

The Competition Amendment Bill and Small and Medium Businesses – a bold step towards economic inclusion.

Section 1: Introduction and summary

The new Competition Amendment Bill that is being considered by Parliament, contains a number of amendments that will positively impact on small and medium-sized businesses (SMEs) and those businesses owned or controlled by black South Africans.

The proposed amendments in the Bill seek to provide the Competition Authorities with improved powers which will address the persistent issue of economic concentration in South Africa through the introduction of an enhanced market inquiry process.

Economic concentration – which results when a few large dominant firms account for the majority of the output or purchases in a market – can have a number of negative effects. It can lead to higher prices for consumers; reduced investment and innovation in the industry; and can also create an environment which impedes the ability of small and medium businesses, particularly black-owned businesses, to participate fairly in the market.

The provisions for market inquiry in the Bill, provide the Competition Commission with the powers to conduct inquiries in a market or sector to determine if the structural features of that market – including high levels of concentration and lack of competition – leads to negative outcomes like unfair pricing, lower levels of employment, lower investment and reduced opportunities for small and medium businesses to participate, and to propose binding remedies which will directly address these negative features.

The Bill also proposes a number of amendments which deal specifically with small and medium businesses. With the amendments it is expected that price discrimination or excessive pricing by dominant firms which makes it hard for small and medium businesses to compete can be better litigated. It is also expected that other abuses of dominance by large firms like predatory pricing, margin squeezes, and refusing to supply scarce resources, that impede the ability of small and medium businesses to operate can be litigated by the authorities.

The Bill also has provisions which make it easier for the authorities to exempt collaboration between small and medium businesses which enable industrial expansion, better aggregate employment, and economic growth, transformation and development.

Small and medium businesses are an important part of the South African economy. Small and medium businesses provide opportunities for employment across a number of segments of the labour force, including low-skilled workers, and provides opportunities for skills development. Small and medium businesses that generate

jobs and value are therefore an important channel to address inclusion and reduce poverty. In addition, entrepreneurial opportunities can represent an important channel for economic participation and transformation, by allowing disadvantaged South Africans, including youth and women to create their own opportunities to participate in the economy.

Section 2: Relevant section changes – 14 improvements in the Competition Act

The Competition Act has provisions currently that deal with

- Dominant firms (those generally with market shares above 45%; or those firms which have “market power”)
- Small businesses.

The Competition Amendment Bill retains the definitions of dominant firms but now expands small business to ‘small and medium business’.

This Note highlights 14 areas of change in the Bill that will make it easier for SMEs and black-owned businesses to operate in the market.

First, the Bill introduces a new restriction on price discrimination by dominant firms that will support SMEs and black-owned businesses against unfair pricing policies.

The new provision in section 9(3) says:

“When determining whether the dominant firm’s action is prohibited price discrimination, the dominant firm must show that its action does not impede the ability of small and medium enterprises and firms controlled or owned by historically disadvantaged persons to participate effectively”.

The amendment to section 9(1)(a) removes the word ‘substantially’ in the test that applies on price discrimination that ‘prevents or lessens competition’.

What this means: The current Act prohibits price discrimination by a dominant firm towards customers, under certain circumstances. The amendments made to section 9(3) will make it more difficult for dominant firms to unfairly discriminate against smaller customer firms through charging higher prices that has the effect of impeding (obstructing or preventing) SMEs or black-owned businesses from participating in a market.

The amendment made in section 9(1)(a) makes the legal test that applies on a dominant firm tougher, in that it requires that price discrimination must not ‘prevent or lessen competition’; rather than the current provision ‘**substantially** prevent or lessen competition’.

Second, the Bill introduces a new provision to prohibit dominant firms from imposing excessively low prices on SME or black-owned suppliers, to the

point where the SMEs or black-owned businesses are obstructed or prevented from staying in business.

The new provision in section 8(1)(d)(vii) says (underlined is the new section):

“It is prohibited for a dominant firm to engage in any of the following exclusionary acts, unless the firm concerned can show technological efficiency or other pro-competitive gains which outweigh the anti-competitive effect of requiring a supplier which is not a dominant firm, particularly a small and medium business or a firm controlled or owned by a historically disadvantaged person, to sell its product to the dominant firm at a price which impedes the ability of the supplier to participate effectively”.

What this means: The current Act does not specifically deal with practices by dominant firms that make it difficult for their suppliers to stay in business. An example may be when a dominant firm forces a supplier to sell to them at a price which is too low, or to accept payment terms which are too long. SMEs and black-owned businesses are most vulnerable to this type of action by dominant customers because of their size.

The amendment made in section 8(1)(d)(vii) specifically states that such action is prohibited unless the dominant firm can show that their action resulted in technological efficiency or other pro-competitive gains which outweigh the anti-competitive effect. The provision has a particular focus on SMEs and black-owned businesses.

Third, the Bill introduces a new provision to prohibit dominant firms refusing to supply customers with goods and services when it is economically feasible to do so.

The amendment in section 8(1)(d)(ii) says (underlined is the new section):

“It is prohibited for a dominant firm to engage in any of the following exclusionary acts, unless the firm concerned can show technological efficiency or other pro-competitive gains which outweigh the anti-competitive effect of refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible”.

What this means: The current Act does not specifically deal with instances where a dominant firm refuses to supply a customer with a good or service without their being a rational economic reason. This is often done to the detriment of SMEs and black-owned businesses by dominant firms, to keep SMEs and black-owned businesses out of the market.

The amendments made in section 8(1)(d)(ii) specifically prohibit this action unless the dominant firm can show that their action resulted in technological efficiency or other pro-competitive gains which outweigh the anti-competitive effect.

Fourth, the Bill clarifies that predatory pricing by dominant firms is prohibited, and gives the competition authorities more defined tools to determine when predatory pricing is happening.

The amendment in section 8(1)(d)(vi) read with the new definitions for “predatory prices”, “average avoidable cost” and “average variable cost” says (underlined is the new section):

“It is prohibited for a dominant firm to engage in any of the following exclusionary acts, unless the firm concerned can show technological efficiency or other pro-competitive gains which outweigh the anti-competitive effect of selling goods or services at predatory prices.

“predatory prices means prices for goods or services below the firm’s average avoidable cost or average variable cost

“average avoidable cost means the sum of all costs, including variable costs and product-specific fixed costs, that could have been avoided if the firm had not produced an identified amount of additional output

“average variable cost means the sum of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of that product.”

What this means: Predatory pricing is the pricing of goods or services at such a low level that other firms cannot compete and are forced to leave the market, after which the dominant firm increases their prices again. SMEs and black-owned businesses are often vulnerable to this type of activity by dominant firms, and are the first to be forced out of the market given their available resources.

The current act provides does not provide appropriate benchmarks to determine if a dominant firm is engaging in predatory pricing.

The new definitions and benchmarks in the Bill provides greater clarity for the competition authorities in determining if a firm’s pricing constitutes predatory pricing.

Fifth, the Bill introduces a new provision which gives firms and associations grounds to apply for exemption of collaboration between them if it allows for greater entry, participation and expansion of SMEs and black-owned businesses in a market.

The amendment in section 10(3)(b)(ii) says (underlined is the new section):

“The Competition Commission may grant an exemption only if the agreement or practice concerned, or category of agreements or practices concerned, contributes to the promotion of the effective entry into, participation in and expansion within a market by small and medium business, or firms controlled or owned by historically disadvantaged persons”.

What this means: the current Act provides powers to the Commission to exempt collaboration between firms if it promotes the ability of small businesses to become competitive. These grounds however are too narrow to exempt other legitimate collaboration between SMEs and black-owned businesses which allows for entry into and expansion in a market.

The amendment in section 10(3)(b)(ii) extends the exemption to medium businesses as well as small businesses, and gives the Commission the ability to look at whether the collaboration can lead to entry, participation and expansion of SMEs and black-owned businesses in the market.

Sixth, the Bill introduces a new provision which gives firms and associations grounds to apply for exemption of collaboration between them if it allows for certain policy objectives, which are consistent with the purposes of the Act.

The amendment in section 10(10) says (underlined is the new section):

“The Minister may, after consultation with the Competition Commission, and in order to give effect to the purposes of this Act as set out in section 2, issue regulations in terms of section 78 exempting an agreement or practice or category of agreements or practices from the application of this Chapter.”

What this means: In many jurisdictions, including the EU, collaboration between smaller firms is often allowed if their aggregate market share does not exceed a certain level. Such provisions often allow SMEs to enter into agreements together to share facilities or resources, or make investment together, which makes it easier for them to compete with larger firms. The current Act does not provide for this.

The amendment in section 10(10) gives the Minister the power to issue regulations which will provides this type of exemption, in certain circumstance, including if it will ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.

Seventh, the Bill makes it clear that, when considering a merger, the competition authorities must consider public interest issues like the impact the merger will have on SMEs and black-owned businesses in the market.

The amendments to section 12A(1) and 12A(1A) says (underlined is the new section):

“When required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition. Despite its determination, the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds”.

What this means: The current Act does specify that the competition authorities must consider whether a merger can be justified on public interest grounds, however it is somewhat ambiguous in its current wording.

The amendments to subsection 12A(1) and introduction of new subsection 12A(1A) clarifies that the competition authorities must determine if a merger can or cannot be justified on public interest grounds, even if the competition authorities have determined that a merger can or cannot be justified based on its impact on competition.

Eighth, the Bill clarifies that when the competition authorities consider if a merger can be justified on public interest grounds, they must consider the effect the merger will have on the ability of SMEs and black-owned businesses to enter, participate and expand in the market,

The amendment to section 12A(3) says (underlined is the new section):

“When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in and expand within the market”.

What this means: the current Act requires the competition authorities to consider the effect the merger will have the ability of small business “to become competitive” in the market when consider if the merger can be justified on public interest grounds. However, it does not provide for a consideration of the effect of the merger on medium business, while the term “to become competitive” is too narrow.

The amendment to section 12A(3) makes it clear that the competition authorities must also consider the effect on medium business, and clarifies, as was initially intended in the Act, that the authorities must consider whether merger will make it harder for SMEs and black-owned businesses to enter, participate and expand in the market.

Ninth, the Bill clarifies that the Minister has the right, in certain circumstances, to appeal mergers decisions by the Competition Tribunal to address public interest issues like the impact the merger will have on SMEs and black-owned businesses.

The amendment to section 17(1)(c) says (underlined is the new section):

“Within 20 business days after notice of a decision by the Competition Tribunal in terms of [a merger], an appeal from that decision may be made to the Competition Appeal Court, subject to its rules, by the Minister on matters raised in terms of [public interest], where the Minister participated in the Competition Commission’s or Tribunal’s proceedings in terms of section 18 or on application for leave to appeal to the Competition Appeal Court”.

What this means: the current Act does not provide the Minister with the right to appeal decisions by the Tribunal where the Minister believes that public interest issues, like the impact the merger will have on SMEs and black-owned businesses in the sector, have not been appropriately considered.

The amendments to section 17(1)(c) clarifies that the Minister has this right to appeal a decision of the Tribunal on matters of public interest where the Minister participated in the proceedings of the Competition Commission or Tribunal on public interest grounds, or upon application to the Competition Appeal Court.

Tenth, the Bill provides the Competition Commission with the powers to conduct a formal inquiry into markets where it has reasonable to believe that the structure of that market leads to higher levels of concentration, and barriers to entry which particularly impact SMEs and black-owned businesses, and gives the Commission the powers to propose binding remedies to address these structures.

The amendments to 43A(3) read together with 43B(1), 43C(1) and (2) and with the powers in 43D(1) says (underlined is the new sections):

“The Competition Commission, may conduct a market inquiry at any time, subject to [certain procedural rules], if it has reason to believe that any feature or combination of features of a market for any goods or services impedes, distorts or restricts competition within that market; or to achieve the purposes of this Act.

“Any reference to a feature of a market for goods or services includes:

- The structure of the market, including levels of concentration and barriers to entry in a market;
- The outcomes observed in the market, such as ownership, prices, innovation, employment, and the ability of national industries to compete in international markets; and
- The conduct in that or any related market.

“In a market inquiry, the Competition Commission must decide whether any feature, including structure and levels of concentration, of each relevant market for any goods or services impedes, restricts or distorts competition within that market.

“In making its decision in terms of subsection (1)(a), the Competition Commission must have regard to the impact of the adverse effect on competition on small and medium businesses, or firms controlled or owned by historically disadvantaged persons.

“Subject to the provisions of any law, the Competition Commission may, in relation to each adverse effect on competition, take action to remedy, mitigate or prevent the adverse effect on competition.”

What this means: the amendments to sections 43A, 43B, 43C, 43D enhance the market inquiry provisions in the Act and provide the Competition Commission with the explicit powers to deal with economic concentration directly.

Economic concentration, which refers to markets where one or a few companies dominate the sector, remains a problem in South Africa. Economic concentration has many negative effects, including unfair pricing which can impact consumers and SMEs and black-owned businesses, and can lead to an environment which makes it difficult for SMEs and black-owned businesses to participate in the market.

The new provisions thus empower the Commission to consider the impact the structure of an existing market has on the ability for SMEs and black-owned businesses to participate in that market and gives the power to propose remedies which can open up the market to greater participation of SMEs and black-owned businesses.

Eleventh, the Bill removes the provision in the Act which says that a dominant firm has to be found guilty of certain prohibited practices twice before they are penalized.

The amendment to section 59(1) says (underlined is the new section):

“The Competition Tribunal may impose an administrative penalty for a prohibited practice, [including all types of restricted horizontal practices, restricted vertical practices, abuse of dominance and price discrimination.”

What this means: the current Act distinguishes between prohibited practices by dominant firms which are specifically listed in the act (often referred to as *per se* offences), and those which require the competition authorities to apply their judgement based on parameters in the Act (often referred to as *rule of reason* offences). In the current Act, the Tribunal may not impose a penalty on a dominant firm if they're found guilty of a rule of reason offence, unless it has committed the offence more than once. This is often referred to as the “yellow-card” provision.

The implication is that the competition authorities have to commit time and resources to finding a dominant firm guilty, without the right to impose a penalty if the dominant firm is found guilty. As a result many acts of abuse by dominant firms, including those which impact SMEs and black-owned businesses in the market, go unpunished.

The new provisions in the Bill do away with this distinction between *per se* and *rule of reason* offences for the purposes of imposing penalties, and ensures that all prohibited acts by dominant firms can attract a penalty of up to 10% of turnover.

Twelfth, the Bill introduces new provisions which say that Competition Tribunal the may impose a higher fine if the offence impacted SMES, and the gives the Tribunal the right to impose a fine of up to 25% of turnover for repeat

offences and can allow for penalties to be extended to holding companies as well.

The amendments to sections 59(2A), 59(3)(d) and 3A say (underlined is the new section):

“An administrative penalty imposed in terms of subsection (1) may not exceed 25 per cent of the firm’s annual turnover in the Republic and its exports from the Republic during the firm’s preceding financial year if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice.

“When determining an appropriate penalty, the Competition Tribunal must consider the market circumstances in which the contravention took place, including whether, and to what extent, the contravention had an impact upon small and medium businesses and firms owned or controlled by historically disadvantaged persons.

“In determining the extent of the administrative penalty to be imposed, the Competition Tribunal may increase the administrative penalty to include the turnover of any firm or firms that control the respondent, where the controlling firm or firms knew or should reasonably have known that the respondent was engaging in the prohibited conduct.”

What this means: the current Act limits the maximum fine which the Tribunal may impose on a dominant firm found guilty of a prohibited act to 10% of turnover irrespective of whether they are a repeat offender, and does not allow the Tribunal to extend the fine to controlling firms even if the controlling firm knew about the offence. This is very different to many international jurisdictions, including the EU, where repeat offences are severely punished, and affiliated firms who benefitted from the offence can also be fined.

The provisions in the sections 59(2A) and 59(3A) thus bring the South African law in line with these other jurisdictions, and send a strong message to dominant firms which engage in anti-competitive behaviour, which often has a very detrimental effect on SMEs and black-owned businesses, that their actions can be punished meaningfully.

The provisions in section 59(3)(d) specifically require the Tribunal to consider the impact of the anti-competitive acts by dominant firms SMEs and black-owned businesses.

Thirteenth, the Bill requires that the Competition Commission publishes guidelines to give more clarity around how it will determine if the actions of a dominant firm impedes the ability of its suppliers to participate in the market.

The amendment to section 8(4) says (underlined is the new section):

“The Competition Commission must publish guidelines in terms of section 79 setting out the relevant factors and benchmarks for determining whether the practice set out in subsection (1)(d)(vii) impedes the ability of a firm which is not a dominant firm, particularly a small and medium business or a firm owned or controlled by a historically disadvantaged person, to participate effectively.”

What this means: 8(4) require the Competition Commission to publish guidelines, and the new provisions in section 79 provide for a process around how the Commission should consult with interest parties before publishing new guidelines.

This provides greater market certainty to all parties, including SMEs and black-owned businesses, around what types of behaviour may be considered anti-competitive and impede the ability of an SME or black-owned business to participate in the market.

Fourteenth, the Bill introduces a more flexible definition for small business, and also introduces a definition for medium business as well.

The new definitions say (underlined is the new provision):

“small business means a small firm determined by the Minister by notice in the Gazette, or if no determination has been made, as set out in the National Small Business Act, 1996 (Act No. 102 of 1996).

“medium-sized business means a medium-sized firm as determined by the Minister by notice in the Gazette.

“small and medium business means either a small business or a medium-sized business”.

What this means: the current Act defines small business narrowly, and makes no provision for medium-sized businesses. The amendments in the definitions and the relevant sections in the Bill provides more flexibility to determine what an SME is in the context of certain industries or markets.

Section 3: Background Note on the Competition Act and the tabling of amendments.

The Minister of Economic Development has recently introduced the [Competition Amendment Bill \(Bill No. 23 of 2018\)](#) (the “Bill”) to Parliament, which seeks to amend the Competition Act. This is the first major amendment to the Competition Act (Act No. 89 of 1998) since it was signed into law by President Nelson Mandela nearly 20 years ago.

The Competition Act provides the legislative framework for the competition authorities to investigate and penalise anti-competitive conduct, regulate mergers and acquisitions and conduct market inquiries to determine the state of competition in a given market. These issues address ownership and control in our economy – and the impact that this has on competition.

South Africa's Competition Act is not limited to narrow changes in ownership and competition alone. It also aims more broadly to promote inclusive growth and enhance the positive impact of companies on society. Thus it also provides for identified public interest considerations such as employment and the promotion of small and medium businesses, to be considered together with competition issues.

Parliament has invited interested parties to provide written comment on the Competition Amendment Bill by no later than **17 August 2018**. Details of how to have your say can be found here: <https://www.parliament.gov.za/committee-notice-details/80Morning>.

As a small or medium business it's important to make sure your voice is heard. For more information on the process please contact Mr Peter-Paul Mbele on (021) 403 8072 or 083 412 1577 or by email at pmbele@parliament.gov.za