What is the South Africa's competition regime and what is new?

South African President Cyril Ramaphosa on 13 February 2019, signed the Competition Amendment Act ('the Amendments') into law.[1] At the time of writing, the effective date of the Amendments has not yet been announced. This note unpacks some of the changes from an economic perspective.

The first version of the Competition Amendment Bill was released for public comment on 1 December 2017[2], with revised versions being available in July and October 2018, following comment and public hearings.

South Africa has developed a strong and admirable competition law. The South African competition regime and the related institutions (the Competition Commission, Competition Tribunal and Competition Appeals Court), created in terms of the Competition Act (number 89 of 1998[3]) have been successful in creating a more competitive economy during the past two decades. In its 2017/18 year, the Competition Commission finalised 388 mergers in the period under review. Over the same period 146 cartel cases were investigated, and 193 enforcement (investigation and/or prosecution of anti-competitive conduct) cases were finalised after screening.[4] Successes have also been highlighted by institutions such as the World Bank, which has published studies showing that South Africa's cartel detection has led to lower prices.[5] The shine of these successes dims in the face of criticisms that South Africa's markets are not competitive and are not inclusive. Competitive and inclusive markets will enable the people to participate in the economic enterprise and take people out from under the thumb of poverty, inequality, corruption and exclusion.

The question is whether these changes are on balance conducive for higher and inclusive economic growth, or whether the increased role of government envisaged in the Amendments, will increase the cost of doing business in South Africa.

What is the reason for the Amendments?

South Africa's competition laws are, in addition to creating a more competitive landscape, also designed to address particular societal problems and society is concerned with outcomes rather than just the promotion of the competition process for its sake. This is the reason why the Competition Act's primary, general purpose, to "promote and maintain competition," is supplemented by six particular sets of goals. These goals include: (1) employment and advancement of social and economic welfare, (2) opportunities to participate in world markets, (3) equitable opportunities for SMEs to participate in the economy, and (4) promoting the ownership

stakes of historically disadvantaged persons. The stated objectives of the amendments include: (1) opening up the economy for greater investment in new businesses, with a focus on opening up space for SMEs and black-owned business; (2) providing the competition authorities with the tools to investigate and address high levels of economic concentration; and (3) strengthening the public interest objectives of economic transformation and inclusion. Taken together, it would seem that, through the Amendments, Government seeks to create an environment conducive for sustainable and inclusive growth.

What are some of the important changes from an economic perspective?

Mergers

Addressing concentration is a main focus in respect of mergers. There is mention of consideration for the extent of ownership in, or relation (through e.g. common members or directors) to, similar or related markets or firms, as well as consideration for any other mergers engaged in by the firms for a period as many be stipulated by the Competition Commission.

The Amendments add an additional public interest criterion to the law which is the promotion of greater economic ownership, particularly by black South Africans, including workers. In addition, mergers that relate to foreign acquiring firms will now need to go through a separate process in order to validate that there are no national security issues. At present this process is still unclear. Another important change is that it is now stated that if a merger is likely to substantially prevent or lessen competition, both efficiency and public interest[6] aspects may be considered. Albeit that public interest has formed an important part of the South African competition regime to date, this is now of increased focus. It remains to be seen how these Amendments will be effected in merger control by the competition authorities.

Market inquiries

Turning to market inquiries[7], there is now a new (and broadened) test for these to be initiated by the Competition Commission, where an adverse effect on competition is established if any market features prevent, restrict or distort competition. In this respect there is now provision for a more extensive list of such features, including market structure (e.g. concentration, advantages arising from e.g. state support, etc.), outcomes and conduct. The main change here is the renewed focus on market structure, as a reason to start a market inquiry. It is also now specified that the Competition Commission's actions or remedies following a market inquiry may be binding. Parties can review the remedies at the Tribunal. Additionally, the Minister (of Economic Development) will be able to initiate market inquiries.

In many markets and sectors where market inquiries will be initiated, the state of knowledge about why those markets or sectors are underperforming will not be readily known. The advantage of a market inquiry is that it will allow for myth-busting in some cases but in cases where there are distortions to competition, it may identify the sources of the distortions. To date, the Commission has faced challenges in finalising market inquiries on time. This may be partly because of the complexity of the analysis, lack of focus in the terms of reference, resources and the volume of evidence.

If the competition authorities are given more resources to attract high level and high quality skills, the frequency of market inquiries will probably increase. This will certainly increase the cost to affected companies, but if it brings better market outcomes in the longer term, this will on balance be positive for the economy.

Abuse of Dominance[8]

The Amendments add to the list of prohibited practices by introducing a '**margin squeeze**' prohibition, among others. In addition, there are certain points which are still to be clarified and will be supported by Regulations (thus far **draft Regulations**[9] [10] are available). In particular one will need to understand how the changes in respect of buyer power (Section 8 of the Act) and price discrimination (Section 9 of the Act) will be implemented. On **buyer power**, the key challenge will be determining what is meant by unfair. From an economic perspective, buyer power arises in two scenarios. The first scenario is one of "monopsony" power, where there is a single buyer on one side of the market and many firms on the seller side of the market. The second scenario is concerned with relative changes in bargaining power on one or the other side of the market. The question usually asked is whether competition law should play a role in regulating any asymmetries of bargaining power between sophisticated parties.

In terms of **price discrimination**, economics teaches that the welfare effects are ambiguous, so not all price differences are a cause for concern. One challenge that dominant firms will face is complying with this provision, given the information asymmetry on the part of dominant firms in knowing whether their conduct effectively impedes on the effective participation of small and medium businesses, and firms controlled by historically disadvantaged persons.

Because of the complexity introduced by both the buyer power and price discrimination provisions, the Amendments require that regulations be developed. When it comes to regulations, we note the procrustean problem with prescriptive regulation. In Greek mythology, Procrustes was a rogue blacksmith. He offered weary travelers a bed for the night. But there was a catch. If the visitor was too small for the bed, Procrustes would stretch him to fit into it. If the visitor was too big, Procrustes would amputate limbs as necessary. Eventually, Procrustes met his own demise at the hands of Theseus, who fit Procrustes to his own bed by cutting off his head. The story of Procrustes warns us against the very tendency to squeeze complicated things into simple boxes. As Nassim Taleb points out in "The Bed of Procrustes," his book of aphorisms,

sometimes we're proud of our cleverness in reducing something complicated to something simple. Not only do we put things in the wrong box, but we often change the wrong variables. Instead of regulations, a case-by-case approach which would allow incremental development of the complex ideas contained in the amendment would have been better, rather than imposing ex ante regulation.

Another important point from an economic perspective is that certain provisions will shift the burden of proof to firms. This is now the case in respect of **excessive pricing**[11], where the burden of proof will be on the firm, following a prima facie case. This may increase compliance requirements by firms. Further, the amendment on excessive pricing prohibition also identifies factors which may be considered when determining whether prices are excessive relative to the competitive price. The factors identified are already part of the tool kit of economists. In practice, situations may arise where some of the factors point in different ways, in such situations the Competition Tribunal and the Competition Appeal Court will have to look at the evidence in totality.

What is the key focus looking forward?

The Competition Commission has identified its priority sectors[12], in which there are product markets with high levels of concentration. For the Competition Commission's 2018/19 year these sectors were listed as: food and agro-processing, infrastructure and construction, healthcare, banking and financial services, energy, intermediate industrial inputs, and information and communication technology. Companies in these sectors can therefore expect increased scrutiny from the Competition Authorities in terms of their business activities.

We commend the work that has stemmed from the Competition Act thus far, and on balance we also view the aims of the Amendments positively. Despite this, there are points in the Amendments that may cause policy uncertainty for investors and businesses, thereby increasing the cost of doing business and hence impacting negatively on economic growth. This is a risk to growth going forward, but the exact outcome will depend on how these new provisions are implemented.

This will be a space to carefully watch. Looking forward, it is important that the independence of Competition Authorities is preserved, that any unintended consequences of these regulatory changes are avoided, and that inclusive growth is not at the expense of actual economic growth.

Further articles over the next weeks will focus on competition policy and topical issues within specific sectors.

For more information please contact Helen Kean, Liberty Mncube or Nicola Theron

1. https://www.gov.za/sites/default/files/gcis_document/201902/competitionamendment-act18of2018.pdf
2. https://archive.opengazettes.org.za/archive/ZA/2017/government-gazette-ZA-vol-630-no-41294-dated-2017-12-01.pdf
3. http://www.compcom.co.za/wp-content/uploads/2014/09/pocket-act-august-20141.pdf
4. http://www.compcom.co.za/wp-content/uploads/2014/09/CCSA_AR2017_18e.pdf
5. http://documents.worldbank.org/curated/en/917591468185330593/pdf/103057-WP-P148373-Box394849B-PUBLIC-SAEU8-for-web-0129e.pdf
6. Public interest refers to the consideration of socio-political and economic issues, as prescribed in Section 12A of the Competition Act.
7. This refers to a formal inquiry in respect of the general state of competition, the levels of concentration in and structure of a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm.
8. Section 7 of the South African Competition Act defines a dominant firm as follows: "A firm is dominant in a market if – it has at least 45% of the market; it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or it has less than 35% of that market, but has market power."
9. https://www.gov.za/sites/default/files/gcis_document/201812/42133gon1424.pdf
10. https://www.gov.za/sites/default/files/gcis_document/201812/42133gon1423.pdf
11. A price that higher than a competitive price where such difference is unreasonable, determined by taking into account all relevant factors. The determination of an excessive price is elaborated on in Section 8 of the amended Competition Act.
12. http://www.compcom.co.za/wp-content/uploads/2018/01/APP-2018-Parliament-Presentation.pdf

For more information please contact:

Helen Kean
Senior Director
FTI Consulting South Africa
helen.kean@fticonsulting.com

Dr. Liberty Mncube
Managing Director
FTI Consulting South Africa
liberty.mncube@fticonsulting.com

Prof. Nicola Theron
Senior Managing Director
FTI Consulting South Africa
nicola.theron@fticonsulting.com

FTI CONSULTING™

EXPERTS WITH IMPACT

0733-05/19