HERBERT SMITH FREEHILLS

KEY CHANGES PROPOSED BY THE SOUTH AFRICAN COMPETITION AMENDMENT BILL

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Legal Briefings – By **Jean Meijer, Partner and Sandhya Naidoo, Associate**

On 1 December 2017, the Minister of Economic Development published the Competition Amendment Bill, 2017 (**Bill**) (see here) for public comment.

The Bill seeks to create and enhance the substantive provisions of the Competition Act No. 89 of 1998 (as amended) (**Act**) and focuses on two key structural challenges in the South African economy: (i) concentration; and (ii) the racially-skewed spread of ownership of firms in the economy.

This briefing sets out the proposed amendments which will have the most impact on firms doing business in South Africa. In summary, dominant firms may be at greater risk of being found guilty of excessive pricing, exclusionary conduct and price discrimination, as the Bill would shift the onus to the dominant firm to prove that any anti-competitive effects of its conduct are outweighed by pro-competitive gains. Dominant firms are also at risk of abusing their dominance vis-à-vis suppliers as a result of the proposed inclusion of a prohibition on extracting excessively low prices from a supplier, and the extension of the price discrimination prohibition to dominant firms as purchasers of goods and services. Investor confidence and willing participation in market inquiries may be hampered by the open-ended remedial powers that would be granted to the Commission, which go as far as making recommendations to the Tribunal for divestiture. In terms of merger control, the Bill would introduce further uncertainty as a result of the proposed power for the competition authorities to consider (and potentially unwind) any direct or indirect steps taken by an acquiring firm to establish control up to three years prior to a notifiable merger.

Members of the public are invited to submit written comments by 30 January 2018, to the following address competitionbill@economic.gov.za.

The proposed amendments to the Act's abuse of dominance provisions are primarily aimed at making it easier for the Commission or a complainant to prove an abuse of dominance case. They are also intended to cast the net wider so as to explicitly capture purchasing abuses by a dominant firm.

ABUSE OF DOMINANCE

EXCESSIVE PRICING

- The Bill proposes that a new provision be included in the Act prohibiting a dominant firm from requiring a supplier to sell at an excessively low price.
- If there is a prima facie case of abuse of excessive pricing, or requiring a supplier to sell at an excessively low price, the Bill shifts the onus to the dominant firm to show that the price was reasonable.
- The Commission is obliged to publish guidelines setting out the relevant factors and benchmarks for determining whether a price is excessive. Although guidelines published by the Commission are not binding, the Bill requires a body interpreting or applying the Act to take the guidelines into account.

EXCLUSIONARY ACTS

- The amendments place the onus on the dominant firm to show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act in respect of all exclusionary acts.
- The proposed amendments to section 8(d) of the Act list examples of exclusionary acts, including the following new exclusionary acts:

    - buying goods or services on condition that the seller accepts an unreasonable condition unrelated to the object of a contract;
    - engaging in a margin squeeze; and
    - requiring a supplier to sell at an excessively low price.
- Where previously the prohibition of predatory pricing as an exclusionary act was the selling of goods or service below their marginal or average variable cost, the Bill would make the cost measure extremely vague, as being the firm's relevant cost benchmark, which may include the average avoidable cost, average variable cost or a long run average incremental cost. The Commission would be able to decide which cost benchmark is best suited to the facts and circumstances of a particular case.

PRICE DISCRIMINATION

- Where previously the onus was on the Commission or complainant to prove that differential treatment of purchasers in equivalent transactions was **likely** to have the effect of **substantially** preventing or lessening competition, under the Bill it would be for the dominant firm to prove that the differential treatment is not likely to have the effect of preventing or lessening competition as a defence.
- When determining the effect of differential treatment, consideration must be given to the effect on small businesses and firms controlled or owned by historically disadvantaged persons.
- Importantly, the prohibition would apply not only to a dominant firm as a seller of goods or services but also to a dominant firm as the purchaser of goods or services.

MERGERS

The proposed amendments to the merger control provisions of the Act introduce uncertainty as to whether the competition authorities may unravel direct or indirect steps taken to establish control within three years prior to a merger as well as the finality of conditions imposed on a merger.

MERGERS BY WAY OF A SERIES OF TRANSACTIONS (I.E. 'CREEPING MERGERS')

- When a merger is notified to the Commission, the proposed amendments empower the Commission to assess not only the merger notified, but any steps taken by the acquiring firm over the previous three years to establish that control. This will be regarded as a series of transactions and, if the Commission or Tribunal (as the case may be) decides to prohibit the merger or impose conditions on it, these may apply to the entire series of transactions.

- In practical terms this means that if an acquirer in a series of transactions: (i) purchased 25% of the shares; (ii) acquired the right to appoint directors to the board; (iii) acquired veto rights on certain decision; and (iv) attempted to establish control by purchasing a further 30% of the shares, the Commission (or Tribunal) could assess all of the transactions as having occurred when step (iv) is attempted and potentially prohibit the entire series of transactions.

ENFORCEMENT OF CONDITIONS

- The Bill would allow the Commission or Tribunal to amend and potentially impose additional conditions after a merger has been implemented, including in relation to the effect of the merger on employment and small businesses or firms controlled or owned by historically disadvantaged persons.

APPEALS OF TRIBUNAL DECISIONS

- The right to appeal against a merger decision of the Tribunal would be extended to the Commission and the Minister, where previously this right was only available to the merger parties, trade unions and employees.

MARKET INQUIRIES

The proposed amendments significantly strengthen the Commission's hand when conducting market inquiries.

INTERPRETATION AND APPLICATION

- In a market inquiry, the Commission must decide whether any feature, or combination of features, of each relevant market for any goods or services prevents, restricts or distorts competition within that market. In making its decision, the Commission must have regard to the impact of the adverse effect on competition on small businesses, or firms controlled or owned by historically disadvantaged persons.
- An adverse effect on competition is established if any feature, or combination of features, of a market for goods or services prevents, restricts or distorts competition.
- Features of a market include:
    - the structure of the market including the level and trends of concentration and ownership in the market, as well as past or current advantage arising from state support or other privileges of firms in the market;
    - the outcomes observed in the market;
    - conduct, whether in or outside the market which is the subject of the inquiry, by a firm or firms that supply or acquire goods or services in the market concerned; and
    - conscious parallel or coordinated conduct by two or more firms in a concerted market without the firms having an agreement between or among themselves.
- Although the Bill proposes to delete the section in the Act dealing with complex monopolies, which was introduced in 2009 but never came into effect, it is clear from the above that market inquiries have the potential to assess complex monopolies.

REMEDIES

- Subject to the provisions of any law or government policy, the Commission must, in relation to each adverse effect on competition, take the action that it considers to be reasonable and practicable in order to remedy, mitigate or prevent the adverse effect on competition, which may include a recommendation by the Commission to the Tribunal

for divestiture. These proposed amendments appear to give the Commission extensive powers to remedy any adverse effect on competition identified in a market inquiry. This stands in contrast to complaint proceedings where the Commission has no power to impose remedies at all, but must prove its case on a balance of probabilities before the Tribunal before the latter is empowered to impose remedies.

- The Commission's remedies and actions will be binding, unless challenged in the Tribunal.

PARTICIPATION IN AND REPRESENTATIONS TO A MARKET INQUIRY

- The following persons may participate in a market inquiry: the Commission; the Minister of Economic Development; any Minister responsible for the sector that includes or is materially affected by the market that is the subject of the inquiry; firms in the market that is the subject of the inquiry; any registered trade union; and any other person who has a material interest in the market inquiry, whose interest is not adequately represented by another participant and who would substantially assist with the work of the inquiry.

APPEAL

- Any of the above persons who is aggrieved by the determination by the Commission may appeal against that determination to the Tribunal.

ADMINISTRATIVE PENALTIES

The proposed amendments to the Act's administrative penalties provisions increased the Tribunal's power to impose penalties.

- Where previously, it was not possible for the Tribunal to impose an administrative

penalty for a 'first time' contravention of the general horizontal and vertical restrictive practices, as well as the price discrimination provisions, the Bill provides the power to impose an administrative penalty for all horizontal and vertical restrictive practices, as well as for abuse of dominance and price discrimination by a dominant firm, regardless of whether it is a first time offence.

- An administrative penalty imposed upon a firm that has contravened the Act may be extended to one or more other firms if those firms form a single economic entity with the firm that contravened the Act.

COMMENT

The Bill proposes significant amendments to address, amongst other things, a number of challenges faced by the South African competition authorities in the prosecution of abuse of dominance cases, criticisms of the lack of meaningful change following lengthy market inquiries and concerns surrounding 'creeping mergers' or a series of transactions which fall short of notifiable mergers but increase concentration in the economy.

While some of the proposed amendments are relatively benign and simply amend the legislation to reflect the current practice of the competition authorities, others have potentially far-reaching implications for firms doing business in South Africa.

At this stage, it is difficult to predict when the Bill will be finalised as much depends on the consultation process. However, we anticipate that the final amendments will be published by mid-2018.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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