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Bill may discourage investors – law firm

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THE NEW COMPETITION Amendment Bill, which proposes various changes to the Competition Act, is likely to create significant uncertainty and discourage foreign direct investment, according to Jean Meijer, a partner at law firm Herbert Smith Freehills.

Minister of Economic Development Ebrahim Patel last week tabled the new bill in Parliament. Cabinet earlier this month approved the submission of the legislation to Parliament. It said the amendments would mitigate against high levels of economic concentration, limited transformation and abuse of market power by dominant firms.

Meijer said the proposed section 18A, which deals with intervention in merger proceedings involving foreign acquiring firm, was likely to have far reaching negative consequences for foreign investment. She said it gave the government the right to block foreign investment in South Africa.

"In broad terms, the section establishes a framework within which a committee appointed by President Cyril Ramaphosa is given the power to decide whether or not a proposed transaction may proceed if it involves an acquisition by a 'foreign acquiring firm' and relates to certain yet to be identified national security interests," said Meijer.

She said there would be a "double notification" procedure for transactions within the ambit of section 18A as merging parties would be required to notify the transaction to the committee prior to notification to the competition authorities.

She said, so far, the Competition Commission was the body responsible for the assessment of public interest factors in mergers. This was done as part of the overall assessment of a merger.

Control process

"The minister of economic development has had the power under the act to intervene in the merger control process – effectively as an interested third party – where this is warranted on public interest grounds," said Meijer.

Recent high profile mergers such as that of brewers Anheuser-Busch InBev (AB InBev) and SABMiller entailed detailed commitments to address public interest issues.

The transaction's public interest commitments included a R1 billion investment over five years in areas such as agriculture as well as enterprise and supplier development.

She said the proposed section 18A gave a political body the power to prohibit a merger independently of the competition authorities "and thereby prevent the ordinary merger control process from occurring at all. Alternatively, it may impose conditions prior to the assessment by the competition authorities."

Ahmore Burger-Smidt, a director at Werksmans Attorneys, on Friday said the amendments would change the competition regulatory landscape and usher in a new competition regime.

She said the amendments would make it easier to prosecute dominant firms for predatory pricing and specifically margin squeeze.

Burger-Smidt said the changes would also elevate public interest considerations "to one of the core assessment considerations when evaluating mergers".

The commission's market inquiry powers would also be enhanced, she said.