

# How Will the Competition Amendment Bill Impact You?

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A WHITE PAPER

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## BACKGROUND

The public hearings on the Competition Amendment Bill ("the Amendment Bill") has been tabled by Parliament's Portfolio Committee of Economic Development for 28 & 29 August 2018. The Competition Amendment Bill, if approved, will amend the Competition Act 89 of 1998 ("the Act").

The main objective of the amendments is to address two persistent structural constraints on the South African economy:

- High levels of economic concentration in the economy
- The skewed ownership profile of the economy

The Amendment Bill aims to address these structural constraints through seven key focus areas

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## THE MARKET STRUCTURE

### Market Enquiries

The role of market enquiries and the Competition Commission's powers in relation thereto will be strengthened. As recently seen with the Health Market Enquiry, the purpose of a market enquiry is for the Competition Commission ("the Commission") to investigate a particular market and to make recommendations to address structural concerns, high levels of economic concentration and economic transformation within a specific market or industry. Presently, the Commission has no explicit power to act on its recommendations.

The Amendment Bill empowers the Commission to take action to remedy, mitigate or prevent the adverse effect on competition by making recommendations to the Competition Tribunal. The Commission is further mandated to publish a report of recommendations to the Minister with recommendations, which may include, recommendations for new or amended policy, legislation or regulations; and recommendations to other regulatory authorities in respect of competition matters.

### Impact Studies

The Commission will be empowered to conduct impact studies on the findings of the competition authorities in order to compile a report to the Minister which will be tabled for discussion during the next parliamentary sitting of the National Assembly. In order to conduct these impact studies, the Commission may request information from any firm in order to compile its impact study report.



## MERGERS

The Amendment Bill will allow all mergers, as opposed to only anti-competitive mergers, to be considered and justified on public interest grounds. 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, as well as their ability to enter into, participate and expand within a market will be central in merger analysis on public interest grounds.

This will further lead to the promotion of competition and economic transformation through addressing the structures and de-concentration of markets. The proposed amendments further attempt to avoid 'creeping mergers' by considering cross-ownership and cross-directorships of merging parties.

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## DOMINANT FIRMS

The proposed amendments relating to the abuse of dominance aim to address the concentration of markets. It places a reverse onus on dominant firms to show that the price of its goods and services is reasonable following a referral by the Commission.

The amendments further lessen the burden of proof on firms in referrals based on price discrimination by dominant firms by removing the qualifier of proving a "substantial" preventing or lessening of competition.

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## POWERS OF THE MINISTER

The Minister responsible for the administration of the Competition Act will be empowered to participate in merger proceedings and applications for exemptions, specifically in relation to public interest grounds.

In terms of the Amendment Bill, the Minister has the right of appeal against a merger decision of competition authorities if it has substantial public interest implications for a particular industrial sector.



## NATIONAL SECURITY

The Amendment Bill mandates the President to constitute a 'National Security Committee' ("the Committee") which will be responsible for considering whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of South Africa.

Foreign acquiring firms will be required to notify the Committee of any potential mergers. The Committee will be empowered to prohibit the transaction on considerations of national security.

The competition authorities will further be prohibited from considering merger filings until it has received a decision from the Committee.

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## NEW DEFINITIONS & AMENDMENTS

The Amendment Bill clarifies provisions of the Act relating to prohibited practices, restricted horizontal and vertical practices, abuse of dominance and price discrimination through the addition of various definitions. The definitions added in the Amendment Bill include margin squeeze, average avoidable and voidable cost, predatory prices etc.

These additions will assist firms, as well as the competition authorities with the interpretation and assessment of various prohibited practices.

Of further relevance is the substitution of 'consumer' to customers which allows for greater protection since all customers involved in commercial transactions would now be protected from excessive prices, as opposed to consumers only.

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## HARSHER SANCTIONS

The Amendment Bill imposes harsher sanctions and penalties for the contravention of the Act. Following the Competition Amendment Bill of 2009, which allowed for the criminalisation of cartel conduct as of 1 May 2016, the current Amendment Bill will increase penalties for contraventions of the Act from 10% to 25% of a firm's annual turnover if conduct constitutes a repeat offence.

In addition, the administrative penalty may further be increased by including the turnover of a parent or controlling firm, and by holding a controlling or parent firm jointly and severally liable for the penalty.

This addition is to encourage parent and controlling firms to ensure that its subsidiaries are complying with the Act.



## CONTACT US / SUBMIT QUERIES

We will keep you updated on any further amendments following the public hearings on 26 and 27 August 2018.

For more information on the Amendment Bill, please contact the Adams & Adams Competition Team at [competitionlaw@adamsadams.com](mailto:competitionlaw@adamsadams.com).

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