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COMPETITION

TAKE NOTE, THE COMPETITION AMENDMENT BILL, 2018

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On 12 July 2018, it was announced that the Competition Amendment Bill, 2018 ("**Bill**") was officially introduced to the National Assembly. This Bill details far-reaching changes to the Competition Act, 1998 and empowers the Competition Authorities to intervene in markets where they deem it appropriate.

The main objective of the amendments as detailed in the Bill, is to address high levels of economic concentration in the economy and the existing ownership profile of the economy. This overarching objective is deemed achievable through various amendments detailed in the Bill.

Amongst other things, the Bill focuses on the ability of small and medium sized firms to participate in the economy and seeks to drive deconcentration and transformation in markets. Overall, the Bill impacts the prohibited practices provisions relating to restrictive horizontal and vertical practices, abuse of dominance and price discrimination. In addition, the approach to merger evaluation as well as market inquiries will see significant changes in terms of the Bill. Also, powers of the Competition Commission and Government are strengthened.

The Bill sets out amendments to the Competition Act, 1998, to introduce provisions, amongst others, that provide for –

- Making it easier to prosecute dominant firms for predatory pricing and specifically margin squeeze;
- in instances where there is prima facia evidence that a dominant firm charged an excessive price, it will be for the dominant firm to show that the price was in fact reasonable;
- a methodology in terms of which an excessive price could be calculated;
- making it compulsory for the Competition Commission to issue Guidelines for purposes of the application of section, 4 and 5 of the Competition Act (horizontal and vertical practices);
- making it compulsory for the Competition Commission to issue Guidelines for purposes of setting out the relevant factors and benchmarks for determining whether the ability of dominant buyers will impede the ability of suppliers, especially a small or medium business or a firm owned or controlled by a historically disadvantaged person, to participate effectively in the economy;
- lowering of the required test when it comes to price discrimination i.e. in determining whether price discrimination is taking place, it will not be required to demonstrate that competition is substantially prevented or lessened but only that it has been prevented or lessened;
- expansion of the grounds in terms of which an exemption from the Competition Act can be granted and specifically, that the Minister may issue regulations providing for the exemptions of certain agreements or practices or categories of agreements of practices from the application of the Competition Act;
- elevating public interest considerations to one of the core assessment considerations when evaluating mergers;
- broadening the extent of information that parties to a merger must provide for purposes of merger assessment, including ownership in other firms not party to the merger, directorships in other firms and historic mergers undertaken prior to the merger before the Competition Commission;
- enforcement of merger conditions and punishment for non-compliance;
- intervention of the President, by way of a Committee, in mergers involving a foreign acquiring firm and where the national security interests of the Republic are at stake, assets and services essential to the health, safety, security or economic well-being of citizens, supply of goods or services to Government, the Republic's international interests, the economic and social stability of the Republic and a number of other aspects are at stake that the merger could potentially impact on;
- empowering the Competition Commission in market inquiries to conduct impact studies as to any prior decisions, rulings or judgements;

- empowering the Competition Commission to take action to remedy, mitigate or prevent an adverse effect on competition, including ordering divestiture;
- firming up the market inquiry powers of the Competition Commission and providing for a far more robust process;
- making available company confidential information submitted to the Competition Commission, to the Minister, any other relevant Minister and any regulatory authority for purposes of their participation in merger proceedings;
- a higher cap on an administrative penalty equal to 25% of a firm's annual turnover for repeat offenses;
- an increase in an administrative penalty which can be imposed by the Competition Tribunal, by including the turnover of any firm of firms that control the party found guilty, in instances where the controlling firm or firms knew or should reasonably have known that the prohibited conduct was taking place.

The above is a clear indication that the competition regulatory landscape will be changing significantly if the Bill becomes law. Companies and advisors are advised to prepare for the new regime that is imminent.

It is now up to the Portfolio Committee on Economic Development to process the Amendment Bill.

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