

South Africa

Act No. 18 of 2018: Competition Amendment Act, 2018 (2019)

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Contents

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ACT

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—

(...)

(d) by the insertion after the definition of “firm” of the following definition: “ ‘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;”;

(...)

Insertion of section 18A in Act 89 of 1998

14. The following section is hereby inserted after section 18 of the principal Act: ‘

‘Intervention in merger proceedings involving foreign acquiring firm

18A.

(1) The President must constitute a Committee which must be responsible for considering in terms of this section whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic.

(2) The Committee contemplated in subsection (1) must consist of such Cabinet Members and other public officials as may be determined and appointed by the President.

(3) The President must identify and publish in the Gazette a list of national security interests of the Republic, including the markets, industries, goods or services, sectors or regions in which a merger involving a foreign acquiring firm must be notified to the committee referred to in subsection (1), in terms of subsection (6).

(4) In determining what constitutes national security interests for purposes of this Act, the President must take into account all relevant factors, including the potential impact of a merger transaction—

(a) on the Republic's defence capabilities and interests;

(b) on the use or transfer of sensitive technology or know-how outside of the Republic;

(c) on the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of citizens and the effective functioning of government;

(d) on the supply of critical goods or services to citizens, or the supply of goods or services to government;

(e) to enable foreign surveillance or espionage, or hinder current or future intelligence or law enforcement operations;

(f) on the Republic's international interests, including foreign relationships;

(g) to enable or facilitate the activities of illicit actors, such as terrorists, terrorist organisations or organised crime; and

(h) on the economic and social stability of the Republic.

(5) The President must issue regulations governing—

(a) the notification, processes, procedure and timeframes to be followed by the Committee referred to in subsection (1) when performing its functions under this section; and

(b) access to information concerning the merger, including confidential information.

(6) A foreign acquiring firm which is required to notify the Competition Commission in terms of section 13A(1) of an intended merger must, at the time of the notification of the merger to the Competition Commission, file a notice with the Committee referred to in subsection (1) in the prescribed form and manner if the merger relates to the list of national security interests of the Republic as identified by the President in terms of subsection (3).

(7) Within 60 days of receipt by the Committee referred to in subsection (1) of a notice in terms of subsection (6), or such further period which the President may agree to, on good cause shown, the Committee must consider and decide on whether the merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic identified by the President in terms of subsection (3).

(8) The Committee referred to in subsection (1) may take into account other relevant factors, including whether the foreign acquiring firm is a firm controlled by a foreign government.

(9) During its consideration of a merger in terms of this section, the Committee may consult and seek the advice of the Competition Commission or any other relevant regulatory authority or public institution.

(10) The Minister must, within 30 days of the decision contemplated in subsection (7)—

(a) publish a notice in the Gazette of the decision to permit, permit with conditions or prohibit the implementation of a merger; and

(b) inform the National Assembly, in appropriate detail, of the decision.

(11) The Competition Commission may not consider a merger in terms of section 12A, and the Competition Tribunal may not consider a merger in terms of section 16(2), if the foreign acquiring firm failed to notify the Committee in terms of subsection (6).

(12) The Competition Commission may not make a decision in terms of section 13(5)(b) or 14(1)(b), and the Competition Tribunal may not make an order in terms of section 16(2), where the Minister has published a notice in the Gazette prohibiting the implementation of the merger on national security grounds.

(13) (a) The Committee may revoke its approval of the merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, if—
(i) the approval was based on incorrect information for which a party to the merger is responsible; (ii) the approval was obtained by deceit; or (iii) a firm concerned has breached an obligation attached to the approval.

(b) If the Committee revokes its permission in terms of paragraph (a), the Competition Commission's or Competition Tribunal's approval or conditional approval of the merger is deemed to be revoked.

(c) Unless the Committee determines otherwise, the Competition Commission's or Competition Tribunal's approval or conditional approval of a merger involving a foreign acquiring firm is deemed to be revoked if the foreign acquiring firm failed to notify the Committee in terms of subsection (6).

(14) The Competition Tribunal may impose an administrative penalty, in accordance with the provisions of section 59(3), on the parties to a merger involving a foreign acquiring firm for any contravention contemplated in section 59(1)(d), read with the changes required by the context.

(15) The President may delegate any power or function conferred on him or her under subsection (3) or (4) to any Cabinet Member.”.

(...)

Short title and commencement

46. This Act is called the Competition Amendment Act, 2018, and comes into operation on a date fixed by the President by proclamation in the Gazette.

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