

Competition Bill seems to invade business principles

Competition kill is not transformation, say critics

Due to an ideological theme imposed by the Minister of Economic Development, Ebrahim Patel, upon his recent draft of a new Competition Amendment Bill recently published for comment by his department, South Africa can expect a highly charged series of hearings following its recent tabling in Parliament.



The Bill seems to lack an understanding of the principles that past and, hopefully, future, investors might expect of competitive markets and safe financial destinations. The Trade and Industry Portfolio Committee has given until August 17 for submissions to be received.

The Bill as tabled differs little from that originally published by gazette despite submissions made direct to Minister Patel's Department of Economic Development (DED) who said it had considered "over seventy submissions" on what the Minister has earlier described as the "first major reform of South Africa's twenty-year old Competition Act".

After a somewhat subtle and disarming preamble and a vague list of intentions, there is little disagreement from most that Minister Patel wishes to, as he put it, "beef up the powers of the Commissioner". Perhaps some might consider it an example of what is meant by "radical transformation".

Racial make up

The Minister said in his budget speech to Parliament, "This Bill provides clear and practical mechanisms to address high levels of concentration that excludes small business and black South Africans from the mainstream economy. It gives the Competition Authorities powers to impose remedies to address problems in the structure of the economy and to promote economic inclusion."

On this, he further stressed that his new Bill would focus on "the de-concentration of markets and protect and stimulate small businesses and firms owned and controlled by historically disadvantaged persons and their growth, whilst at the same time protecting and promoting employment, employment security and worker ownership."



Proving innocence

The Commission therefore is being called upon, business and legal commentators have already noted, to make a separate judgement amongst themselves upon the racial structures of businesses with no precise definitions in the Bill, it appears, of what they have been looking for. Legal experts on their websites also do not like any consequential retributive action open to the of discretion of the CC board alone.

It seems therefore, they say, that the Commission and/or the Minister has relieved itself of much of the work surrounding economic investigations and considerations for which it is currently responsible; has expanded the categories of conduct defined as abuses of dominance; and has shifted to the dominant firms defined as such the question to proving that their conduct is not anti-competitive which would, presumably, incur legal costs. In other words, proving that they are innocent.

More to follow

Using the descriptive phrase, “The Bill will 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”, the Bill also states that it will deal with “practices by dominant firms which leads to excessive prices, price discrimination against smaller players and other abusive and anti-competitive practices.”



Where the Bill completely deviates from past practice is to allow the Competition Commission “to act in accordance with the results of market inquiries” and to initiate any such inquiries as approved by the Minister. What additional powers are provided to the Commissioner is far from clear.

Methods

“The Bill”, the Minister said, “will equip the competition authorities with the tools to investigate anti-competitive behaviour by cartels and monopolies in the economy. It will amend the Competition Act 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”.

He went on, “The Bill will also introduce greater flexibility in the granting of exemptions which promote transformation and growth and 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.”

New powers

In calling the proposals “a new deal for economic transformation and inclusion”, he said that the amendments will give a mandate to the Commission to act in accordance with the results of a market inquiry and thus “expand the use of market inquiries to deal directly with economic inclusion and economic concentration.”



Minister Patel added that the result for Commission amending the process by which market inquiries are initiated, that this would clarify and foster greater certainty regarding the determination of confidential information and access to confidential information. He said that this “would promote greater efficiency regarding the conduct of market inquiries”

Deeper dive

The proposals contained in the Bill will provide the Competition Commission with the powers to conduct impact studies on prior decisions and “facilitate the effective participation of the National Executive within proceedings contemplated in the Act, including making provision for National Executive intervention in respect of mergers that affect the national security interests of the Republic.”

This proposal, it would seem, has vast implications on business dealings in South Africa and only when the Minister responds to submissions or when his Department of Economic Development (DED) is under questioning in Parliament will business and industry, present or potential, get some idea of whether DED have ignored the obvious reactions to invasion of economic freedoms.



In the meanwhile, business and industry can only wonder whether the DED feel that black empowerment targets are a more valued first prize of the new Bill or whether they genuinely feel, as DED stated in Parliament, that investment world will ignore such powers granted to the Commissioner.

Whilst banks, investment companies, business institutes and business chambers have heeded the call for transformation to be speeded up in order to embrace a far greater of growth contributors and employers, eliminating competitors cannot be the route, say the Free Market Foundation.

It can be seen also that any Minister of Economic Development can, with the powers granted in terms of the proposals, block foreign investment deals, say financial experts and Opposition members. It appears too that no reasons must be given.

Not playing games



On fines, previously the Competition Commission board, in deciding upon penalties made its first move in terms of what has often been referred to as the “yellow card” system; in other words, pronouncing in the case of a first offence first on their findings and then provide a warning before instituting any fines assessed by them as appropriate.

This was supposedly in order to give the relevant parties subject to the investigation or inquiry a chance to bring their structures or arrangements into line with the requirements stated. Such provisions are not built into the proposed Bill which expressly states that any “warnings” will only be at the discretion of the Commissioner.

Bigger than who?

Also included is the concept of a “dominant buyer” and obliges such parties not to buy at prices that are excessively low. However, DED in their proposals on this issue give little understanding of how anybody, including the buyer itself, could possibly be able to establish whether their entity is a “dominant” player or not.

In general, say financial parties, the Bill is miserably short on definitions and understandable only in policy direction.

Looking at the person

Quite clearly the amendments are perceived by the Minister as a further way to bring pressure for transformation and, possibly with the support of Minister Davies of Trade and Industry, both Ministers have tried to embrace a way to encourage and possibly to bring pressure to bear for more inclusion of new black businesses and SMMEs generally.

Whilst certainly giving “more teeth to the Commissioner and tribunal findings” and gaining for himself somewhat draconian powers in the marketing world, the Minister Patel may be at the same time introducing a sledgehammer into South Africa’s delicately poised investment market.

As a side note, Minister Patel is no newcomer to politics. He has a proud record in the union movement record and is a recognised speaker at the ILO. He was nominated by President Mandela to serve on the Financial and Fiscal Commission (FFC) during its first term and served on the Councils of the University of Cape Town and Higher Education, the board of Proudly SA and the governing body of the CCMA.



Still, as a close associate of past minister of finance, Trevor Manuel, he seems not to have been listening to his friends. Somehow this Bill smacks of “Animal Farm”.

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