



# Government Gazette

**REPUBLIC OF SOUTH AFRICA**

Vol. 530 Cape Town

28 August 2009

**No. 32533**

## **THE PRESIDENCY**

No. 875

28 August 2009

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

**No. 1 of 2009: Competition Amendment Act, 2009.**



**AIDS HELPLINE: 0800-123-22 Prevention is the cure**

GENERAL EXPLANATORY NOTE:

- [ ] Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.

(English text signed by the President.)  
(Assented to 26 August 2009.)

ACT

To amend the Competition Act, 1998, so as to provide certainty with regard to the concurrent jurisdiction between the Competition Commission and other regulatory authorities; to introduce provisions to address other practices that tend to prevent or distort competition in the market for any particular goods or services; to provide more guidance in relation to conducting market enquiries as a tool to identify, and make recommendations with respect to, conditions that tend to prevent, distort or restrict competition in the market for any particular goods or services; to introduce provisions to hold personally accountable those individuals who cause firms to engage in cartel conduct; and to authorise the Competition Commission to excuse a respondent to a complaint if the respondent has assisted the competition authorities in the detection and investigation of cartel conduct; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 1 of Act No. 89 of 1998, as amended by section 1 of Act 39 of 2000**

1. Section 1 of the Competition Act, 1998 (hereinafter referred to as the principal Act), 5  
is hereby amended—
- (a) by the deletion in subsection (1) of the numbering preceding each definition;
  - (b) by the substitution in subsection (1) for paragraph (a) of the definition of 10  
“**acquiring firm**” of the following paragraph:  
“(a) that, as a result of a [**transaction in any circumstances set out**]  
merger as defined in section 12, would directly or indirectly acquire,  
or establish direct or indirect control over, the whole or part of the  
business of another firm;”;
  - (c) by the insertion in subsection (1) after the definition of “**Constitution**” of the 15  
following definition:  
“**deserving of leniency**”, when used with respect to a firm contemplated  
in section 50, or a person contemplated in section 73A, means that the  
firm or person has provided information to the Competition Commission,  
or otherwise co-operated with the Commission’s investigation of an  
alleged *prohibited practice* in terms of section 4(1)(b) to the satisfaction 20  
of the Commission;”;

- (d) by the substitution in subsection (1) for the definition of “**prohibited practice**” of the following definition:  
     “ ‘**prohibited practice**’ means a practice prohibited in terms of Chapter 2 or Chapter 2A;”;
- (e) by the substitution in subsection (1) for the definition of “**respondent**” of the following definition: 5  
     “ ‘**respondent**’ means a *firm* against whom a complaint of a *prohibited practice* has been initiated or submitted in terms of *this Act*;”;
- (f) by the substitution in subsection (1) for the definition of “**target firm**” of the following definition: 10  
     “ ‘**target firm**’ means a *firm*—  
     (a) the whole or part of whose business would be directly or indirectly controlled by an *acquiring firm* as a result of [**a transaction in any circumstances set out**] a merger as defined in section 12;  
     (b) that, as a result of a [**transaction in any circumstances set out**] merger as defined in section 12, would directly or indirectly transfer 15  
         direct or indirect control of the whole or part of [,] its business to an *acquiring firm*; or  
     (c) the whole or part of whose business is directly or indirectly controlled[, by a *firm* contemplated in paragraph (a) or (b);”]; and 20
- (g) by the addition of the following subsection:  
     “(4) For the purposes of this Act, a person is a historically disadvantaged person if that person—  
     (a) is one of a category of individuals who were disadvantaged by unfair discrimination on the basis of race before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation; 25  
     (b) is an association, a majority of whose members are individuals contemplated in paragraph (a);  
     (c) is a juristic person, other than an association, in which the individuals contemplated in paragraph (a) own and control a majority of its issued share capital or members’ interest and are able to control a majority of its votes; or 30  
     (d) is a juristic person or association in which the individuals contemplated in paragraph (a) own and control a majority of its issued share capital or members’ interest and are able to control a majority of its votes.”. 35

## Amendment of section 2 of Act 89 of 1998

2. Section 2 of the principal Act is hereby amended by the deletion of the word “and” at the end of paragraph (e) and the addition of the following paragraphs after paragraph (f): 40
- (f):  
     “(g) to detect and address conditions in the market for any particular goods or services, or any behaviour within such a market, that tends to prevent, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic; and 45  
     (h) to provide for consistent application of common standards and policies affecting competition within all markets and sectors of the economy.”.

**Substitution of section 3 of Act 89 of 1998, as amended by section 2 of Act 39 of 2000**

3. The following section is hereby substituted for section 3 of the principal Act:

**“Application of Act**

- 3.** (1) Despite anything to the contrary in any other legislation, public regulation or agreement, *this Act* applies to all economic activity within, or having an effect within, the Republic, subject to subsections (2) and (3). 5
- (2) This Act does not apply to—
- (a) collective bargaining within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (Act No. 66 of 1995);
  - (b) a collective agreement as defined in section 213 of the Labour Relations Act, 1995; or
  - (c) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.
- (3) In so far as this Act applies to any conduct arising within an industry or sector of an industry that is subject to the jurisdiction of another *regulatory authority* in terms of any other legislation— 15
- (a) *this Act*, and that other legislation, must be construed as establishing concurrent jurisdiction in respect of any such conduct that is regulated in terms of both *this Act*, and that other national legislation, subject to paragraph (b), such that— 20
    - (i) any other *regulatory authority* contemplated in this subsection will exercise primary authority to establish conditions within the industry that it regulates as required to give effect to the relevant legislation in terms of which that authority functions, and *this Act*; and 25
    - (ii) the Competition Commission will exercise primary authority to detect and investigate alleged *prohibited practices* within any industry or sector, and to review mergers within any industry or sector, in terms of *this Act*; and
  - (b) details of the administrative manner in which any concurrent jurisdiction contemplated in paragraph (a) is to be exercised, must be determined by an agreement between the Competition Commission and that other *regulatory authority*, as provided for in sections 21(1)(h) and 82(1).” 30

**Insertion of Chapter 2A in Act 89 of 1998**

35

4. The following Chapter is hereby inserted in the principal Act after section 10:

**“Chapter 2A**

**Complex Monopoly Conduct**

**Complex monopoly conduct**

- 10A.** (1) Complex monopoly conduct subsists within the market for any particular goods or services if— 40
- (a) at least 75% of the goods or services in that market are supplied to, or by, five or fewer firms;
  - (b) any two or more of the firms contemplated in paragraph (a) conduct their respective business affairs in a conscious parallel manner or co-ordinated manner, without agreement between or among themselves; and
  - (c) the conduct contemplated in paragraph (b) has the effect of substantially preventing or lessening competition in that market, unless a firm engaging in the conduct can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect. 50

- (2) For the purposes of subsection (1)(b) ‘conscious parallel conduct’ occurs when two or more *firms* in a concentrated market, being aware of each other’s action, conduct their business affairs in a cooperative manner without discussion or agreement.
- (3) If the Competition Commission has reason to believe that complex monopoly conduct subsists within a market—
- (a) the Commission may investigate any conduct within that market without initiating or having received a complaint in terms of Chapter 5; and
- (b) Parts A and B of Chapter 5, and section 49D, each read with the changes required by the context, apply to an investigation in terms of paragraph (a).
- (4) After conducting an investigation in terms of subsection (3), the Competition Commission may apply to the Competition Tribunal for a declaratory order contemplated in subsection (5) against two or more *firms* if—
- (a) at least one of the *firms*—
- (i) has at least 20% of the relevant market; and
  - (ii) are engaged in complex monopoly conduct as described in subsection (1); and
- (b) the conduct of the *firms* has resulted in—
- (i) high entry barriers to that market;
  - (ii) exclusion of other *firms* from the market;
  - (iii) excessive pricing within that market;
  - (iv) refusal to supply other *firms* within that market; or
  - (v) other market characteristics that indicate co-ordinated conduct.
- (5) If the Tribunal, after conducting a hearing in the manner required by Part D of Chapter 5, read with the changes required by the context, is satisfied that the requirements of subsection (4) are satisfied, the Tribunal may make an order reasonably requiring, prohibiting or setting conditions upon any particular conduct by the firm, to the extent justifiable to mitigate or ameliorate the effect of the complex monopoly conduct on the market, as contemplated in subsection (4)(b).
- (6) Contravention by a *firm* of an order contemplated in subsection (5) is a prohibited practice.”.

**Amendment of section 21 of Act 89 of 1998, as amended by section 8 of Act 39 of 2000**

5. Section 21 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:
- “(c) investigate and evaluate alleged contraventions of Chapter 2 or 3;”;
- (b) by the substitution in subsection (1) for paragraph (f) of the following paragraph:
- “(f) negotiate and conclude consent orders in terms of section [63] 49D;”;
- (c) by the insertion after subsection (1) of the following subsection:
- “(1A) The Competition Commission may exercise jurisdiction by way of an agreement contemplated in section 3(3) and subsection (1)(h).”; and
- (d) by the substitution for subsection (3) of the following subsection:
- “(3) The *Minister* must table in [the National Assembly] Parliament any report submitted in terms of subsection (1)(k) or section 43C(1), and any report submitted in terms of subsection (2) if that report deals with a substantial matter relating to the purposes of *this Act*—
- (a) within [10] 30 business days after receiving that report from the Competition Commission; or
  - (b) if Parliament is not then sitting, within [10] 30 business days after the commencement of the next sitting.”.