

REPUBLIC OF SOUTH AFRICA

COMPETITION AMENDMENT BILL

(As amended by the Portfolio Committee on Economic Development (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF ECONOMIC DEVELOPMENT)

[B 23B—2018]

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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.

BILL

To amend the Competition Act, 1998, so as to introduce provisions that clarify and improve the determination of prohibited practices relating to restrictive horizontal and vertical practices, abuse of dominance and price discrimination and to strengthen the penalty regime; to introduce greater flexibility in the granting of exemptions which promote transformation and growth; to strengthen the role of market inquiries and merger processes in the promotion of competition and economic transformation through addressing the structures and de-concentration of markets; to protect and stimulate the growth of small and medium businesses and firms owned and controlled by historically disadvantaged persons while at the same time protecting and promoting employment, employment security and worker ownership; to facilitate the effective participation of the National Executive within proceedings contemplated in the Act, including making provision for the National Executive intervention in respect of mergers that affect the national security interests of the Republic; to mandate the Competition Commission to act in accordance with the results of a market inquiry; to amend the process by which market inquiries are initiated and promote greater efficiency regarding the conduct of market inquiries; to clarify and foster greater certainty regarding the determination of confidential information and access to confidential information; to provide the Competition Commission with the powers to conduct impact studies on prior decisions; to promote the administrative efficiency of the Competition Commission and Competition Tribunal; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 89 of 1998, as amended by section 1 of Act 39 of 2000 and section 1 of Act 1 of 2009

1. Section 1 of the Competition Act, 1998 (Act No. 89 of 1998) (hereinafter referred to as “the principal Act”), is hereby amended— 5

(a) by the insertion after the definition of “*agreement*” of the following definitions:

“**‘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* ceased producing an identified amount of additional output, divided by the quantity of the additional output; 10

- “**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;”;
- (b) by the deletion of the definition of “excessive price”;
- (c) by the substitution for the definition of “exclusionary act” of the following definition: 5
- “**‘exclusionary act’** means an act that impedes or prevents a *firm* from entering into, *participating in* or expanding within [,] a market;”;
- (d) by the insertion after the definition of “*firm*” of the following definition: 10
- “**‘foreign acquiring firm’** means an *acquiring firm*—
- (a) which was incorporated, established or formed under the laws of a country other than the Republic; or
- (b) whose place of effective management is outside the Republic;”;
- (e) by the insertion after the definition of “*interest*” of the following definition: 15
- “**‘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*;”;
- (f) by the insertion after the definition of “*market power*” of the following definition: 20
- “**‘medium-sized business’** means a medium-sized *firm* as determined by the *Minister* by notice in the *Gazette*;”;
- (g) by the substitution for the definition of “Minister” of the following definition: 25
- “**‘Minister’** means the *Minister [of Trade and Industry]* responsible for the administration of *this Act*;”;
- (h) by the insertion after the definition of “*organ of state*” of the following definition: 30
- “**‘participate’** refers to the ability of or opportunity for *firms* to sustain themselves in the market, and “**‘participation’**” has a corresponding meaning;”;
- (i) by the insertion after the definition of “*party to a merger*” of the following definition: 35
- “**‘predatory prices’** means prices for *goods or services* below the *firm’s average avoidable cost* or *average variable cost*;”;
- (j) by the substitution for the definition of “prohibited practice” of the following definition:
- “**‘prohibited practice’** means a practice prohibited in terms of Chapter 2 [or Chapter 2A];”;
- (k) by the insertion after the definition of “*restrictive vertical practice*” of the following definition: 40
- “**‘small and medium business’** means either a *small business* or a *medium-sized business*;”;
- (l) by the substitution for the definition of “small business” of the following definition: 45
- “**‘small business’ [has the meaning]** 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);”;
- (m) by the insertion after the definition of “*vertical relationship*” of the following definition: 50
- “**‘workers’** means employees as defined in the Labour Relations Act, 1995 (Act No. 66 of 1995), and in the context of ownership, refers to ownership of a broad-base of workers;”.

Amendment of section 2 of Act 89 of 1998, as amended by section 2 of Act 39 of 2000 and section 2 of Act 1 of 2009 55

2. Section 2 of the principal Act is hereby amended by the substitution for paragraph (g) of the following paragraph:

- “(g) to detect and address conditions in the market for any particular [**goods or services**] *goods or services*, or any behaviour within such a market, that tends 60

to **[prevent]** impede, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic; and”.

Amendment of section 4 of Act 89 of 1998, as amended by section 3 of Act 39 of 2000

3. Section 4 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1)(b) for subparagraph (ii) of the following subparagraph: 5

“(ii) dividing markets by allocating market shares, customers, suppliers, territories[,], or specific types of *goods or services*; or”;
and

- (b) by the addition after subsection (5) of the following subsection: 10

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

Amendment of section 5 of Act 89 of 1998

4. Section 5 of the principal Act is hereby amended by the addition after subsection (3) of the following subsection: 15

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

Substitution of section 8 of Act 89 of 1998

5. The following section is hereby substituted for section 8 of the principal Act:

“Abuse of dominance prohibited” 20

8. (1) It is prohibited for a dominant *firm* to—

- (a) charge an **[excessive price]** excessive price to the detriment of consumers or customers;
- (b) refuse to give a competitor access to an *essential facility* when it is economically feasible to do so; 25
- (c) engage in an *exclusionary act*, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive[,], gain; or
- (d) 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 its act— 30
 - (i) requiring or inducing a supplier or customer to not deal with a competitor;
 - (ii) refusing to supply scarce **[goods]** goods or services to a competitor or customer when supplying those **[goods]** goods or services is economically feasible; 35
 - (iii) selling *goods or services* on condition that the buyer purchases separate *goods or services* unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract; 40
 - (iv) selling *goods or services* **[below their marginal or average variable cost; or]** at predatory prices;
 - (v) buying-up a scarce supply of intermediate goods or resources required by a competitor; or
 - (vi) engaging in a *margin squeeze*. 45

(2) If there is a *prima facie* case of abuse of dominance because the dominant *firm* charged an excessive price, the dominant *firm* must show that the price was reasonable.

(3) Any person determining whether a price is an *excessive price* must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include— 50

- (a) the *respondent’s* price-cost margin, internal rate of return, return on capital invested or profit history;
- (b) the *respondent’s* prices for the *goods or services*— 55

- (i) in markets in which there are competing products;
 - (ii) to customers in other geographic markets;
 - (iii) for similar products in other markets; and
 - (iv) historically;
 - (c) relevant comparator *firm's* prices and level of profits for the *goods or services* in a competitive market for those *goods or services*;
 - (d) the length of time the prices have been charged at that level;
 - (e) the structural characteristics of the relevant market, including the extent of the *respondent's* market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the *respondent's* own commercial efficiency or investment, such as direct or indirect state support for a *firm* or *firms* in the market; and
 - (f) any regulations made by the *Minister*, in terms of section 78 regarding the calculation and determination of an excessive price.
- (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.”.

Amendment of section 9 of Act 89 of 1998

6. Section 9 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the section of the following heading:
‘Price discrimination by dominant firm as seller prohibited’;
- (b) by the substitution in subsection (1) for paragraph (a) of 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;”;
- (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—