REPUBLIC OF SOUTH AFRICA

COMPETITION AMENDMENT BILL --

(As introduced in the National Assembly as a section 75 Bill)

(MINISTER OF TRADE AND INDUSTRY)

[B **34—99]**

REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP MEDEDINGING

(Soos ingedien in die Nasionale Vergadering as 'n artikel 75-wetsontwerp)

(MINISTER VAN HANDEL EN NYWERHEID)

[W 34—99]

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GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Competition Act, 1998, so as to close an existing loophole in respect of merger control; to determine the status and validity period of a ministerial notice; to make pre-merger notification compulsory in certain instances; to make provision for certain matters on appeal; to provide for certain transitional arrangements; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of Schedule 3 to Act 89 of 1998

1. Schedule 3 to the Competition Act. 1998, is hereby amended—

(a) by the substitution for item 1 of the following item:

"1. A ruling issued in terms of section **[6(1)(a)]** 6(2)(a) of the Maintenance and Promotion of Competition Act. 1979 **[(Act No.** 86 of 1979)] (Act No. 96 of 1979). or notice issued in terms of section 14(1)(c) of that Act. in relation to an "acquisition" as defined in that Act. must be regarded for the purposes of *this Act*. depending on the context. to be either—

(a) a conditional approval of a merger as if it had been granted after *this Act* came into operation, by the Competition Commission in terms of section 14(1)(b)(ii) or by the Competition Tribunal in terms of section [16(2)(b)] 15(2)(b); or

(b) a prohibition of a merger as if it had been prohibited after *this Act* came into operation. by the Competition Commission in terms of section 14(1)(b)(iii) or by the Competition Tribunal in terms of section 15(2)(c)..';

(b) by the insertion after item 3 of the following item:

"3A. A notice issued by the *Minister* in terms of section 14(1)(c) of the Maintenance and Promotion of Competition Act. 1979 (Act No. 96 of 1979). in relation to a "restrictive practice" or a "monopoly situation" as defined in that Act, must be regarded as an order in terms of section 60(l)(u) of *this Act* and is valid for a period of 12 months from the date on which *this Act* comes into operation.';

(c) by the addition to item 4 of the following paragraph:

"*(e)* The chairperson of the Competition Board contemplated in section 3 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979). must be regarded as a reference to either the Competition Commissioner contemplated in section 22 of *this Act*, or the chairperson of the Competition Tribunal contemplated in section 26 of *this Act*, as determined by the *Minister*.";

(d) by the insertion after item 4 of the following items:

"4A. Any transaction that takes place between the date on which *this Act is* published and the date on which *this Act* comes into operation, and which would constitute an intermediate or large merger if it had taken place after *this Act* came into operation. is regarded for a period of 12 months after the date on which *this Act* comes into operation as a merger in contravention of Chapter 3 and is subject to the provisions of section 62(1), unless—

(a) the transaction has been approved by the Competition Board in terms of the Maintenance and Promotion of Competition Act. 1979 (Act No. 96 of 1979): or

(b) the transaction has been notified in terms of item 4B.

4B. Any party to a transaction contemplated in item 4A may, within three months after the date on which *this Act* comes into operation, notify the Competition Commission of the transaction in terms of section 13 as if it were an intermediate or large merger.

4C. The provisions of Chapter 3. with the changes required by the context, apply to a transaction that is notified under item 4B.

4D. After *this Act* comes into operation, any appeal pending before a special court contemplated in section 15 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as an appeal to the Competition Appeal Court contemplated in section 36 of *this Act* in the manner *prescribed.*

4E. Subject to items 1 to 3A. the Competition Appeal Court may, after hearing any appeal contemplated in item 4D, make any decision that the special court could have made in terms of section 15(10) of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), and the provisions of *this Act* otherwise apply to that decision, as if it were a decision of the Competition Appeal Court in terms of *this Act.*

4F. (1) Notwithstanding sections 6 and 11, the first determinations of thresholds made by the *Minister* in terms of those sections must be made before the date on which *this Act* comes into operation.

(2) Notwithstanding sections 6(2) and 11(2), the first determinations contemplated in subsection (1) take effect on the date on which *this Act* comes into operation.";

(e) by the substitution for the expression "(Act No. 86 of 1979) '., wherever it appears, of the expression "(Act No. 96 of 1979)".

Short title and commencement

2. This Act is called the Competition Amendment Act, 1999, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE COMPETITION AMENDMENT BILL, 1999

The amendment proposed in item 1 closes an existing loophole by providing that if a merger is prohibited under the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979) ("the old Act") it will also be considered to have been prohibited under the Competition Act, 1998 (Act No. 89 of 1998) ("the Act").

Item 3A provides for a prohibition made under the old Act to be valid for a period of 12 months once the Act comes into operation.

The old Act does not make pre-merger notification compulsory. The Act makes pre-merger notification compulsory, but only for mergers that have taken place after the date of implementation of the Act. This means that it is possible for opportunistic mergers to take place prior to implementation of the Act by parties who do not notify the Competition Board. In order to close this loophole, the power is given to the relevant authorities under the Act to act *ex post facto* against mergers which were not notified under the old Act, if they occur during the period from date of notification of the Act. namely 30th October 1998, to the date of the implementation of the Act. This power. however, is only retained for a period of 12 months from the date of the commencement of the Act. At the same time. however, parties who did not notify under the old Act. are given the opportunity to do so within three months of the date that the Act comes into operation (Items 4A and 4B).

Under the old Act. parties are entitled to appeal against decisions of the Minister of Trade and Industry to a special court. Although the special court currently has no cases pending before it, it is necessary nevertheless to provide for this eventuality The amendments proposed in items 4D and 4E provide that matters pending before the special court on the date of implementation of the Act will be referred to the Competition Appeal Court, which in this instance is given the same powers as the special court had in relation to the powers of the Minister under the old Act, namely to confirm, set aside or amend the notice to which the appeal relates. If the Competition Appeal Court sets aside a notice, it will obviously fall away. On the other hand if the court confirms it or amends it. it still only remains valid for a period of 12 months after the date of implementation of the Act, in the same way as a notice of the Minister that was not the subject of an appeal to the special court.

Firms with assets or a turnover below a threshold determined by the Minister are excluded from the operation of the abuse of dominance and merger control provisions. As the Act is drafted at present, the Minister must give six months advance notice of these thresholds before they take effect. However. this is impractical in relation to the first notice introduced under the Act, as this could mean that six months would have to elapse before the Act can come into operation. Since the Act cannot operate without the threshold having been determined and it is also necessary to provide a period of consultation around the thresholds, the necessity for the six month notice is excluded for the first threshold published in terms of the Act for reasons of practicality (Item 4F).

Parliamentary procedure

The Department of Trade and Industry and the State Law Advisers are of the view that the Bill must be dealt within accordance with the procedure established by section 76(1) or (2) of the Constitution since it falls within a functional area listed in Schedule 4 of the Constitution, namely Trade.

Since the Joint Tagging Mechanism, on 9 September 1998. classified the Act (then still the Competition Bill [B 98—98]) as a section 75 Bill and since this Bill (the Competition Amendment Bill) does not introduce any subject matter not dealt with in the Act, it follows that the procedure established by section 75 of the Constitution must be applied in respect of this Bill.