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## **AMENDMENTS TO THE COMPETITION ACT MAY FURTHER CURTAIL FOREIGN INVESTMENT APPETITE**

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The South African Competition Amendment Act 18 of 2018 ('the Amendment Act') which was tabled in Parliament in July 2018, and signed into law by President Ramaphosa last month, has been the subject of much debate and comment, especially insofar as it aims to implement far-reaching changes to the current Competition Act 89 of 1998 ('the Competition Act'). Although the Amendment Act has been signed into law, it is yet to be brought into operation on a date to be declared by the President.

The changes to the Competition Act introduced by the Amendment Act include strengthening and clarifying the provisions which relate to abuse of dominance and prohibited practices by dominant firms; giving the Competition Commissioner and the Minister the right to appeal against a merger decision of the Competition Tribunal; and giving the President of South Africa the power to identify a list of national security interests and establish a committee to assess whether or not an acquisition by a foreign firm will be adverse to national security.

These changes are part of the Amendment Act's broader stated aim of addressing persistent structural constraints on the South African economy, such as high levels of economic concentration, and strongly promoting transformation and economic growth in South Africa and working towards achieving a greater spread of ownership by historically disadvantaged individuals.

The Competition Act itself states in its preamble that "apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anticompetitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans", and further that the economy must be open to greater ownership by a greater number of South Africans.

### **Does the Amendment Act curtail what it aims to achieve?**

The aims of the Amendment Act are noble, and it cannot be disputed that transformation and economic growth are desperately required in the South African economy. Indeed, as stated by President Cyril Ramaphosa at the World Economic Forum Annual meeting in Davos in January 2019, *"We have placed the task of inclusive growth and job creation at the centre of our national agenda...We recognise that we cannot create work on any meaningful scale unless we grow the economy at a far greater rate – and for that we need much more investment in the productive sectors of the economy, in infrastructure and in skills development."* That

*"[Local] competition policy, therefore, allows for economic intervention that arguably leans more extreme than in other jurisdictions. For instance, nowadays, frequent mention is made by policy makers of "ownership structures" and "participation in markets" as a focus for competition interventionism. The recent proposed amendments to the Competition Act will likely exacerbate the scope for interventionism along these lines."*

**TG van Onselen**

**(2018)**

being said, it may be an unintended consequence of the Amendment Act that the bureaucratic and administrative cost of doing business in South Africa is simply too high, and the changes imposed by the Amendment Act will not in fact grow the economy at the rate and on the scale as envisaged, but will give foreign investors yet another excuse to seek out more appealing jurisdictions for their investments.

Heightened regulation of the free market economy by the government, as proposed by the Competition Act, and further encouraged by the Amendment Act, may add to foreign investors' concerns around doing business in South Africa, as compared to other, less highly regulated countries. Take for example the prohibition against charging an excessive price for a particular commodity or service, which is addressed differently in various countries. The likes of the United Kingdom and Germany are similar to South Africa, insofar as they specifically prohibit organisations from levying what they deem to be excessive prices. In other countries, such as the United States of America ('US'), Canada and Australia, a general offence of abuse of dominance is acknowledged, but there is no specific reference in the law to the levying of excessive prices as an offence. This is because there is a reticence to allow regulators to become too directly involved in a free market economy, especially through action being taken against excessive pricing. Indeed, in the US, it was found by the Supreme Court that "the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only *not* unlawful; it is an important element of the free market system". In other words, it should be for the market to regulate itself, with those suppliers charging excessive prices ultimately being faced with a decrease in demand.

Unlike in Germany and the United Kingdom, however, South Africa imposes further legislative constraints on local market players, in addition to the constraints on free market forces which are imposed by the Competition Act and Amendment Act. These include legislation that deal with employment equity, broad-based black economic empowerment, preferential procurement, including various mandatory levies such as those for skills development which go beyond the company's own training and development budgets which is calculated at one percent (1%) of the organisation's monthly wage bill. Considering these factors, amongst a host of other business challenges in a less than exciting economy, many would-be business investors and entrepreneurs, especially those considering opening their businesses in South Africa, may be discouraged by the bleak prospectus of success. Quite ironically, the Competition Act purportedly seeks to remove these restrictions to encourage "full and free participation in the economy".

*"The Bill constitutes a major overhaul of the Competition Act of 1998 and sweeping new powers are given to the Competition Authorities to address the perceived high concentration levels and lack of transformation in the South African economy."*

**Werskmans**

**(2018)**

The real motivation for the heightened state of government interference and regulation of the market therefore needs to be questioned. Is penalising what are elsewhere considered to be normal business practices indeed beneficial to the South African economy in the long term?

## **The Amendment Act is likely to come into operation soon**

In spite of the concerns raised from several quarters and the intense debate around the Amendment Act, at the time of writing this article, the Amendment Act had passed through both South African Houses of Parliament and been signed into law by the President, awaiting only the proclamation of the date on which it will commence operation (there is talk in this regard that it will be brought into operation in stages). The Competition Commission has already issued draft guidelines in relation to buyer power, price discrimination and the definition of small and medium businesses, and it would seem that South African businesses and potential foreign investors need to brace themselves once again for another piece of legislation which seeks to address the symptoms, rather than the cause of a rapidly failing economy, and which may in fact work against the very aims which it seeks to achieve.

With the Amendment Act likely to come into force soon (at least in part), one should consider whether or not these changes will improve some of the following worrying key economic statistics:

1. a dismally poor performing economy where South Africa's growth rate over the last decade has barely surpassed 1,5% per annum;
2. unemployment has dramatically increased to figures hovering at 27,5% (not including the figures of the 'despondently unemployed');
3. South Africa's Total Public Debt -- as a percentage of nominal GDP -- has ballooned from a low point of 26.5% in 2008 to 53% towards the end of 2017, where our total debt is now circa R3 trillion;
4. South Africa's nett Foreign Direct Investment (FDI) -- as percentage of GDP -- fell from 22,7% (2010) to -29% (2017); and
5. company income taxes were 6,6% lower in December 2018 than a year ago, and economists predict a grim 2019 Budget with an estimated budget deficit of between 4-4,5%.

Indeed, the "new dawn" espoused by President Ramaphosa would be a welcomed event, especially considering that South Africa is the only OECD country that experienced a "technical recession" last year, not least also remembering that our economy is currently at its lowest growth path since 1945.

With the imminent changes of the Amendment Act, including the uncertainty of the ANC's Expropriation Without Compensation (EWC) policy -- and its associated Expropriation Bill (2019) which was published in December last year for public comment -- the "new dawn" actually feels quite ominous, and truthfully this does not inspire any form of confidence, let alone business confidence and optimisation.

## **ENDS**

Words: 1,344

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