South Africa: Commencement of the Competition Amendment Act, 2018

1. The Competition Amendment Act, No. 18 of 2018, which contains a number of significant revisions and additions to South Africa’s competition law regime, was passed into law on 14 February 2019.

2. A number of the provisions of the Amendment Act came into force on 12 July 2019 and others on 13 February 2020 (with the remaining provisions still to come into effect on a future date). The provisions which came into effect relate to, among other things: the test for excessive pricing; abuse of buyer power; price discrimination; category exemptions for prohibited practices; additional considerations for the competition authorities in merger decisions; Ministerial intervention in merger proceedings; additional market inquiry powers for the Competition Commission; revised penalty provisions; and advisory opinions by the Commission.

3. Significantly, the provisions relating to the new national security review procedure that is to be established have not come into effect. Attention is likely to turn to these provisions in the near future.

4. The provisions that have come into effect are each considered briefly below.

4.1 Excessive pricing

4.1.1 The test for determining an excessive price, which was previously developed through case law, is now codified in the legislation. The new provisions list a number of factors that may be taken into account in determining whether pricing is excessive, including: the respondent firm’s price-cost margin, internal rate of return, return on capital invested or profit history; relevant comparator prices and level of profits; and structural characteristics of the relevant market.

4.1.2 The Amendment Act introduces a provision that expressly shifts the evidentiary burden to the respondent firm to show that the price was reasonable where the Commission has made out a prima facie case of excessive pricing.

4.2 Abuse of buyer power

4.2.1 The Amendment Act introduces a new species of abuse of dominance, which prohibits a dominant buyer from directly or indirectly requiring from, or imposing on, a supplier that is a small and medium business (SME) or a firm controlled or owned by historically disadvantaged persons (HDP) unfair prices or other trading conditions. However, this provision only applies to purchasing firms that are dominant in a sector designated by the Minister by way of regulations; refer to the discussion of these here.

4.2.2 An anti-avoidance provision prohibits a dominant firm in a designated sector from avoiding or refusing to purchase goods or services from an SME or HDP in order to circumvent this new buyer power provision.

4.2.3 Furthermore, the Amendment Act introduces a provision that expressly shifts the evidentiary burden to the respondent firm to show that the price or other trading condition is not unfair or that it has not avoided or refused to purchase goods or services from an SME or HDP in order to circumvent the provision, in circumstances where the Commission has made out a
4.2.4 The application of the new buyer power provisions is also subject to regulations and (yet-to-be-issued) guidelines. For more information, refer to the more detailed discussion here.

4.3 Price discrimination

4.3.1 The new price discrimination provisions introduced by the Amendment Act alter the test for price discrimination insofar as it involves discrimination as against SMEs or HDPs. In such cases, an action by a dominant firm as the seller of goods or services is prohibited price discrimination if it is likely to have the effect of impeding the ability of SMEs or HDPs to participate effectively.

4.3.2 The requirements of transactional equivalence still apply and it remains open to a respondent firm to rely on objective justifications related to: differences in cost arising from differing places and methods of supply; good faith meeting of competition; and responses to changes in market conditions. However, volume-based cost differences are no longer available to justify differences in prices charged to SMEs and HDPs. For information on the proposed safe harbours, refer to the discussion here.

4.3.3 An anti-avoidance provision prohibits a dominant firm in a designated sector from avoiding or refusing to sell goods or services to an SME or HDP in order to circumvent this new price discrimination provision.

4.3.4 Furthermore, the Amendment Act introduces a provision that expressly shifts the evidentiary burden to the respondent firm to show that its action did not impede the ability of SMEs or HDPs to participate effectively or that it has not avoided or refused to sell goods or services to an SME or HDP in order to circumvent the provision, in circumstances where the Commission has made out a prima facie case under either the new price discrimination or related anti-avoidance provision respectively.

4.3.5 The application of the new price discrimination provision is also subject to regulations and (yet-to-be-issued) guidelines. For more information, refer to the more detailed discussion here.

4.4 Exemptions

4.4.1 The Amendment Act gives the Minister of Trade and Industry the power, after consultation with the Commission, to issue regulations exempting a category of agreements or practices from the prohibited practice chapter of the Competition Act. Previously exemptions could only be granted by the Commission. This may be useful, for example, where certain industries develop joint initiatives to promote growth and transformation in line with government policy.

4.4.2 The grounds on which exemptions can be granted have also been slightly amended and supplemented. In addition to the extant (i) maintenance or promotion of exports; and (ii) change in productive capacity necessary to stop decline in an industry, exemptions can now be granted on the following additional or amended grounds:

(A) promotion of the effective entry into, participation in, or expansion within, a market by small and medium businesses, or firms controlled or owned by historically disadvantaged persons;

(B) the economic development, growth, transformation or stability of any industry designated by the Minister, after consulting the Minister responsible for that industry;

(C) competitiveness and efficiency gains that promote employment or industrial expansion.

4.5 Merger considerations

4.5.1 The substantive test to be applied in consideration of mergers has been slightly amended and supplemented. Overall, public interest considerations have been elevated to an equal status alongside competition considerations in the wording of the Competition Act.
4.5.2 Factors relevant to the competition assessment have been amended to include: the extent of ownership by a party to the merger in another firm, or other firms in related markets; the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and any other mergers engaged in by a party to a merger. These provisions are in part aimed at catching instances of so-called “merger creep” where firms may, through a sequence of transactions that are not subject to scrutiny by the competition authorities, ultimately alter the competitive landscape of a relevant market.

4.5.3 In relation to the public interest assessment, the considerations now include: the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market; and the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

4.6 Ministerial intervention in merger proceedings

4.6.1 The Minister is now permitted to appeal large merger decisions of the Competition Tribunal on public interest grounds, even if the Minister did not participate in the Commission’s or Tribunal’s proceedings.

4.6.2 More generally, the Minister can participate in any merger proceedings before the Commission, Tribunal or Competition Appeal Court in order to make representations on any public interest grounds.

4.7 Market inquiries

4.7.1 In addition to the general state of competition in a market for particular goods and services, a market inquiry is now also expressly directed at considering the levels of concentration in, and structure of, that market.

4.7.2 In the context of justifying the initiation of a market inquiry, the test for whether a feature of the market “prevents, restricts or distorts competition” has been replaced with whether it “impedes, restricts or distorts competition”.

4.7.3 Additional sections have been added which provide for: (i) the Commission to consult with any regulatory authority that might have jurisdiction over a particular market that is subject to investigation by a market inquiry; and (ii) the appointment of one or more Deputy Commissioners who are responsible for conducting market inquiries.

4.7.4 Concerning the outcomes of market inquiries, the Commission now has a duty to remedy any adverse effects on competition that it finds arise from one or more features of the market. The scope of the possible action which the Commission may now take appears to be fairly broad. Provisions have however been included which set out certain factors that must be taken into account by the Commission when determining appropriate remedial action that would be reasonable and practicable.

4.7.5 These include: the nature and extent of the adverse effect on competition, the remedial action, and the relation between the two; the likely effect of the remedial action on competition in the market; and the availability of less restrictive means to remedy, mitigate or prevent the adverse effect on competition.

4.7.6 The Commission must communicate with any person who is materially affected by any provisional finding, decision, remedial action or recommendation of the market inquiry and call for comments from them. The Commission is then obliged to have regard to any further information or submissions received as a result of this process when deciding on the appropriate remedial action to take. Parties that are materially and adversely affected by the final determination of the Commission may appeal against that determination to the Tribunal. This appeal right constitutes a check and balance against the fairly extensive powers now granted to the Commission to act on its own recommendations.

4.7.7 One possible action that the Commission may take pursuant to a market inquiry is to recommend to the Tribunal that it impose a divestiture order (i.e. an order that a firm sell off part of its business). If such an order is issued by the Tribunal based on a recommendation made by the Commission pursuant to a market inquiry, that order now does not require
confirmation by the Competition Appeal Court (where previously any divestiture, regardless of its origins or form, would require confirmation by this court).

4.8 Administrative penalties

4.8.1 For conduct that is substantially a repeat by the same firm of conduct previously found by the Tribunal to be a prohibited practice, the cap for administrative penalties has now increased from 10% to 25% of the offending firm’s turnover in South Africa and exports from South Africa during its preceding financial year.

4.8.2 The Tribunal is also now permitted to: (i) increase the administrative penalty imposed to include the turnover of any firm or firms that control the respondent, but only where the controlling firm or firms knew or should reasonably have known that the respondent was engaging in the prohibited conduct; and (ii) on notice to the controlling firm or firms, order that the controlling firm or firms be jointly and severally liable for the payment of the administrative penalty imposed.

4.8.3 Furthermore, under the new provisions, an administrative penalty may be imposed for all horizontal and vertical restrictive practices, as well as for abuse of dominance and price discrimination by a dominant firm, regardless of whether the conduct is a first-time offence - certain first-time offences were not subject to an administrative penalty prior to the amendments.

4.9 Advisory opinions

4.9.1 The new provisions now provide for the Minister to make regulations regarding non-binding advisory opinions issued by the Commission.

4.9.2 This is the first time that such functions of the Commission are expressly regulated under the Competition Act.