

10 OCTOBER 2019

NOTICE IN TERMS OF SECTION 78 OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998)

PRICE DISCRIMINATION REGULATIONS AND BUYER POWER REGULATIONS

By virtue of the powers vested in me in terms of section 78 of the Competition Act, 1998 (Act No. 89 of 1998), I Ebrahim Patel, Minister of Trade and Industry, hereby –

- (a) publish the regulations in Schedule 1 and 2 hereto for public comment; and
- (b) request that any comments in this regard be submitted to: Ms Linda Herbst on competitionregulations@economic.gov.za, within twenty eight (28) days from the date of publication of this Notice.

MR EBRAHIM PATEL
MINISTER OF TRADE AND INDUSTRY
DATE: 8 OCTOBER 2019

Guidelines issued by Competition Commission



Press Release
For Immediate Release
16 October 2019

COMMISSION RELEASES PRICE DISCRIMINATION AND BUYER POWER DRAFT GUIDELINES

The Competition Commission has issued the draft Price Discrimination and Buyer Power Draft Guidelines following the announcement of the regulations by the Minister of Trade and Industry, Ebrahim Patel, last week.

The Department of Trade, Industry and Competition published the draft regulations for public comment in terms of section 78 of the Competition Act (Act No 89 of 1998). The regulations deal with buyer power and price discrimination in terms of (section 8(4) and (section 9) respectively.

In February this year, President Ramaphosa signed the amendments to the Competition Amendment Act, and in July this year Minister Patel promulgated certain sections of the amendments to the Act. The amendments seek to address persistent concentration and promote greater participation in the economy by SMMEs and companies owned by historically disadvantaged persons (HDP companies).

One of the primary objectives of the Act is to provide an opportunity for all South Africans to participate fairly in the national economy. The intention of the regulatory guidelines is to provide small businesses with remedies against price discrimination by dominant firms and abuse of power by dominant buyers through imposition of unfair prices and other trading conditions.

"Making markets more inclusive not only addresses social imperatives, but also provides a platform for more competitive markets and economic growth. A large and vibrant SME sector, including entry and expansion of HDP companies, is essential in providing dynamism, growth and employment opportunities to an economy," says Competition Commissioner, Tembinkosi Bonakele.

"Some of these firms will also grow and become future industry leaders. The consumer benefits manifest themselves in lower prices, but also greater choice, more product variety and innovation. The provisions dealing with buyer power and price discrimination are important amendments to the Competition Act, and have been proposed to provide small businesses with protection against abusive practices by either dominant suppliers, in the case of price discrimination, or customers, in the case of buyer power," he says.

The draft guidelines will be published in the Government Gazette on Friday 18 October for comments by interested parties. These written representations should be submitted within 28 days of the publication of the Government Gazette.

NB: BACKGROUND AND GUIDELINES ATTACHED

[ENDS]

Issued by:

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Competition Commission issued guidelines 16 October 2019: <http://www.compcom.co.za/2019-media-releases/>

Purpose of the Guidelines

The Guidelines seek to support fair participation in the economy by small businesses.

Price Discrimination

- Small businesses and historically disadvantaged persons are frequently charged higher prices than larger firms for their critical inputs
- Aim to bring greater degree of certainty to firms that seek to comply with the Act

Buyer Power

- The weak bargaining power of small business and historically disadvantaged persons as suppliers is some times exploited by power buyers
- The onus to demonstrate that the price adjustment is objectively justified is borne by the powerful buyer

Intervention in merger proceedings involving foreign interest

- The next significant action to be done is the implementation of Section 18A, the intervention in merger proceedings involving foreign interests.
- The President must establish a Committee responsible for considering
 - *“(1)...whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic.*
 - *(2) The Committee...must consist of...Cabinet members and other public officials as may be...appointed by the President.”*

5. Financial Implications

4. Financial Implications for the Competition Commission

MTEF SPREAD

Functions	2020 / 2021	2021 / 2022	2022/2023
Total	R 42 630 194,14	R80 006 090,11	R122 720 654,64

- The figures are for funding Market conduct, Legal Services, Advocacy & Screening, additional Deputy Commissioners.
- These figures are based on the implementation of the Amendment Act in the 2020/21 MTEF period, culminating in the full implementation in outer 2 Financial Years.
 - Implementation of Phase 1 and Phase 2 Reports
- The total figure over the MTEF is R245 356 939, including Competition Policy

6. Implications for the Competition Tribunal

Implications for the Competition Tribunal

- Amended Sections Promulgated 12 July 2019 in effect:
 - Section 16 - Clarifying the Tribunal's powers.
 - Section 26 - Number of Tribunal members:
 - 2019/2020 budget made provision for additional full-time member and additional senior case manager
 - Section 31 - Number of Tribunal acting members:
 - Requests will be sent to Ministry as required
 - Section 54 - Tribunal powers to amend or withdraw any direction or summons
 - Section 58 - Orders of Tribunal in respect of market inquiries
- Nature of cases likely to vary, with increased complexity.
- Volume and length of cases anticipated to increase.
 - Need for increased capacity.
 - Administrative costs associated with the adjudicative process will increase.
- Training of case managers and Tribunal members ongoing.

- Note the activities that are being executed and others still to be implemented.
- Also note the regulations and guideline are still out for public consultation.
- The required financial resources have been submitted to National Treasury and are still to be appropriated during the 2020 February budgetary speech.



SIYABONGA



Economic Development Department