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ECONOMIC DEVELOPMENT DEPARTMENT

NO. 1345 **01 DECEMBER 2017**

The Minister of Economic Development hereby publishes the Competition Amendment Bill, 2017 for public comment.

Accompanying the Bill is the Background Note on the Competition Amendment Bill, 2017 and an Explanatory Memorandum.

Members of the public are invited to submit written comments within 60 calendar days of publication of this notice, on the Competition Amendment bill, 2017 set out on page 25 to the following address:

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By Post to: The Director-General: Economic Development Department

Attention: Ms MT Mushi

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Comments received after the closing date will not be considered.

MINISTRY
ECONOMIC DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

BACKGROUND NOTE ON

COMPETITION AMENDMENT BILL, 2017

1 December 2017

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INTRODUCTION

The Competition Amendment Bill, 2017 ("the draft Bill") is published for comment. It is hoped that the consultation process about this draft Bill will enrich the content of the final Bill to give further effect to the important objectives of the Competition Act 1998 (Act 89 of 1998) ("the Act").

The Preamble to the Act states that the people of South Africa recognise that our country's past discriminatory laws resulted in excessive concentrations of ownership and control within the national economy, and that the South African economy has to be opened to a greater number of South Africans through ownership and opportunity.

The Preamble also records that an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans. And, to promote and maintain competition, it provides that we need effective structures to administer the Act.

Through the promotion and maintenance of competition, the Act[1] seeks to:

(i) promote the efficiency, adaptability and development of the economy;

(ii) provide consumers with competitive prices and product choices;

(iii) promote employment and advance the social and economic welfare of South Africans;

(iv) expand opportunities for South African participation in world markets;

(v) ensure that small and medium sized enterprises have an equitable opportunity to participate in the economy; and

(vi) promote a greater spread of ownership by increasing the ownership stakes of historically disadvantaged persons.

Clearly, these objectives cannot be achieved through the Act alone. The Act is one of many complementary policy instruments to achieve these objectives. However, the explicit reference to these structural and transformative objectives in the Act clearly indicates that the legislature intended that competition policy should be broadly framed, embracing both traditional competition issues, as well as these explicit transformative public interest goals.

The draft Bill seeks to advance these objectives of the Act in two important ways.

First, the draft Bill focuses on creating and enhancing the substantive provisions of the Act aimed at addressing two key structural challenges in the South African economy: concentration and the racially-skewed spread of ownership of firms in the economy.

[1]Section 2 of the Act.

Concentration refers to the extent to which a small number of firms account for the bulk of sales in a given market. The South African economy is characterised by unusually high levels of concentration, in part due to strategic barriers to entry created by incumbents as well as low rates of business formation and as a result of mergers and acquisitions. Concentration at the levels observed in South Africa is not adequately explained by improvements in efficiency nor is it driven by innovation.

In a number of competition regimes there is growing concern about the impact of high levels of concentration and the impact thereof upon a viable competitive process and the enhancement of welfare. There is also evidence that highly concentrated markets stultify innovation much needed for viable, inclusive economic growth.

Enhanced scrutiny of the causes of concentration and the need for tailored measures to deconcentrate markets are facilitated by the proposed amendments contained in the draft Bill. These amendments seek to ensure evidence-based inquiry into and explicit scrutiny of concentration when mergers are considered, abuses of dominance are prosecuted, and market inquiries are undertaken by the competition authorities. The amendments permit the competition authorities to undertake far-reaching and targeted interventions to address concentration.

The draft Bill provides for scrutiny of the racially-skewed spread of ownership of the South African economy. These measures also are required in order to realise the transformative vision of economic empowerment for all South Africans, in particular those individuals who are historically excluded and disadvantaged, as set out by the Act's Preamble and which are required to fulfil its Purposes. The amendments proposed will create more opportunities to advance the transformation of ownership of the economy.

While the transformative provisions are often motivated on the basis of an 'equity' argument, it is important to note the *economic* argument for transformation. Concentrated markets that inhibit new entrants and that, accordingly, exclude large numbers of black South Africans from the opportunity to run successful enterprises, are not a basis for strong and sustained growth. They continue to limit the talent pool of entrepreneurs on which the growth potential of the economy relies. An inclusive growth path requires that we address these barriers to entry - whether they are regulated or presently hidden from scrutiny.

Second, the draft Bill also proposes amendments to the Act aimed at enhancing the policy and institutional framework, and procedural mechanisms for the administration of the Act. These measures are designed to improve policy coherence, as well as to promote institutional and procedural efficiency.

Each of these focus areas of the draft Bill is addressed in turn below. These focus areas are the product of consultations undertaken by the Minister of Economic Development, within Government and with competition legal and economic practitioners, international experts and the South African competition authorities, and follow from advice received from a panel of legal and economic experts on regulatory options to give effect to the goals set out above. Based on this wide and comprehensive range of input, the draft Bill is produced for public comment.

These consultations resulted in the identification of five priorities elaborated on below, before detailing the rationale for the package of proposed amendments.

FIVE PRIORITIES

As a result of these engagements, five priorities were identified:

(i) The provisions of the Competition Act relating to prohibited practices and mergers must be strengthened.

(ii) Special attention must be given to the impact of anti-competitive conduct on small businesses and firms owned by historically disadvantaged persons.[2]

(iii) The provisions relating to market inquiries must be strengthened so that their remedial actions effectively address market features and conduct that prevents, restricts or distorts competition in the relevant markets.

(iv) It is necessary to promote the alignment of competition-related processes and decisions with other public policies, programmes and interests.

(v) The administrative efficacy of the competition regulatory authorities and their processes must be enhanced.

The amendments in the draft Bill address these identified priorities, as explained in further detail below. They are considered under four main headings below: *Economic Concentration; Transformation*; *Aligning Competition Related Decisions with other Public Policies, Programmes and Interests*; and *Improving the Efficacy of the Regulatory Institutions*.

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[2]In section 3 (2) of the Act, the term "historically disadvantaged persons is defined. This section states: "(2) For all purposes of this Act, a person is a historically disadvantaged person if that person—

(a) is one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race;

(b) is an association, a majority of whose members are individuals referred to in paragraph (a);

(c) is a juristic person other than an association, and individuals referred to in paragraph (a) own and control a majority of its issued share capital or members' interest and are able to control a majority of its votes; or

(d) is a juristic person or association, and persons referred to in paragraph (a), (b) or (c) own and control a majority of its issued share capital or members' interest and are able to control a majority of its votes."

ECONOMIC CONCENTRATION

Background

Most studies find that economic concentration is relatively high in many markets in South Africa. This situation results largely from the racially-skewed historical development of South Africa's economy and its isolation during apartheid, which gave rise to conglomerate firms and suppressed black-owned small producers and entrepreneurs. Once concentrated markets have been established, they tend to increase barriers to entry to new and emerging competitors, including through regulatory requirements, collusion and excessive and predatory pricing by dominant companies, and the difficulties newcomers typically face in competing with long-established companies. These may be compounded by the decisions of licensing or other regulatory regimes.

In economic theory, concentrated markets have the following negative effects.

- Dominant companies tend to maximise profits by charging higher prices, at the cost of lower levels of production, employment and investment. The result is that the economy grows more slowly while the dominant firm captures monopoly rents.

- Because it is difficult for new competitors to emerge, there is less incentive for dominant firms to innovate and invest in new technologies. This complacency represents a long-run cost to economic development.

- Flowing from the capture of monopoly rents, dominant companies are associated with higher levels of income inequality and narrower ownership structures. This is a major contributor to income inequality in South Africa.

In addition, dominant firms axiomatically arise in concentrated markets and concentrated markets are more susceptible to collusion. Anti-competitive conduct that arises from these market conditions can be addressed through the provisions in the Act relating to abuse of dominance or collusion. However, the structural features of the market that give rise to dominance are presently difficult to address under the existing provisions of the Act.

It must be emphasised that, while concentration often imposes significant drawbacks on the economy and society, it may also bring benefits. This is particularly true where a company must be relatively large in order to use advanced technologies in production, distribution and sales. Certain markets require economies of scale to bring down cost per unit (potentially to the benefit of consumers) that require large enterprises and thus, in a small economy, this may result in concentrated markets. In a globalised world, South African companies who compete in external markets may require scale and significant presence in its own domestic market. Domestic firms, to be able to compete effectively in the South African market against imports from larger, foreign competitors, may require scale. For this reason, the Bill accepts that measures to address concentration must take into account these cases, where the socio-

economic benefits of achieving economies of scale outweigh the costs of concentrated markets.

Research conducted by the Commission supports a widely-held view that markets in South Africa remain highly-concentrated, some twenty-three years after the end of apartheid.

A recent study by the Commission analysed over 2 150 merger reports to identify product markets with dominant firms for the period 2009 to 2016. The study used the statutory presumptive threshold requirement, namely that a firm with more than 45% market share is assumed to be dominant.

The study found there were 294 dominant firms in defined markets identified in the 31 sectors considered. 70% of the sectors have dominant firms in some of their defined product markets.

Using the Hirschmann-Heirfindahl index, the study found all of the sectors set out below to be highly concentrated (index score more than 2 500) given the average HHI score in their defined product markets. The right-hand column shows the average market share of a dominant firm in a defined product market.

Table 1: Average market share of a dominant firm in a defined product market within each sector

Sector	**Average market shares**	**HHI (a)**
Communication Technologies	55.2	3 539
Energy	60.8	2 832
Financial Services	68.8	2 788
Food and agro-processing	60.5	2 861
Infrastructure and construction	52.6	2 859
Intermediate industrial products	63.3	2 958
Mining	62.0	
Pharmaceuticals	59.6	3 003
Transport	67.4	3 254
Total	61.6	

Note: Market shares serve as inputs to producing the HHI index, with market shares:

- *below 1500 deemed to be unconcentrated*
- *between 1500 and 2500 being moderately concentrated*
- *above 2500 classified as highly concentrated.*

Moreover, concentration and racial exclusion often overlap.

It is therefore Government's intention that changes will be made to the Competition Act to enable the competition authorities to deal more clearly with high levels of concentration where it has a negative effect on competition, to enhance small business

development and promote the related goal of greater inclusion of black South Africans in the economy. This is required to achieve the Purposes of the Act.

The existing Act does not enable the Competition Commission or the Tribunal to address concentration, but only collusion and market abuse. The proposed amendments provide for a flexible and responsible evaluation of concentration, especially through the market inquiry mechanism, and on that basis can develop evidence-based and reasoned measures to promote more developmental market structures.

Since the Act came into operation, the Competition Commission ("the Commission") and the Competition Tribunal ("the Tribunal") have investigated many mergers, and exposed and ended several South African cartels and other anti-competitive prohibited practices. There is little doubt that these institutions have been successful.

In the consideration of mergers, the competition authorities have imposed innovative conditions that give effect to the twin needs to enable competition and to promote the explicit public interest goals set out in the Act. In a number of prominent cases, government has joined the proceedings and engaged merger parties on appropriate public interest commitments. Some examples include:

- Walmart's acquisition of Massmart: the Competition Appeal Court (i) ordered a local supplier development fund to be set up, capitalised with R200m by the merging parties, to promote smaller businesses to become part of its supply-chain, (ii) re-instated workers retrenched in anticipation of the retrenchment and (iii) protected the collective bargaining arrangements that had been in place prior to the merger;

- AB InBev's acquisition of SAB Miller was approved subject to extensive public interest conditions, including (i) a commitment not to retrench any employee involuntarily as a result of the merger, (ii) the retention of aggregate employment levels at the same level for five years as pertained at the date of the merger, (iii) support for small businesses and emerging farmers through a R1 billion supplier development fund, (iv) support for the local procurement of inputs including through an active programme to support domestic farmers (with a target of 2 600 new employees and 800 new farmers) that will help to turn SA from a net importer of beer inputs to a net exporter of value-added beer inputs; and (v) a requirement to divest of certain operations owned by the target firm in South Africa.

- Coca-Cola's merger of three bottling plants and subsequent change in ownership of the controlling share in the company was accompanied by binding commitments to open up company-sponsored display unit space to competitors, as well as extensive employment and small business development conditions, including the attainment of a 30% black-economic empowerment ownership target in the SA operations within a defined period.

Notwithstanding transformative success across a number of areas of the economy since the transition to our constitutional democracy, public disquiet understandably exists about high levels of economic concentration in the economy.

Two broad possible approaches to addressing the question of concentration were identified.

The first approach was to propose to the Legislature a standalone statute, based on a presumption that concentration is intrinsically bad for the attainment of inclusive growth and thus would provide for a mechanism, such as predefined thresholds of concentration or untransformed ownership profiles, which if reached, would trigger measures to de-concentrate the market or restructure firms or a combination of both measures.

The second approach was to effect changes to the Act. The second option was favoured for, amongst others, the following reasons:

(i) As already noted, economic concentration is a necessary feature in certain markets in which company size and scale of operation is critical and where significant economies of scale are accordingly required and realised. In such examples, in a small domestic market, this will lead to market concentration. The outlawing of concentration would then have negative consequences for consumers and may simply result in imports of products replacing inefficient local, smaller producers. Similar consideration would apply to markets characterised by unique or expensive technologies.

(ii) The outlawing of concentration would not necessarily induce entry or lower barriers to entry for firms, including small businesses and firms that are owned or controlled by historically disadvantaged persons. This approach may also introduce inefficiencies into the market, raising costs borne by consumers.

(iii) A standalone Act would be difficult to implement because it would require the setting of thresholds of concentration in multiple specific product and geographic markets, which would have to be based on a prior detailed analysis of each market. The institutional capacity to implement such an approach is significant and duplicates powers already possessed by the competition authorities.

(iv) There is no international precedent in either competition law or economics for outlawing concentration and ownership profiles without reference to the anti-competitive effects of abuse of dominance, or for that matter, merger control. Concentration alone is not condemned in competition policy globally because scale is a desirable economic feature, particularly in mid-sized economies with export ambitions.

(v) The existing language and structure of the Act, with suitable changes, permits for more effective measures to address issues of market concentration by targeting structural market feature that impede entry and competition.

The second option requires effective scrutiny by a skilled and experienced regulator to create an evidence-based, considered foundation for interventions aimed at addressing these issues. The amendments recognise that the competition authorities possess these skills and experience. The amendments create the necessity for scrutiny by merging parties, respondents in enforcement proceedings and participants in market inquiries, as well as the competition authorities when they engage in their respective investigative and adjudicative work, to analyse and interrogate existing market structure, and to consider and propose remedies to address concentration and ownership transformation.

To give effect to this option, the following proposed changes to the Act were identified.

(i) The provisions of the Act that prohibit collusion, abuse of dominance and price discrimination should be strengthened.

(ii) A more intensive consideration of these features in merger proceedings is required. This includes addressing the phenomenon of creeping concentration and preventing coordination among horizontal competitors through a common shareholder.

(iii) Special attention must be given to the impact of anti-competitive conduct on small businesses and on firms owned or controlled by historically disadvantaged persons.

(iv) The Commission must be empowered to investigate and analyse the impact of decisions made by it, the Tribunal and the CAC in mergers, enforcement proceedings and market inquiries.

(v) The market inquiry process must be boosted to provide for outcomes that can address structural features in the light of evidence-based analysis.

The object of including concentration in a competition statute is to ensure that concentration does not present unacceptable barriers to entry into the relevant market and the prevention of stagnation whereby firms with significant market power use their power to capture rents while preventing entry of innovative small firms.

These amendments are described below.

ECONOMIC TRANSFORMATION

At the same time as tackling economic concentration, it is imperative to address the persistently racially-skewed profile of ownership of the economy. Instruments and

mechanisms addressing economic transformation must ensure inclusive and meaningful change. They must be neither cursory nor superficial, and they must avoid undesirable practices like fronting.

Continued and accelerated transformation of the ownership profile of the economy is necessary not only to redress historic discrimination and exclusion, but also as part of a sound policy for economic development. Inclusive growth and the harnessing of the skills, talents and productivity of all South Africans is a vital component to ensuring a dynamic and successful long-term growth path for the economy. It is a clear goal of the Act to enable the competition authorities to take steps aimed at ending the exclusion of the majority of South Africans from owning a stake in the economy. These amendments seek to further this objective.

For these reasons, the amendments proposed in the draft Bill seek to address both concentration and ownership representivity concerns whenever these issues are before the competition authorities. They also establish a framework that incentivises merging parties and active firms to proactively address concentration and ownership representivity concerns arising in the markets in which they are active.

PROPOSED AMENDMENTS TO ADDRESS CONCENTRATION AND OWNERSHIP

The proposed amendments strengthen the Act's provisions relating to collusion, abuse of dominance, price discrimination, merger control, exemptions from prohibited practices and market inquiries. Each of these will be considered in turn, addressing the reasons for each of the proposed amendments on which public comment is sought.

Collusion

As previously stated, collusion in concentrated markets with stable, large market shares is usually easier because there are fewer firms to coordinate and monitor compliance with an anti-competitive cartel arrangement.

The amendment to section 4 (clause 2 of the draft Bill) reflects the factual position that collusive agreements in concentrated markets are achieved and monitored through the allocation of market shares between cartel members. This amendment will enhance the prohibition of cartel activity in concentrated markets, which in turn, creates opportunities for entry into and expansion in these markets. This will benefit small businesses (whose definition is included in section 1 (clause 1)) and firms controlled or owned by historically disadvantaged persons by presenting them with opportunities for entry into the market, with a deconcentrating effect.

Abuse of Dominance

Section 8 of the Act prohibits abuse of dominance by a firm that is dominant in a market. It is a key provision for addressing anti-competitive conduct in concentrated markets. Section 7 of the Act defines when a firm is dominant. It states that a firm is

dominant in a market if: (a)it has at least 45% share of that market; (b) it has at least 35% share, but less than 45% share, of that market, unless it can show that it does not have market power; or (c) it has less than 35% share of that market, but has market power."

In clause 3, it is proposed to delete the requirement in section 8(a) that an excessive price be shown to be to the "detriment of consumers", since excessive pricing may also affect businesses that buy inputs from dominant firms.

To further strengthen the provisions of section 8, the section is amended so as to delete the current section 8(c) and transform section 8(d) into an open list of the known, predictable exclusionary acts developed in competition jurisprudence as abuses of dominance.

Given that the determination of excessive pricing cases is complex, subsection (3) mandates the Commission to issue guidelines on how to determine excessive prices. The draft Bill also proposes that section 79 (clause 37), which empowers the Commission to issue guidelines, be amended to require a body interpreting or applying the Competition Act to take the guidelines into account even though they are not binding.

In addition, it is proposed that the subsection prohibiting predatory pricing[3] (subsection (1)(d)(v)) is amended to accommodate a more general cost standard ("the firm's relevant cost benchmark") for determining whether a firm has engaged in predatory pricing. This amendment enables flexibility and the case-specific determination of the applicable and relevant cost benchmark to be applied in each case. This enables the competition authorities to determine which cost benchmark out of the possible range of options is best-suited to the facts and circumstances of a particular case.

The subsection also includes as possible benchmarks the practice of selling goods or services below their average avoidable cost[4] or long run average incremental cost[5]. These cost benchmarks have been developed in global competition jurisprudence and reflect a broad consensus as to their usefulness in establishing pricing abuses. The inclusion of these standard economic benchmarks, in particular, is important because the failure of a dominant firm to cover its average avoidable costs or long run average

[3]Predatory pricing takes place when a dominant firm engages in significant price reductions (or sets low prices for a certain period) inducing a "profit sacrifice" relative to standard profit-maximising conduct, motivated by the marginalisation or exclusion of a rival followed by an expectation of "recoupment" (increase in market power and profits).

[4] Average avoidable costs refer to the costs, including both the variable costs and product-specific fixed costs, that could have been avoided by not engaging in a predatory strategy. Unlike average variable cost, it includes all product-specific fixed costs.

[5]Long run average incremental cost is the average cost of producing the predatory increment of output whenever such costs are incurred. It includes all product specific fixed costs. Examples of long run incremental costs are energy, maintenance, growth and rent.

incremental cost suggests that the dominant firm is sacrificing profits in the short-term, and therefore, may be involved in exclusionary conduct.

These cost benchmarks have the additional advantage of enabling market participants and dominant firms to guide their pricing practices with greater certainty. It is also expected that the identification of these cost benchmarks will enable market participants and dominant firms to better evaluate the likely compliance of their pricing practices with the Act.

Cases involving the abuse of dominance through charging excessive pricing have not to date been successfully prosecuted and this may continue to be the case unless the allocation of evidentiary burdens between the Commission and the dominant firm is addressed. Therefore, a new subsection (2) is proposed to place the burden on the dominant firm to show that the price it charges is reasonable after a *prima facie* case against it has been established by the Commission.

The definition of an *exclusionary act* (clause 1) is also amended by expanding its ambit to include not only *barriers to entry* and *expansion* within a market, but also to *participation in* a market.

Other proposed changes to give effect to the priorities identified above are the introduction of section 8(1)(d)(iv) to prevent unreasonable conditions unrelated to the object of a contract being placed on the seller of goods or services.

Section 8(1)(d)(vii) is inserted to include the practice of engaging in a margin squeeze[6] as a possible abuse of dominance.

Section (1)(d)(viii) is introduced to protect suppliers to dominant firms from being required, through the abuse of dominance, to sell their goods or services at excessively low prices. This addresses the problem of monopsonies, namely when a customer enjoys significant buyer power over its suppliers.

Administrative Penalties

The amendment to section 59 (clause 31) provides for the imposition of administrative penalties for all contraventions of the Act. This abolition of the “yellow card” is aimed at enhancing enforcement of the Act and to ensure greater compliance with it by firms. The “yellow card” was an appropriate penalty framework at the time of the Act’s commencement and early implementation. Given the greater certainty that has now been developed since its promulgation, it is appropriate to withdraw the “yellow card” at this time. There is now far greater awareness of the Act’s prohibitions of anti-

[6]A margin squeeze takes places when a vertically integrated firm holding a dominant position in the upstream market prevents its (non-vertically integrated) downstream competitors from achieving an economically viable price-cost margin by withholding, restricting or impeding access to a key input required by the downstream competitor.

competitive conduct and the serious consequences of non-compliance with its provisions, removing the need for these provisions.

Administrative penalties are left to the discretion of the Tribunal. Its decision must consider the factors listed in section 59(3).[7] The amendments stipulate that the Tribunal must take into account, when determining the quantum of the administrative penalty, the impact of the contravention upon small businesses and firms owned by historically disadvantaged persons.

The amendments also provide that an administrative penalty imposed upon a firm may be extended to other firms that form a single economic entity with the contravening firm. This will prevent the manipulation of corporate structures to avoid administrative penalties being realised.

Price Discrimination

Section 9 deals with price discrimination by a dominant firm. As with the provisions prohibiting abuse of dominance generally, it is proposed in clause 4 that the ambit of section 9 be expanded to prohibit price discrimination by a dominant firm against its suppliers.

In addition, it is proposed that the allocation of the burden of proof provisions be addressed so that the dominant firm must show that the action of price discrimination is not likely to have an effect of preventing or lessening competition. This is the effect of the deletion of subsection (1)(a) and its inclusion in subsection (2).

Most importantly, it is proposed that this section requires that special attention be given to the effect of anti-competitive price discrimination on small businesses and firms owned or controlled by historically disadvantaged persons. The entry and viability of these "outsider" firms are harmed by price discrimination where it is used to disadvantage them, to the benefit of larger firms. Ensuring that the competition authorities are cognisant of this consequence and consider it in every section 9 case advances the inclusive and transformative purposes of the Act.

Exemptions from Prohibited Practices

The proposed amendment to section 10(3)(b)(ii) (clause 5) again places emphasis on small businesses and firms owned or controlled by historically disadvantaged persons. It makes the entry, participation in and expansion of these businesses a key

[7]Section 59(3) states: "When determining an appropriate penalty, the Competition Tribunal must consider the following factors: (a) the nature, duration, gravity and extent of the contravention; (b) any loss or damage suffered as a result of the contravention; (c) the behaviour of the respondent; (d) the market circumstances in which the contravention took place; (e) the level of profit derived from the contravention; (f) the degree to which the respondent has cooperated with the Competition Commission and the Competition Tribunal; and (g) whether the respondent has previously been found in contravention of this Act."

consideration when determining exemptions. This will be a further tool to address the concern that these firms frequently exit the market.

The proposed amendment to section 10(3)(b)(iv) (clause 5) extends the set of objectives in which an exemption from the application of Chapter 2 may be granted to include the economic development of an industry designated by the Minister, thereby advancing the objectives of the Act.

Merger Control

Several amendments are proposed to the current merger control regime.

The first amendment of the merger control regime (clause 7(a)) reflects the settled, established position in South African case law that the competition and public interest tests for the approval of a merger are equal in status. This confirms the legislative intention that a merger must be justified on both competition and public interest grounds to be approved.

The proposed amendments also seek to prevent creeping concentration, and the erection and maintenance of strategic barriers to entry, and the regulation of conditions under which a merger was approved. Preventing creeping concentration and strategic barriers to entry are the primary motivation for the proposed amendments to section 12A (clause 7). These amendments propose that cross-shareholdings and cross-directorships be explicitly considered in all mergers and, in particular, to require disclosure of merger activity engaged in by the merging parties in the preceding three years to identify markets in which, and firms by which, creeping concentrations are being pursued. These requirements would reveal merger activity that may have fallen below the current thresholds for scrutiny by the competition authorities. This should ensure that transactions which give rise to creeping concentration are appropriately investigated and considered by the competition authorities.

Co-ordination between competitors may occur through a common shareholder and. overlapping ownership structures may increase concentration. Therefore, the amendment to section 12A (clause 7), provides for mandatory disclosure and express scrutiny of these relationships during merger proceedings.

The new section 12B (clause 8) enables the Commission to scrutinise transactions occurring within a three-year period that result in a change of control, or which are steps towards a change of control, as if they occurred simultaneously. This also ensures that the creeping acquisition of control is subject to the appropriate scrutiny and analysis by the competition authorities.

This package of amendments will require consideration of these structural features in every merger, and the identification of measures to ameliorate any identified and credible concerns.

The amendment to section 12A (clause 7) also seeks to explicitly create public interest grounds in merger control that address ownership, control and the support of small businesses and firms owned or controlled by historically disadvantaged persons.

In addition, the proposed amendment to section 15 (clause 9) provides that the Commission may make an appropriate order regarding any condition relating to the merger, including those relating to employment, small businesses and firms owned or controlled by historically disadvantaged persons. The amendment to section 16 (clause 10) provides the Tribunal with a similar power. These amendments aim to reflect and consolidate the jurisprudence developed by the Competition Appeal Court and Tribunal recognising the breadth and scope of conditions that can be imposed to creatively address the public interest impact of mergers.

Market Inquiries

The package of amendments to chapter 4A (clauses 18 to 24), envisage that market inquiries will become the chief mechanism for analysing and tackling the structural problems in a market, thereby advancing the purposes of the Act. The proposed amendments to the chapter relating to market inquiries will enhance the market inquiry process and will ensure that its outcomes include measures to address concentration and the transformation of ownership. These mechanisms are similar to those in other jurisdictions elsewhere in the world which have had some success at addressing structural issues in markets.

The central concept of a market inquiry is to empower the Commission to inquire into market structure, and decide on interventions and remedies to address any features of the markets that would enhance competition and advance the purposes of the Act.

A market inquiry's focus remains on the general state of competition in a market, rather than on the conduct of a particular firm. This distinguishes the market inquiry process from the Commission's initiation of complaints for investigation and possible referral to the Tribunal, which focus on firms' anti-competitive conduct.

The proposed amendments to section 43A(b) (clause 18) identify three categories of market features that may be relevant to the market inquiry: (a) market structure; (b) observed market outcomes; or (c) the conduct - whether of suppliers, customers or firms active in a concentrated market - related to the market into which the Commission will conduct a market inquiry. It also includes reference to the target of the complex monopoly provisions of the 2008 Amendment to the Act. These three categories of market features enable the Commission to flexibly craft a market inquiry, while ensuring that the market inquiry remains focussed on these particular concerns. The amendment provides for a non-exhaustive list of market outcomes, including concentration and the past or current state support afforded to firms in the market that may result in a market being uncompetitive. The list of features of a market is broad and flexible, to enable the tailoring of a market inquiry to the features of a specific market.

The amendments also establish a new test for market inquiries, namely whether any feature or combination of features in a market that prevents, restricts or distorts competition in that market constitutes an "adverse effect". This is a different test to the "substantially prevents or lessens competition" test utilised in enforcement proceedings against anti-competitive conduct elsewhere in the Act. This new "adverse effect" test is designed as a lower threshold to enable intervention by the competition authorities in circumstances where features of a market, or conduct in a market, impair competition.

As set out below, the new architecture of the market inquiry process is designed to enhance its focus, predictability and required remedial outcomes. It empowers the Commission to take all reasonable and practicable action to remedy, mitigate or prevent the adverse effect on competition established by the market inquiry process.

One of the current mechanisms for addressing structural issues – the prohibition or regulation of complex monopolies, which is found in section 10A – will be less effective than a focussed market inquiry. This is because that section is complex and is likely to be the subject of substantial litigation, including constitutional attacks about its validity. It is also rigid and does not effectively deal with concentrated markets. Notwithstanding the deletion of section 10A (clause 6), the competition problem typically associated with complex monopolies is reflected in the list of market features that can trigger a market inquiry, set out in the new amended section 43A.

As with the merger control regime, the Commission's potential findings and actions following a market inquiry will be binding, unless challenged in the Tribunal. The amendments envisage a range of creative, flexible and bespoke actions that the competition authorities will undertake where an adverse effect on competition due to the features of a market is established. These are only required to be reasonable and practicable, and designed to remedy, mitigate or prevent the adverse effect on competition established by the market inquiry. The exception to this approach is divestiture, which is only competently imposed by the Tribunal on the recommendation of the Commission. Given the far-reaching nature of this remedy, this is appropriate.

Time limits are desirable for the completion of the market inquiry process to avoid it becoming an iterative process without end. For this reason, the amendments (clause 19(b)) require a market inquiry to be completed within 18 months, with a permissible extension of a reasonable period.

The amendment to section 43B (clause 19) sets out the procedures and processes to be followed in a market inquiry. It identifies the powers available to the Commission for the conduct of the inquiry, sets the applicable time limit for it, and provides for amendment of the terms of reference or time limit for completion of a market inquiry.

The section also creates protections relating to access to confidential information. The amendment empowers the Commission to determine whether a claim of confidentiality is appropriate in the first instance. If a Commission determines that the party's claim of confidentiality is invalid, the aggrieved party may appeal to the Tribunal for relief.

The proposed new section 43C (clause 20) requires the Commission to consider and expressly decide on specific issues in every market inquiry. This imposes a discipline on the market inquiry that will ensure that its focus is clear, and which will guide the conduct of the inquiry itself.

This amendment requires the inquiry to consider (a) whether there are structural features that have an adverse effect on competition in a market; (b) whether the Commission can impose a remedy (and then creates an obligation for it to do so); or, (c) whether another regulator is responsible for further action.

This amendment requires the Commission to address structural impediments to competition, including by addressing concentration and barriers to entry by small businesses and firms owned by historically disadvantaged persons. Likewise, the insertion in section 43D (clause 21) places a duty on the Commission to remedy structural features identified as having an adverse effect on competition in a market, including the use of divestiture orders. It also requires the Commission to record its reasons for the identified remedy. This is again reinforced in the insertion of section 43E (an amendment of the old section 43C) (clause 22). In this section, the Commission is obliged to make recommendations regarding structural features identified as having an adverse effect of competition in a market. These amendments empower the Commission to tailor new remedies demanded by the findings of the market inquiry. These remedies can be creative and flexible, constrained only by the requirements that they address the adverse effect on competition established by the market inquiry, and are reasonable and practicable.

The amendment to section 58 (clause 30) empowers the Tribunal to use any of the other remedies currently permitted under the Act to address the findings of the Commission following a market inquiry, including utilising any of the remedies that target prohibited practices or abuses of dominance, and potentially voiding anti-competitive agreements. This also now includes the conclusion of consent orders (clause 27).

The proposed amendment to section 60 (clause 32) enables divestiture as a remedy following a market inquiry, and on terms that have regard to the purposes of the Act, with the safeguard that a divestiture remedy can only be imposed by the Tribunal, following a recommendation from the Commission. In addition, there is the right of appeal to the Competition Appeal Court.

To facilitate the efficiency of an inquiry, the insertion of section 43G (clause 24) draws a distinction between participation in the market inquiry and the opportunity to make representations to the market inquiry. It is required to protect the constitutional rights of parties likely to be affected by the market inquiry.

Naturally, a party is, under our constitutional democracy, entitled to challenge the outcome of a market inquiry. The insertion of Section 43F (clause 23) provides for an appeal (rather than a review) to the Tribunal. This enables the Tribunal to consider the merits of the Commission's decision-making and remedial action following a market

inquiry, while limiting it to the record used by the Commission. It also prevents a reconsideration, and replication, of the market inquiry before the Tribunal. This should reduce the delays and litigious challenges to the market inquiry process undertaken by the Commission. The aggrieved parties initiating an appeal would be restricted in their arguments to the Commission's record of its market inquiry.

ALIGNING COMPETITION-RELATED DECISIONS WITH OTHER PUBLIC POLICIES, PROGRAMMES AND INTERESTS

At present, there is insufficient alignment of competition-related processes and decisions with other public policies, programmes and interests and with the policies that voters embrace through the democratic process.

This disjuncture should be addressed. One option would be to centralise the decision-making processes in the Executive where there is a confluence of all related matters – competition-related priorities and other public policies, programmes and interests. This could be achieved by providing the responsible Minister with a greater role in the decision-making process by, for example, providing the Minister with the right to review merger decisions on specified grounds such as the impact it would have on employment, small business and upon businesses or potential business that are owned or controlled by historically disadvantaged persons. There is international precedent for providing the executive with an effective veto-power over mergers.

This approach has a number of problems. First, it may create a high level of uncertainty through the introduction of a dual approval system, centred on the one hand in the regulator and on the other hand, the executive. Second, the separation of competition and public interest issues into two unconnected processes may make the development of innovative solutions that affect both sets of considerations, more difficult to craft. Third, the possibility of improper considerations that falls outside the scope of the Act being applied in a merger will be higher when one process is simply a political decision that is not subject to the same transparency and engagement that would be the case in a public, regulator-led process. Finally, the dual-approval system may lengthen and delay consideration of mergers.

The second and preferred option is to follow the underlying philosophy of the existing Act and to keep the decision-making processes within the Commission, Tribunal and CAC, but to provide the responsible Minister with more effective means of participating in competition-related inquiries, investigations and adjudicative processes. This option allows the Executive to engage in the decision-making processes, ensure the consideration of policy-related matters, enable better integration of policies across the state and provide the necessary connection between concerns of the electorate and the work of the competition authorities. This promotes transparency and a rational consideration of all related matters.

PROPOSED AMENDMENTS

The regulation of a market to foster competition and economic growth is quintessentially a policy issue for which the Executive is responsible and accountable. Therefore, the Executive should have access to the Act's mechanisms that assist with the development of relevant policies and programmes for that market. The proposed amendment to section 43B (clause 19) gives effect to this by providing the Minister[8] with the power to establish a market inquiry.

The proposed amendment to section 17 (clause 11) provides the Minister and the Commission with the right of appeal against a decision of the Tribunal, a provision that is currently lacking in the Act. It thus addresses a *lacuna* in the Act and provides the Commission and Executive with a meaningful means of participating in the Act's adjudicative processes.

The new section 45 (3) (clause 26) provides the Minister with the right of access to confidential information, but makes this right subject to the Minister honouring the confidentiality provisions of the Act, so that legitimate commercially-sensitive information affecting a company is kept confidential. This gives effect to the Minister's right to intervene and make representations in the public interest. The same applies to other Ministers or regulatory authorities who are involved in the proceedings, although the Tribunal may override this right.

IMPROVING THE EFFICACY OF THE COMPETITION INSTITUTIONS

While it is apparent that the Commission and Tribunal are effective institutions, it is necessary to enhance their capacity, provide for functions associated with the proposed amendments referred to above and further streamline their processes.

In addition, it is necessary to regulate the question of appeals from the Competition Appeal Court (CAC) and prevent competition-related matters from being determined in multiple legal forums.

PROPOSED AMENDMENTS

The Commission

In addition to the amendments relating to market inquiries which expand and clarify the role of the Commission in these inquiries, the following amendments are proposed in order to promote the Commission's advocacy powers and the administrative efficacy of the Commission.

The proposed insertion of section 21A (clause 13) creates a new power for the Commission to gather information and study the impact of earlier decisions of the Commission, Tribunal or Competition Appeal Court. This power enhances the

[8]The definition of Minister in section 1 is updated (clause 1).

Commission's advocacy powers. These studies will provide valuable insights into the impact of the Competition Act on the competitiveness of South African markets and inform future action or approaches, including measures to enhance competition, whether in mergers, market inquiries or enforcement cases.

The proposed amendments provide the Commissioner with the power to determine delegations of authority (clause 14) and designate staff members of the Commission with rights of appearance in courts of law (clause 15).

To give effect to existing case law regarding the Commission's leniency policy, the Commission's powers and functions are expanded to include the adoption of a leniency policy and making decisions about leniency applications (clauses 12 and 28). Pending the adoption of a new leniency policy in terms of these sections, the amendment of section 83 (clause 38) provides for the continued applicability of the Commission's present leniency policy. The Commission's leniency policy encourages and protects whistleblowers who alert the authorities to cartel conduct. They are protected from the imposition of an administrative penalty by the Tribunal, on condition that they fully disclose their involvement in and knowledge of the cartel, and cooperate with and assist the Commission in its prosecution of their fellow cartel members. The leniency policy has played a key role in the Commission's success in pursuing cartel conduct throughout the economy.

The amendment to section 67 clarifies the wording regarding the prescription of claims so that firms cannot argue that the Commission is unable to investigate the matter because it has prescribed (clause 36). The Commission must be able to investigate a matter even if it is to determine whether it has prescribed.

The amendment to section 74 increases the fine for offences relating to the administration of the Act from R2 000 to R10 000 (clause 37), which is a more appropriate deterrent against the commission of such an offence.

The Tribunal

To improve the capacity of the Tribunal, especially during peak periods, the amendments propose a mechanism for the appointment of acting Tribunal members (clause 16). This should also facilitate the development of practitioners for possible full-time or part-time appointment to the Tribunal. To prevent a situation where there is an overuse of acting members, the amendments limit the number of acting Tribunal members hearing any matter (clause 17).

In addition, the amendments propose the extension of the kinds of matters that a single Tribunal member may hear and determine. These matters are limited to interlocutory applications such as application relating to time periods, access to information and discovery of documents. The Tribunal's Chairperson is empowered to determine when an application does not warrant three Tribunal members to hear the matter.

It is also proposed that the Tribunal be provided explicitly with the power to amend and withdraw a direction and summons (clause 29). This reflects the current case law and will prevent overly technical points about this matter, which are time-consuming.

Confidential Information and Access to Confidential Information

One of the most time-consuming issues in Commission and Tribunal processes, which often prevent the speedy resolution of disputes, is the regulation of confidential information and access to that information. The proposed amendments to sections 44 and 45 (clauses 25 and 26) attempt to streamline the determination of these matters and provide guidance on how such matters should be resolved.

Appeals from the CAC

The proposed amendments bring the Act into line with the amendments to section 168 of the Constitution, which allows for appeals directly to the Constitutional Court (clauses 33 and 34).

Litigation in Multiple Legal Forums

The proposed amendment encourages referrals of competition-related matters from the High Court to the Tribunal (clause 35). This will not only reduce the burden on the High Courts, but also ensure that a more consistent set of competition law jurisprudence is established.

CONCLUSION

In sum, the package of amendments proposed in the draft Bill is a comprehensive and significant enhancement of the policy implementation mechanisms, institutional arrangements, powers and processes of the competition authorities. The amendments also strengthen the available interventions that will be undertaken to redress the specific challenges posed by concentration and untransformed ownership. These measures will advance the fulfilment of the purposes of the Act as set out in section 2 of the Act and the creation of inclusive, vibrant and competitive markets to the benefit of all South Africans, as envisaged in the Preamble to the Act.

REPUBLIC OF SOUTH AFRICA

COMPETITION AMENDMENT BILL, 2017

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. of) (The English text is the official text of the Bill)

(MINISTER OF ECONOMIC DEVELOPMENT)

[B —2017]

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 introduce provisions that: clarify and improve the determination of prohibited practices relating to restrictive horizontal practices, abuse of dominance and price discrimination; improve the regulation of mergers; to provide for the promotion of competition and economic transformation through addressing the de-concentration of markets; to protect and to stimulate small businesses and firms owned and controlled by historically disadvantaged persons and their growth; to protect and promote decent employment and employment security; to facilitate the effective participation of the national Executive within proceedings contemplated in the Competition Act, 1998; to empower the Commission to act in accordance with the results of a market inquiry; to amend the process by which the Competition Commission may initiate market inquiries; to empower the Minister to initiate market enquiries; to promote greater efficiency regarding the conduct of market inquiries; to clarify and foster greater efficiency regarding the determination of confidential information and access to confidential information; to promote the administrative efficiency of the Competition Commission and Competition Tribunal; and provide for matters connected therewith.

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

Amendment of section 1 of Act 89 of 1998, as amended by section 1 of Act No. 39 of 2000

1 The Competition Act, 1998 (Act 89 of 1998) (hereinafter 'the Principal Act') is hereby amended by the —

(a) the substitution in section 1 for the definition of "exclusionary act" of the following definition—

"**exclusionary act**" means an act that impedes or prevents a *firm* from entering into, participating in or expanding within **[,]** a market;"

(b) the substitution in section 1 of the definition of "Minister" with the following—

"**Minister**" means the *Minister* responsible for the administration of *this Act*;"

(c) the substitution in section 1 of the definition of "small business" with the following—

"**small business**" **[has the meaning]** means a small enterprise as set out in the National Small Enterprise Act, 1996 (Act No. 102 of 1996);

Amendment of section 4 in Act 89 of 1998, as amended by section 3 of Act 39 of 2000

2 The Principal Act is hereby amended by the substitution of section 4(1)(b)(ii) for the following section —

"(ii) dividing markets by allocating market shares, customers, suppliers, territories or specific types of *goods or services*; or"

Amendment of section 8 in Act 89 of 1998

3 The Principal Act is hereby amended by the substitution of the section for the following —

"**Abuse of dominance prohibited.**

(1) It is prohibited for a dominant *firm* to —

(a) charge an excessive price **[to the detriment of consumers]**;

(b) refuse to give a competitor access to an *essential facility* when it is economically feasible to do so;

[(c) engage in an *exclusionary act*, other than an act listed in paragraph (*d*), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain; or]

(d) engage in any **[of the following]** *exclusionary acts*, unless the *firm* concerned can show technological, efficiency or other pro-competitive **[,]** gains which outweigh the anti-competitive effect of its act, including—

(i) requiring or inducing a supplier or customer to not deal with a competitor;

(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

(iii) selling *goods or services* on condition that the buyer purchases separate *goods or services* unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;

(iv) buying *goods or services* on condition that the seller accepts an unreasonable condition unrelated to the object of a contract;

(v) selling *goods or services* below their relevant cost benchmark, which may include the **[marginal]** average avoidable cost, **[or]**average variable cost or a long run average incremental cost; **[or]**

(vi) buying-up a scarce supply of intermediate goods or resources required by a competitor;

(vii) engaging in a margin squeeze; or

(viii) requiring a supplier to sell at an excessively low price.

(2) If there is a *prima facie* case of abuse of dominance because the dominant *firm* charged an excessive price or required a supplier to sell at an excessively low price, the dominant *firm* must show that the price was reasonable.

(3) The Commission must publish guidelines in terms of section 79 setting out the relevant factors and benchmarks for determining whether a price is excessive."

Amendment of section 9 in Act 89 of 1998

4 The Principal Act is hereby amended by the —

(a) deletion of paragraph (a) in section 9(1); and

(b) substitution of subsection (2) for the following—

"(2) Despite subsection (1), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of that subsection is not prohibited price discrimination if the dominant *firm* establishes that the differential treatment—

(a) is not likely to have the effect of preventing or lessening competition; and

(b)(i) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which, *goods or services* are supplied to different purchasers;

(ii) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or

(iii) is in response to changing conditions affecting the market for the *goods or services* concerned, including—

(aa) any action in response to the actual or imminent deterioration of perishable goods;

(bb) any action in response to the obsolescence of goods;

(cc) a sale pursuant to a liquidation or sequestration procedure; or

(dd) a sale in good faith in discontinuance of business in the *goods or services* concerned.

(c) the insertion of the following subsections after subsection (2) —

"(3) When determining whether the differential treatment is likely or unlikely to have the effect of preventing or lessening competition referred to in subsection (2)(a), consideration must be given to the effect on *small businesses* and *firms* controlled or owned by historically disadvantaged persons.

(4) The provisions of subsections (1) to (3), read with the changes required by the context, apply to a dominant *firm* as the purchaser of *goods or services*."

Amendment of section 10 in Act 89 of 1998

5 The Principal Act is hereby amended by the —

(a) substitution of subparagraph (ii) in subsection (3)(b) for the following subparagraph—

"(ii) promotion of the **[ability of]** effective entry into, participation in and expansion within a market by *small business*, or *firms* controlled or owned by historically disadvantaged persons **[, to become competitive]**;

(b) substitution of subparagraph (iv) in subsection (3)(b) for the following subparagraph—

"(iv) the economic development or stability of any industry designated by the *Minister*, after consulting the Minister responsible for that industry."

Amendment of section 10A in Act 89 of 1998, as amended by section 4 of Act 1 of 2009

6 The Principal Act is hereby amended by the deletion of Chapter 2A and section 10A.

Amendment of section 12A in Act 89 of 1998, as amended by section 6 of Act 39 of 2009

7 The Principal Act is hereby amended by —

(a) the substitution of subsection (1) for the following —

"(1) When required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and—

(a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine—

(i) whether or not the merger is likely to result in any technological, efficiency or other pro- competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); **[or]**and

(b) **[otherwise,]** determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

(b) the substitution of paragraphs (g) and (h) in subsection (2) for the following and the insertion of the following paragraphs in subsection (2) after paragraph (h) —

"(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; **[and]**

(h) whether the merger will result in the removal of an effective competitor[.];

(i) the extent of shareholding by a party to the merger in another *firm* or other *firms* in related markets;

(j) the extent of to which a party to the merger is related to another *firm* or other *firms* in related markets, including through common members or directors; and

(k) any other mergers engaged in by a *party to the merger* in the preceding three years."

(c) the substitution of paragraphs (c) and (d) in subsection (3) for the following and the insertion of the following paragraph in subsection (2) after paragraph (d)—

"(c) the ability of *small businesses,* or *firms* controlled or owned by historically disadvantaged persons, to **[become competitive]** effectively enter into, participate in and expand within the market; **[and]**

(d) the ability of national industries to compete in international markets; and

(e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons in the *firms* in the market."

Insertion of section 12B in Act 89 of 1998

8 The Principal Act is hereby amended by the insertion of the following section—

"**12B Mergers by way of a series of transactions.**

(1) In this section, a "series of transactions" are two or more transactions during a three-year period that result in a merger.

(2) This subsection applies to—

(a) any transaction by which a person acquires control of a *firm* in terms of section 12(2)(a) to (f); and

(b) any transaction which—

(i) enables that person to control the *firm* in terms of section 12(2)(g);

(ii) enables that person to do so to a greater degree; or

(iii) is a direct or indirect step towards enabling that person to do so.

(3) A merger that occurs by way of a series of transactions may, if the Competition Commission considers it appropriate, be treated for the purposes of section 12A as having occurred simultaneously on the date on which the latest of them occurred.

(4) A transaction that takes place after a series of transactions that has already resulted in a person acquiring control of a *firm* in terms of section 12(2)(a) to (f) must be disregarded for the purposes of subsection (3)."

Amendment of section 15 in Act 89 of 1998, as amended by section 6 of Act 39 of 2000

9 The Principal Act is hereby amended by the substitution of section (15) for the following section —

"**15. Revocation of merger approval and enforcement of merger conditions.**

(1) The Competition Commission may —

(a) revoke its own decision to approve or conditionally approve a small or intermediate merger if —

(i) the decision was based on incorrect information for which a party to the merger is responsible;

(ii) the approval was obtained by deceit; or

(iii) a *firm* concerned has breached an obligation attached to the decision; or

(b) make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) and (c).

(2) If the Competition Commission revokes a decision to approve a merger under subsection (1)(a), it may prohibit that merger even though any time limit set out in this Chapter may have elapsed."

Amendment of section 16 in Act 89 of 1998, as amended by section 6 of Act 39 of 2000

10 The Principal Act is hereby amended by the substitution of subsections (3) and (4) for the following subsection —

"(3) Upon application by the Competition Commission, the Competition Tribunal may —

(a) revoke its own decision to approve or conditionally approve a merger, and section 15, read with the changes required by the context, applies to a revocation in terms of this subsection; or

(b) make any appropriate order regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) and (c).

(4) The Competition Tribunal must—

(a) publish a notice of a decision made in terms of subsection (2) or (3)(a) in the *Gazette*; and

(b) issue written reasons for any such decision."

Amendment of section 17 in Act 89 of 1998

11 The Principal Act is hereby amended by the substitution of section 17(1) for the following subsection –

"(1) Within 20 business days after notice of a decision by the Competition Tribunal in terms of section 16, an appeal from that decision may be made to the Competition Appeal Court, subject to its rules, by —

(a) any party to the merger; **[or]**

(b) the Competition Commission;

(c) the *Minister*; or

(d) a person who, in terms of section 13A (2), is required to be given notice of the merger, provided the person had been a participant in the proceedings of the Competition Tribunal."

Amendment of section 21 in Act 89 of 1998, as amended by Act 39 of 2000

12 The Principal Act is hereby amended by the insertion of the following subsections after section 21(1)(g) —

"(gA) develop a policy regarding the granting of leniency to any *firm* contemplated in section 50;

(gB) grant or refuse applications for leniency in terms of section 49E;"

Insertion of section 21A into Act 75 of 1997

13 The Principal Act is hereby amended by the insertion after section 21 of the following section –

"**21A Impact Studies**

(1) The Competition Commission may study the impact of any decision, ruling or judgment of the Commission, the Competition Tribunal or the Competition Appeal Court.

(2) The Commission may request information from any *firm*in order to compile its impact study report.

(3) The Commission must submit its report to the *Minister* and publish its report in the *Gazette* 15 business days after submitting it to the *Minister*.

(4) The Minister must table in the National Assembly any impact study report within 10 business days after receiving the report from the Commission and, if Parliament is not sitting, within 10 business days after the commencement of the next sitting.

(5) Sections 44 and 45A, read with the changes required by the context, apply to the Commission's request for information from a*firm* and the publication of its report.

(6) A *firm* that receives a request for information in terms of subsection (2) may lodge an objection with the Competition Tribunal within 20 business days of receiving the request.

(7) The Competition Tribunal must determine the objection referred to in subsection (6) and may make any appropriate order after having considered all relevant information, including—

(a) the nature and extent of the information requested;

(b) the purpose and scope of the impact study;

(c) the relevance of the information requested to the impact study."

Amendment of section 22 of Act 89 of 1998

14 The Principal Act is hereby amended by the insertion after section 22(3) of the following subsections —

"(3A) The Commissioner, after consultation with the *Minister*, may determine a policy regarding the delegation of authority in the Competition Commission in order to facilitate administrative and operational efficiency.

(3B) The delegations of authority referred to in subsection (3A) may —

(a) provide for the delegation to a deputy commissioner or another staff member of the Commission of —

(i) any of the Commissioner's powers, functions or duties conferred or imposed upon the Commissioner under *this Act*, except those referred to in sections 24 and 25(1)(b); and

(ii) any of the Competition Commission's powers, functions or duties conferred or imposed upon the Commission under *this Act,* except those referred to in section 15; and

(b) in appropriate circumstances, include the power to sub-delegate a delegated power.

(3C) The Commissioner may —

(a) delegate only in terms of the policy on delegations of authority;

(b) delegate either to a specific individual or the incumbent of a specific post;

(c) delegate subject to any conditions or restrictions that are deemed fit;

(d) withdraw or amend a delegation made in terms of the policy on delegations of authority;

(e) withdraw or amend any decision made by a person who exercises a power or performs a function or duty delegated in terms of the policy on delegations of authority.

(3D) A delegation in terms of the delegations of authority policy —

(a) must be in writing, unless it is impracticable in the circumstances;

(b) does not limit or restrict the competence of the Commissioner to exercise or perform any power, function or duty that has been delegated;

(c) does not divest the Commissioner of the responsibility concerning the exercise of the power or performance of the delegated duty; and

(d) is subject to the limitations, conditions and directions that the policy on delegations of authority imposes."

Amendment of section 25 of Act 89 of 1998

15 The Principal Act is hereby amended by the substitution of subsection 25 for the following —

"(1) The Commissioner may —

(a) appoint staff, or contract with other persons, to assist the Competition Commission in carrying out its functions; and

(b) in consultation with the *Minister* and the Minister of Finance, determine the remuneration, allowances, benefits, and other terms and conditions of **[appointment]** employment of each member of the staff.

(2) Subject to the provisions of *this Act*, the Commissioner may designate a staff member of the Competition Commission who has suitable qualifications or experience to appear on behalf of the Commission in any court of law.

Substitution of section 26(2) in Act 89 of 1998

16 The Principal Act is hereby amended by the substitution for section 26(2) for the following subsection –

"26(2)(a) The Competition Tribunal consists of a Chairperson and not less than three, but not more than fourteen, other women or men appointed by the President, on a full or part-time basis, on the recommendation of the *Minister*, from among persons nominated by the *Minister* either on the *Minister's* initiative or in response to a public call for nominations, and any other person appointed in an acting capacity in terms of paragraph (b).

(b) The *Minister*, after consultation with the Chairperson of the Competition Tribunal, may appoint one or more persons who meet the requirements of section 28 as acting part-time members of the

Competition Tribunal for such a period as the *Minister* in each case may determine.

(c) The *Minister* may re-appoint an acting member at the expiry of that member's term of office.

(d) Sections 30 to 34 and 54 to 55, read with the changes required by the context, apply to acting members of the Competition Tribunal."

Amendment of section 31 in Act 89 of 1998, as amended by section 12 of Act 39 of 2000

17 The Principal Act is hereby amended by —

(a) the substitution of section 31(2) for the following subsection —

"(2) When assigning a matter in terms of subsection (1), the Chairperson must —

(a) ensure that at least one member of the panel is a person who has legal training and experience; **[and]**

(b) ensure that no more than one member of the panel is an acting member appointed in terms of section 23(2)(b); and

(c) designate a member of the panel to preside over the panel's proceedings."

(b) the substitution for section 31(5) for the following subsection —

"(5) **[If the Competition Tribunal may extend or reduce a *prescribed* period in terms of *this Act*, t]** The Chairperson of the Competition Tribunal, or another member of the Tribunal assigned by the Chairperson, sitting alone, may make an order of an interlocutory nature that in the opinion of the Chairperson does not warrant being heard by a panel comprised of three members, including—

(a) extending or reducing [that period] a *prescribed* period in terms of *this Act*; **[or]**

(b) condoning late performance of an act that is subject to [that period] a *prescribed* period in terms of *this Act*; **[.]**

(c) granting access to information contemplated in sections 44 to 45A and any conditions that should be attached to the access order; and

(d) compelling discovery of documents.

Amendment of section 43A in Act 89 of 1998, as amended by section 6 of Act 1 of 2009

18 The Principal Act is hereby amended by the substitution of section 43A for the following section —

"**43A. Interpretation and Application of this Chapter.**

In this Chapter **[,]**—

(1) "**[m]** Market inquiry" means a formal inquiry in respect of the general state of competition in a market for particular *goods or services*, without necessarily referring to the conduct or activities of any particular named *firm*.

(2) An adverse effect on competition is established if any feature, or combination of features, of a market for *goods or services* prevents, restricts or distorts competition in that market.

(3) Any reference to a feature of a market for *goods or services* includes —

(a) the structure of that market or any aspect of that structure, including;

(i) the level and trends of concentration and ownership in the market;

(ii) the barriers to entry in the market;

(iii) the regulation of the market, including the instruments in place to foster to transformation in the market;

(iv) past or current advantage arising from state support or other privileges of *firms* in the market;

(b) the outcomes observed in the market, including—

(i) prices;

(ii) concentration;

(iii) customer choice;

(iv) quality of *goods and services*;

(v) innovation;

(vi) employment;

(vii) entry into the market; or

(viii) exit from the market;

(c) conduct, whether in or outside the market which is the subject of the inquiry, by a *firm* or *firms* that supply or acquire *goods or services* in the market concerned;

(d) conscious parallel or co-ordinated conduct by two or more *firms* in a concentrated market without the *firms* having an agreement between or among themselves; or

(e) conduct relating to the market which is the subject of the inquiry of any customers of *firms* who supply or acquire good or services.

Amendment of section 43B in Act 89 of 1998, as amended by section 6 of Act 1 of 2009

19 The Principal Act is hereby amended by —

(a) the substitution of subsection (1) for the following subsection—

"(1)(a) The Competition Commission, acting within its functions set out in section 21 (1), **[on its own initiative, or in response to a request from the *Minister*]**, may conduct a market inquiry at any time, subject to subsections (2) to (4)—

(i) if it has reason to believe that any feature or combination of features of a market for any goods or services prevents, distorts or restricts competition within that market; or

(ii) to achieve the purposes of this Act.

(b) The *Minister*, after consultation with the Competition Commission and after consideration of the factors in subparagraphs (i) and (ii), may require the Competition Commission to conduct a market inquiry contemplated in paragraph (a) during a specified period."

(b) the substitution of subsection (2) for the following—

"The Competition Commission must, at least 20 business days before the commencement of a market inquiry, publish a notice in the *Gazette* announcing the establishment of the market inquiry, setting out the terms of reference for the market inquiry and inviting members of the public to provide written representations to the market inquiry."

(c) the insertion of subsection (3A) after subsection (3) —

"(3A) For purposes of this Chapter—

(a) The Competition Commission may, within 20 business days of receipt of information claimed as confidential in terms of

section 44(1), determine whether or notthe information is confidential information;

(b) If the Competition Commission determines that the information is confidential, it may, within five business days, make an appropriate determination concerning access to that information by any person;

(c) Before making the decisions in subsections (1) and (2), the Competition Commission must give the party claiming the information to be confidential, notice of its intention to make its determination and consider the representations, if any, made to it by that person.

(d) Any person aggrieved by the determination of the Competition Commission in terms of subsections (1) or (2) may within 10 business days of the determination, appeal against the determination to the Competition Tribunal."

(d) the substitution of subsection (4) for the following—

"(4)(a) The terms of reference required in terms of subsection (2) must include, at a minimum, a statement of the scope of the inquiry, and the time within which it is expected to be completed, which period may not exceed 18 months.

(b) The Competition Commission may apply to the *Minister* to extend for a reasonable period, the completion of a market inquiry beyond the period referred to in paragraph (a)."

(e) the substitution of subsection (6) for the following —

"Subject to subsections (4) and (5), the **[The]** Competition Commission must complete a market inquiry by publishing a report contemplated in **[section 43C]** sections 43D and 43E, within the time set out in the terms of reference referred to**[contemplated]** in subsection (2)."

Insertion of a new section 43C in Act 89 of 1998 and the renumbering of old section 43C as 43E

20 The Principal Act is hereby amended by the insertion after section 43B in Chapter 4A of the following section and the renumbering of section 43C as 43E—

"**43C. Matters to be decided at a market inquiry.**

(1) In a market inquiry, the Competition Commission must decide whether any feature, or combination of features, of each relevant market for any *goods or services* prevents, restricts or distorts competition within that market.

(2) In making its decision in terms of subsection (1), the Competition Commission must have regard to the impact of the adverse effect on competition on *small businesses*, or *firms* controlled or owned by historically disadvantaged persons.

(3) If the Competition Commission decides that there is an adverse effect on competition, it must determine—

(a) the action that must be taken in terms of section 43D;

(b) whether it must make recommendations to any Minister, *regulatory authority* or affected *firm* to take action to remedy, mitigate or prevent the adverse effect on competition;

(c) if any action must be taken in terms of paragraph (b), the action that must be taken in respect of what must be remedied, mitigated or prevented.

(4) In determining the matters in subsection (3), the Competition Commission must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable."

Insertion of section 43D in Act 89 of 1998

21 The Principal Act is hereby amended by the insertion after section 43C in Chapter 4A of the following section—

"**43D. Duty to remedy adverse effects on competition.**

"(1) Subject to the provisions of any law or government policy, the Competition Commission must, in relation to each adverse effect on competition, take the action that it considers to be reasonable and practicable in order to remedy, mitigate or prevent the adverse effect on competition.

(2) The action taken in terms of subsection (1) may include a recommendation by the Competition Commission to the Competition Tribunal in terms of section 60(2)(c).

(3) The decision of the Competition Commission in terms of subsection (1) must be consistent with the decisions of its report unless there has been a material change in circumstances since the preparation of the report or the Competition Commission has a justifiable reason for deciding differently."

Amendment of section 43C in Act 89 of 1998, as amended by section 6 of Act 1 of 2009

22 The Principal Act is hereby amended by the renumbering of section 43C to section 43E and the substitution of subsection (1) for the following —

"(1) Upon completing a market inquiry, the Competition Commission must publish a report of the inquiry in the *Gazette*, and must submit the report to the Minister with **[or without]** recommendations, which may include, but are not limited to—

(a) recommendations for new or amended policy, legislation or regulations; and

(b) recommendations to other regulatory authorities in respect of competition matters.

(2) Section 21 (3), read with the changes required by the context, applies to a report to the Minister in terms of subsection (1).

(3) On the basis of information obtained during a market inquiry, the Competition Commission may—

(a) initiate a complaint and enter into a consent order with any respondent, in accordance with section 49D, with or without conducting any further investigation;

(b) initiate a complaint against any firm for further investigation, in accordance with Part C of Chapter 5;

(c) initiate and refer a complaint directly to the Competition Tribunal without further investigation;

(d) take any other action within its powers in terms of this Act recommended in the report of the market inquiry; or

(e) take no further action.

Insertion of section 43F in Act 89 of 1998

23 The Principal Act is hereby amended by the insertion after section 43E in Chapter 4A of the following section—

"**43F. Appeals against decisions made under this Chapter.**

(1) Any person referred to in section 43G (1) who is aggrieved by the determination of the Competition Commission in terms of section 43D may, within the *prescribed* period, appeal against that determination to the Competition Tribunal in accordance with the Rules of the Competition Tribunal.

(2) In determining an appeal in terms of subsection (1), the Competition Tribunal may—

(a) confirm the determination of the Competition Commission;

(b) amend or set aside the determination, in whole or in part; or

(c) make any determination or order that is appropriate in the circumstances.

(3) If the Competition Tribunal sets aside the decision of the Competition Commission, in whole or in part, it may remit the matter, or part of the matter, to the Competition Commission for further inquiry in terms of this Chapter.

(4) Any remittal to the Competition Commission in terms of subsection (3) must be completed within six months from the date of the order of the Competition Tribunal.

(5) Any person aggrieved by a determination or order of the Competition Tribunal in terms of subsection (2) may appeal against that determination or order to the Competition Appeal Court."

Insertion of section 43G in Act 89 of 1998

24 The Principal Act is hereby amended by the insertion after section 43F in Chapter 4A of the following section —

"**43G. Participation in and representations to a market inquiry.**

(1) In accordance with the procedures adopted by the inquiry, the following persons may participate in a market inquiry —

(a) the Competition Commission;

(b) the *Minister*;

(c) at the request of the *Minister*, any Minister responsible for the sector that includes or is materially affected by the market that is the subject of the inquiry;

(d) *firms* in the market that is the subject of the inquiry;

(e) any *registered trade union* that represents a substantial number of employees or the employees or representatives of the employees if there are no registered trade unions at the *firms* referred to in paragraph (d); and

(f) any other person—

(i) who has a material interest in the market inquiry;

(ii) whose interest is, in the opinion of the presiding member of the inquiry, not adequately represented by another participant; and

(iii) who would, in the opinion of chairperson of the inquiry, substantially assist with the work of the inquiry.

(2) Subject to the procedures and time periods adopted by the inquiry, any person may make representations to the market inquiry on any issue related to the terms of reference published in terms of section 43B (2).”

Amendment of section 44 in Act 89 of 1998

25 The Principal Act is hereby amended by—

(a) the substitution of subsection (2) for the following —

“From the time information comes into the possession of the Competition Commission, Competition Tribunal or *Minister* until a final determination has been made concerning it, the Commission, Tribunal and *Minister* must treat as confidential, any information that is the subject of a claim in terms of this section.”

(b) the substitution of subsection (3) for the following —

“In respect of information submitted to the Competition Commission, the Competition Commission may —

(a) determine whether the information is *confidential information*; and

(b) if it finds that the information is confidential, make any appropriate determination concerning access to that information."

(c) the insertion of the following subsections after subsection (3) —

"(4) The Competition Commission may not make a determination in terms of subsection (3) before it has given the claimant the *prescribed* notice of its intention to make this determination and considered the claimant's representations, if any."

(5) A person contemplated in subsection (1) who is aggrieved by the determination of the Competition Commission in terms of subsection (3) may, within the *prescribed* period of the Commission's decision, refer the decision to the Competition Tribunal.

(6) The Competition Tribunal may confirm or substitute the Competition Commission's determination or substitute it with another appropriate ruling.

(7) In respect of confidential information submitted to the Competition Tribunal, the Tribunal may —

(a) determine whether the information is confidential information; and

(b) if it finds that the information is confidential, make any appropriate determination concerning access to that information.

(8) A person aggrieved by the ruling of the Competition Tribunal in terms of subsections (6) or (7) may, within the *prescribed* period and in accordance with the Competition Appeal Court's rules—

(a) refer the Tribunal's ruling to the Competition Appeal Court, if the Tribunal grants leave to appeal; and

(b) petition the President of the Competition Appeal Court for leave to refer the Tribunal's ruling to the Competition Appeal Court, if the Tribunal refuses leave to appeal.

(9) Unless the Competition Commission, Competition Tribunal or Competition Appeal Court holds otherwise, an appropriate determination concerning access to *confidential information* includes the disclosure of the information to the legal representatives and economic advisors of the person seeking access —

(a) in a manner determined by the circumstances; and

(b) subject to the provision of appropriate confidentiality undertakings."

Amendment of section 45 in Act 89 of 1998

26 The Principal Act is hereby amended by the substitution of section 45 for the following —

"45. Disclosure of information.

(1) A person who seeks access to information that is subject to a claim or determination that it is confidential information may apply to the Competition Tribunal in the *prescribed* manner and form, and the Competition Tribunal may—

(a) determine whether or not the information is confidential information; and

(b) if it finds that the information is confidential, make any appropriate order concerning access to that confidential information.

(2) **[Within 10 business days after an order of the Competition Tribunal is made in terms of section 44 (3), a party concerned may appeal against that decision to the Competition Appeal Court, subject to its rules.]**

The provisions of section 44(8), read with the changes required by the context, apply to the application referred to in subsection (1).

(3) **[From the time information comes into the possession of the Competition Commission or Competition Tribunal until a final**

determination has been made concerning it, the Commission and Tribunal must treat as confidential, any information that—

(a) the Competition Tribunal has determined is confidential information; or

(b) is the subject of a claim in terms of this section.]

Subject to section 44(2) and for the purposes of their participation in proceedings contemplated in *this Act*, including merger proceedings —

(a) the *Minister* may have access to a *firm's confidential information*; and

(b) any other relevant Minister and any relevant *regulatory authority* may have access to a *firm's confidential information* unless the Tribunal determines otherwise.

(4) Once a final determination has been made concerning any information, it is confidential only to the extent that it has been accepted to be confidential information by the Competition Tribunal or the Competition Appeal Court."

Amendment of section 49D in Act 89 of 1998, as inserted by section 15 of Act 39 of 2000

27 The Principal Act is hereby amended by the substitution of subsection (1) for the following—

"(1) If, during, on or after the completion of the investigation of a complaint or a market inquiry, the Competition Commission and the respondent, or any person that is the subject of action by the Competition Commission in terms of section 43E, agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58 (1) (b)."

Insertion of section 49E in Act 89 of 1998

28 The following section is hereby inserted in the Principal Act after section 49D —

"49E. Leniency.

(1) The Competition Commission must develop, and publish in the *Gazette*, a policy on leniency, including the types of leniency that may be granted, criteria for granting leniency, the procedures to apply for leniency and the possible conditions that may be attached to a decision to grant leniency.

(2) The Competition Commission may grant leniency, with or without conditions, in terms of its leniency policy."

Amendment of section 54 in Act 89 of 1998, as amended by section 15 of Act 39 of 2000

29 The Principal Act is hereby amended by the insertion after subsection (c) of the following—

"(dA) amend or withdraw any direction or summons referred to in subsections (a), (c) or (d)."

Amendment of section 58 in Act 89 of 1998, as amended by section 15 in Act 39 of 2000

30 The Principal Act is hereby amended by—

(a) the substitution of paragraph (a) in subsection (1) for the following —

"(a) make an appropriate order in relation to a *prohibited practice* or an appeal referred to in section 43F, including—

(i) interdicting any prohibited practice;

(ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;

(iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;

(iv) ordering divestiture, subject to section 60;

(v) declaring conduct of a *firm* to be a prohibited practice in terms of this Act, for purposes of section 65;

(vi) declaring the whole or any part of an agreement to be void;

(vii) ordering access to an essential facility on terms reasonably required;"

(b) the substitution of paragraph (c) in subsection (1) for the following—

"(c) subject to sections 13 (6)**,** **[and]** 14 (2) and 43B (4)(b), condone, on good cause shown, any non-compliance of—

(i) the Competition Commission or Competition Tribunal rules; or

(ii) a time limit set out in *this Act*."

Amendment of section 59 in Act 89 of 1998, as amended by section 10 in Act 1 of 2009

31 The Principal Act is hereby amended by —

(a) the substitution of paragraph (a) in subsection (1) for the following —

"(a) for a *prohibited practice* in terms of section 4 (1), 5 (1) and (2), 8 (1) or 9 (1);"

(b) the deletion of paragraph (b) in subsection (1)

(c) the substitution of paragraph (d) in subsection (3) for the following —

"(a) the market circumstances in which the contravention took place, including whether, and to what extent, the contravention had an impact upon *small businesses* and firms owned or controlled by historically disadvantaged persons;"

(d) the insertion after subsection (3) of the following:

"(3A) An administrative penalty imposed upon a *firm* that contravened *this Act* may be extended to one or more other *firms* if those *firms*

form a single economic entity with the *firm* that contravened *this Act.*"

Amendment of section 60 in Act 89 of 1998, as amended by section 15 of Act 39 of 2000

32 The Principal Act is hereby amended by the —

(a) insertion after paragraph (b) in subsection (2) of the following —

"(c) after a market inquiry conducted in terms of Chapter 4A, the Competition Commission finds that there is an adverse effect on competition in the relevant market and makes a recommendation to the Competition Tribunal that such an order is appropriate."

(b) substitution for subsection (4) for the following —

"(4) An order made in terms of subsection (1) or (2) may set a time for compliance, and any other terms that the Competition Tribunal considers appropriate, having regard to the commercial interests of the party concerned and the purposes of *this Act*."

Amendment of section 62 in Act 89 of 1998, as amended by section 15 of Act 39 of 2000

33 The Principal Act is hereby amended by the substitution for subsection (4) for the following—

"(4) An appeal from a decision of the Competition Appeal Court in respect of a matter within its jurisdiction in terms of subsection (2) lies to the **[Supreme Court of Appeal or]** Constitutional Court, subject to section 63 and **[their]** its respective rules."

Amendment of section 63 in Act 89 of 1998, as amended by section 15 of Act 39 of 2000

34 The Principal Act is hereby amended by the —

(a) substitution for subsection (2) for the following subsection —

"(2) Subject to the Constitution and despite any other law, an appeal in terms of section 62(4) may be brought, **[to the Supreme Court of Appeal or if it concerns a constitutional matter,]** to the Constitutional Court **[,only]** —

(a) **[with the leave of the Competition Appeal Court; or**

(b) **if the Competition Appeal Court refuses leave],** with the leave of **[the Supreme Court of Appeal or]** the Constitutional Court **[, as the case may be]**."

(b) substitution for subsection (4) for the following subsection —

"(2) **[If the Competition Appeal Court, when refusing leave to appeal, made an order as to costs against the applicant, [the Supreme Court of Appeal or] the Constitutional Court may vary that order on granting leave to appeal.]"**

(c) deletion of subsections (7) and (8).

Amendment of section 67 in Act 89 of 1998

35 The Principal Act is hereby amended by the substitution for subsection (1) for the following subsection —

"(1) A complaint in respect of a *prohibited practice* that ceased more than three years before the complaint was initiated may not be **[initiated more than three years after the practice has ceased]** referred to the Competition Tribunal."

Amendment of section 74 in Act 89 of 1998, as amended by section 13 of Act 1 of 2009

36 The Principal Act is hereby amended by the substitution for subsection (b) for the following subsection —

"(b) in any case, to a fine not exceeding **[R2 000-00]** R10 000-00 or to imprisonment for a period not exceeding six months, or to both a fine and imprisonment."

Amendment of section 79 in Act 89 of 1998

37 The Principal Act is hereby amended by the substitution of section 79 with the following section —

"**79. Guidelines**

(1) The Competition Commission may prepare, amend, replace and issue guidelines to indicate the Commission's policy approach to any matter within its jurisdiction in terms of *this Act*.

(2) A guideline referred to **[prepared]** in **[terms of]** subsection (1) **[—**

(a)] must be published in the *Gazette*. **[; but**

(b) is not binding on the Competition Commission, the Competition Tribunal or the Competition Appeal Court in the exercise of their respective discretion, or their interpretation of *this Act*.]

(3) Before the Competition Commission issues a guideline referred to in subsection (1), the Competition Commission must —

(a) publish a notice in the *Gazette*—

(i) stating that a draft guideline has been prepared;

(ii) stating the place, which may include the Competition Commission's website, where a copy of the draft guideline may be obtained; and

(iii) inviting interested parties to submit written representations on the draft guideline within a reasonable period; and

(b) consider any representations which were submitted within the period specified in the notice.

(4) A guideline referred to in subsection (1) is not binding, but any person interpreting or applying *this Act* must take it into account."

Amendment of section 83 in Act 89 of 1998

38 The Principal Act is hereby amended by the insertion of the following subsection after section 83(2) —

"(3) Until a leniency policy referred to in section 49E is published in the *Gazette*, the leniency policy published in Government *Gazette* No. 31064 (GN 628 of 23 May 2008) and amended in Government *Gazette* No. 35139 (GN 212 of 16 March 2012) will remain in effect."

39 **Short Title and commencement of Act.** —This Act is called the Competition Amendment Act, 2017, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE COMPETITION AMENDMENT BILL, 2017

1. INTRODUCTION

The Competition Act, 1998 (Act 89 of 1998)("the Act") provides the legislative framework for the competition authorities to investigate and penalise anti-competitive conduct and regulate mergers and acquisitions. In addition, there are numerous public interest issues, such as employment and the promotion of small businesses that must be considered together with competition issues.

2. OBJECTS OF THE BILL

1. The main objective of these amendments is to address two persistent structural constraints on the South African economy: the high levels of economic concentration in the economy and the skewed ownership profile of the economy. This is done through:

1.1. strengthening the provisions of the Competition Act relating to prohibited practices, especially abuse of dominance, price discrimination and mergers;

1.2. requiring special attention to be given to the impact of anti-competitive conduct on small businesses and firms owned by historically disadvantaged persons;

1.3. strengthening the provisions relating to market inquiries so that:(a) the outcomes of these inquiries result in action that promotes competition; (b) there is guidance on how to evaluate the adverse features of a market; and, (c) requiring special attention upon small businesses and firms owned by historically disadvantaged persons;

1.4. providing the Executive with effective means of participating in competition related proceedings and the power to initiate market inquiries into a sector; and

1.5. promoting the administrative efficacy of the Competition Commission, market inquiries and the Competition Tribunal.

3. SUMMARY OF THE BILL

AMENDMENTS TO CHAPTER 1 – DEFINITIONS, INTERPRETATION, PURPOSE AND APPLICATION

1. **Clause 1– Amendment of Section 1**

1.1. Clause 1 amends the definition "exclusionary act" by expanding its ambit to include not only *barriers to entry* and *expansion* within a market, but also to *participation in* a market.

1.2. Clause 1 also updates the definitions of *Minister* and *small business*.

AMENDMENTS TO CHAPTER 2 – PROHIBITED PRACTICES

AMENDMENT TO PART A – RESTRICTIVE PRACTICES

2. **Clause 2 – Amendment of Section 4**

2.1. This amendment reflects the factual position that collusive agreements in concentrated markets may be achieved and monitored through the allocation of market shares.

2.2. Collusion in concentrated markets with stable, large market shares is usually easier because there are only a few firms to coordinate.

2.3. This amendment enhances enforcement of cartel activity in concentrated markets, which in turn, should create opportunities for entry and expansion in the market. This will benefit small businesses and firms controlled or owned by historically disadvantaged persons by presenting them with opportunities for entry into the market.

AMENDMENTS TO PART B – ABUSE OF DOMINANT POSITION

3. **Clause 3 – Amendment of Section 8**

3.1. Section 8prohibits abuse of dominance by a firm that is dominant in a market.[1] Section 8 is especially important when dealing with concentrated markets.

3.2. Subsection (a), now subsection (1)(a), is amended by the deletion of the words "to the detriment of consumers". It is not only consumers that

[1]Section 7 outlines when a firm is a dominant firm.

should be protected from excessive prices, but all firms involved in commercial transactions.

3.3. Subsection (1)(d)(v), which prohibits predatory pricing[2], is amended to accommodate a more general standard ("their relevant cost benchmark"). This enables flexibility and case specific determinations of the applicable and relevant cost benchmark.

3.4. The subsection also includes as possible benchmarks the practice of selling goods or services below their average avoidable cost[3] or long run average incremental cost[4]. The inclusion of these standard economic benchmarks is important because the failure of a dominant firm to cover its average avoidable costs or long run average incremental cost suggests that the dominant firm is sacrificing profits in the short-term, and therefore, may be involved in exclusionary conduct.

3.5. Subsection (1)(d)(iv) is introduced to prevent unreasonable conditions unrelated to the object of a contract being placed on the seller.

3.6. Subsection (1)(d)(vii) is inserted to include the practice of engaging in a margin squeeze.[5]

3.7. Subsection (1)(d)(viii) is introduced to protect suppliers to dominant firms from being required, through the abuse of dominance, to sell their goods or services at excessively low prices. (This addresses the problem of monopsonies.)

3.8. Subsection (2) is inserted to place the burden on the dominant firm to show that the price is reasonable after a *prima facie* case is established.

3.9. The determination of excessive prices is complex and often case specific. Subsection (3) mandates the Commission to provide guidelines on how to determine excessive prices.

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[2] Predatory pricing takes place when a firm prices its goods or services at such a low level that other suppliers cannot compete and are forced to leave the market.

[3] Average avoidable costs refer to the costs, including both the variable costs and product-specific fixed costs, that could have been avoided if the firm had not produced a discrete amount of additional output.

[4] Long run average incremental cost refers to the average changes to incremental costs that firms are able to predict and account for. Examples of long run incremental costs are energy, maintenance, growth and rent.

[5] A margin squeeze is a form of vertical leveraging whereby a vertically integrated firm exploits its dominant position in an input market to restrict competition in a competitive downstream market.

4. **Clause 4 – Amendment of Section 9**

4.1. Section 9 deals with price discrimination by a dominant firm.

4.2. The deletion of subsection (1)(a) and its inclusion in subsection (2) means that the dominant firm must show that the action of price discrimination is not likely to have an effect of preventing or lessening competition.

4.3. Subsection (3) requires that special attention be given to small businesses and firms owned or controlled by historically disadvantaged persons.

4.4. The addition of subsection (4) means that the prohibition of price discrimination will also apply to a dominant firm vis-à-vis its suppliers.

AMENDMENTS TO PART C – EXEMPTIONS FROM APPLICATION OF THE CHAPTER

5. **Clause 5 – Amendment of Section 10**

5.1. The amendment to section 10(3)(b)(ii) makes the entry, participation in and expansion of small businesses and firms owned or controlled by historically disadvantaged persons an important considerationin the process of determining exemptions. This will also address the concern that these firms frequently exit the market.

5.2. The amendment to section 10(3)(b)(iv) extends the set of objectives in which an exemption from the application of Chapter 2 may be granted to include the economic development of an industry designated by the Minister.

6. **Clause 6 – Amendment of Section 10A**

6.1. Section 10A dealt with the prohibition or regulation of a complex monopoly. It has not come into operation. The section is complex and is likely to be the subject of substantial litigation, including constitutional attacks about its validity. It is also rigid and does not effectively deal with concentrated markets.

6.2. The strengthening of the market inquiryprovisions is a better way to deal with the problem of concentration. The problem associated with complex monopolies is incorporated into the meaning of adverse effects upon competition, which is set out in the new amended section 43A.

AMENDMENTS TO CHAPTER 3 – MERGER CONTROL

7. **Clause 7 – Amendment of Section 12A**

7.1. The amendment adds the requirement that consideration be given to cross-shareholdings and cross-directorships by the merging parties. These are the mechanisms by which unseen, creeping concentration, and the erection and maintenance of strategic barriers to entry are possible.

7.2. The amendment also proposes amending section 12A (2) to require disclosure of merger activity engaged in by the merging parties in the preceding three years to identify markets in which, and firms by which, creeping concentrations are being pursued. These requirements would reveal merger activity that may have fallen below the current thresholds for scrutiny by the competition authorities.

7.3. The proposed amendments also seek to explicitly create public interest grounds in merger control that address ownership, control and the support of small businesses and firms owned or controlled by historically disadvantaged persons.

7.4. These amendments will require consideration of these structural features in every merger, and the identification of measures to ameliorate any identified and credible concerns.

7.5. Co-ordination among horizontal competitors may occur through a common shareholder, and that similar complex and overlapping ownership structures may increase concentration. Therefore, there is an amendment to ensure disclosure and scrutiny of these relationships during merger proceedings.

8. **Clause 8 – Insertion of Section 12B**

8.1. This amendment enables the Commission to consider transactions occurring within a three-year period that result in a change of control or which are steps towards a change of control, to be scrutinised in terms of section 12A as if they occurred simultaneously.

8.2. This ensures that the creeping acquisition of control is subject to the appropriate scrutiny and analysis by the competition authorities.

9. **Clause 9 – Amendment of Section 15**

Section 15 regulates the Competition Commission's powers to revoke its approval of an intermediate merger. Revoking approval of a merger is in many

cases a drastic remedy and may in certain circumstances be inappropriate or impractical. This amendment provides that the Competition Commission may make an appropriate order regarding any condition relating to the merger, including those relating to employment, small businesses and firms owned or controlled by historically disadvantaged persons.

10. **Clause 10–Amendment of Section 16**

The amendment provides the Competition Tribunal with a similar power as described in paragraph 9 above.

11. **Clause 11 – Amendment of Section 17**

This amendment provides the Minister and the Competition Commission with the right of appeal against a decision of the Competition Tribunal and addresses a lacuna in the Act.

AMENDMENTS TO CHAPTER 3 – COMPETITION COMMISSION, TRIBUNAL AND COURT

AMENDMENTS TO PART A – THE COMPETITION COMMISSION

12. **Clause 12 – Amendment of Section 21**

Section 21 sets out the functions of the Competition Commission. The amendments provide for functions relating to the development of a leniency policy and making decisions about leniency applications. This gives effect to case law.

13. **Clause 13 – Insertion of section 21A**

13.1. This proposed amendment creates a new power for the Commission to study the impact of earlier decisions by the Commission, Tribunal or Competition Appeal Court. This power enhances the Commission's advocacy powers.

13.2. The studies will provide valuable insights into the impact of the Competition Act on the competitiveness of South African markets and inform future action or approaches, including measures to enhance competition, whether in mergers, market inquiries or enforcement cases.

14. **Clause 14 – Amendment of section 22**

Section 22 provides for the appointment of the Competition Commissioner and specifies the Commissioner's general duties. The amendment provides the Competition Commissioner with the power to determine delegations of authority. As this delegation of statutory powers is given to the Commissioner by virtue of

the appointment by the Minister, provision is made for the policy to be done after consultation with the Minister.

15. **Clause 15 – Amendment of Section 25**

This amendment provides designated staff members of the Commission with rights of appearance in courts of law.

AMENDMENTS TO PART B – THE COMPETITION TRIBUNAL

16. **Clause 16 – Amendment of Section 26**

Section26 deals with the constitution of the Competition Tribunal. The amendment provides for the appointment of acting Tribunal members. This is necessary in the light of the Tribunal's workload and the fact that permanent seats on the Tribunal are sometimes vacant.

17. **Clause 17 – Amendment of Section 31**

Section 31 regulates Tribunal proceedings. The amendments limit the number of acting Tribunal members hearing any matter and extends the kinds of matters that a single Tribunal member may hear and determine. These matters are limited to issues of interlocutory applications such as application relating to time periods, access to information and discovery of documents. The Tribunal's Chairperson is empowered to determine when an application does not warrant three people. This should assist with the Tribunal's efficiency.

AMENDMENTS TO CHAPTER 4A – MARKET INQUIRIES

18. **Clauses 18 to 24 – Amendments of sections 43A to 43C and the insertion of sections 43D to 43G**

18.1. These proposed amendments will enhance the market inquiry process and will ensure that its outcomes include measures to address concentration and the transformation of ownership.

18.2. These mechanisms are similar to those in other jurisdictions elsewhere in the world which has had some success at addressing structural issues in markets.

18.3. The central concept of a market inquiry is to empower the Commission to inquire into market structure, and decide on interventions and remedies to address any features of the markets that would enhance competition and the purposes of the Act.

18.4. As with the merger control regime, the Commission's potential findings and actions following a market inquiry are binding, unless challenged in

the Tribunal. The notable exception to this is divestiture, which is only competently imposed by the Tribunal on the recommendation of the Commission. Given the far-reaching nature of this remedy, this is appropriate.

18.5. Time limits are desirable for this process to avoid it becoming an iterative process without end.

18.6. **Clause 18 – Amendment of Section 43A**

18.6.1. A market inquiry's focus is on the general state of competition in a market, rather than on the conduct by a particular firm. This distinguishes the market inquiry process from the Commission's initiation of complaints for investigation and possible referral to the Tribunal.

18.6.2. The amendments to section 43A(b) identify three types of market features that may be relevant to the market inquiry: (a) structure; (b) conduct by either suppliers and customers in the market at issue; or,(c) the conduct of customers related to that market. It also includes reference to the complex monopoly provisions of the 2008 Amendment to the Act.

18.6.3. The amendments provide for anon-exhaustive list of market outcomes that fall within the market structure category to enable the Commission and firms active in a market to determine what types of issues the market inquiry will consider. This list of structural features includes concentration and the past or current state support afforded to firms in the market that may result in the market being uncompetitive.

18.7. **Clause 19 – Amendment of Section 43B**

18.7.1. The amendments provide that the Commission or the Minister may establish a market inquiry.

18.7.2. The remainder of section 43B sets out the procedures and process to be followed for a market inquiry. It identifies the powers available to the Commission for the conduct of the inquiry, sets the applicable time limit for it, and provides for amendment of the terms of reference or time limit for completion of a market inquiry.

18.7.3. The section also creates protections relating to access to confidential information.

18.7.4. Regarding the confidentiality of information provided to the Commission during a market inquiry, the Commission is empowered to determine whether a claim of confidentiality is appropriate in the first instance. If aCommission determines that the party's claim of confidentiality is invalid, the aggrieved party may appeal to the Tribunal for relief.

18.8. **Clause 20 – Insertion of a new Section 43C**

18.8.1. The proposed new section 43C requires the Commission to consider and expressly decide on specific issues. This imposes a discipline on the market inquiry that will ensure that its focus is clear, and which will guide the conduct of the inquiry itself.

18.8.2. The new section requires the inquiry to consider whether there are structural features that have an adverse effect on competition in a market, whether the Commission can impose a remedy, and then creates an obligation to do so, or whether another regulator is responsible for further action.

18.8.3. This section requires the Commission to address structural impediments to competition, including by addressing concentration and barriers to entry by small businesses and firms owned by historically disadvantaged persons.

18.9. **Clause 21 – Insertion of Section 43D**

This new section places a duty on the Commission to remedy structural features identified as having an adverse effect on competition in a market, including the use of divestiture orders. It also requires the Commission to record its reasons for the identified remedy.

18.10. **Clause 22 – Renumbering of the old Section 43C to 43E and amendments to that the section**

This amendment reinforces the duty on the Commission to make recommendations regarding structural features identified as having an adverse effect of competition in a market.

18.11. **Clause 23 – Insertion of Section 43F**

18.11.1. This amendment enables an appeal (rather than a review) to the Tribunal. This enables the Tribunal to consider the merits of the Commission's decision-making and remedial action

following a market inquiry, while limiting it to the record used by the Commission.

18.11.2. This prevents a reconsideration, and replication, of the market inquiry before the Tribunal. This should reduce the delays and litigious challenges to the market inquiry process undertaken by the Commission. The aggrieved parties initiating an appeal would be restricted in their arguments to the Commission's record of its market inquiry.

18.12. **Clause 24 – Insertion of Section 43G**

This section draws a distinction between participation in the market inquiry and the opportunity to make representations to the market inquiry. It is required to protect the constitutional rights of parties likely to be affected by the market inquiry.

AMENDMENTS TO CHAPTER 5 – INVESTIGATION AND ADJUDICATION PROCESS

AMENDMENTS TO PART A – CONFIDENTIAL INFORMATION

19. **Clauses 25 and 26 – Amendments of Sections 44 and 45**

19.1. These clauses amend the sections relating to information that is claimed to be confidential and access to information that is confidential. Often disputes relating to the disclosure of information are time consuming and delay the speedy determination of the main matter. The amendments streamline the determination of these issues.

19.2. The new section 45 (3) provides the Minister with the right of access to confidential information and makes this right itself subject to honouring the confidentiality provisions of the Act. This gives effect to the Minister's right to intervene and make representations in the public interest. The same applies to other Ministers or regulatory authorities who are involved in the proceedings, although the Tribunal may override this right.

20. **Clause 27 – Amendments of Section 49D**

This amendment enables parties to agree to consent orders after a market inquiry. This could potentially avoid a contested Tribunal review.

AMENDMENT TO PART C – COMPLAINT PROCEDURES

21. **Clause 28 – Insertion of Section 49E**

Section 49E provides for the adoption a Leniency Policy by the Competition Commission and empowers it to grant leniency.

AMENDMENTS TO PART D – TRIBUNAL HEARINGS AND ORDERS

22. **Clause 29 – Amendment of Section 54**

This amendment provides the Tribunal explicitly with the power to amend and withdraw a direction and summons. This reflect the current case law and will prevent overly technical points about this matter.

23. **Clause 30 – Amendment of Section 58**

This amendment empowers the Tribunal to use any of the remedies permitted under the Act to address the findings of the Commission following a market inquiry.

24. **Clause 31 – Amendment of Section 59**

24.1. Section 59 regulates the administrative penalties that the Competition Tribunal may impose.

24.2. The amendments provide for the imposition of administrative penalties for all contraventions of the Competition Act, even offences in respect of non-specific contraventions. Penalties for non-specified exclusionary acts are left to the discretion of the Competition Tribunal. Their decision must consider the factors listed in subsection (3).

24.3. The amendments stipulate that the Tribunal must take into account, when determining the quantum of the administrative penalty, the impact of the contravention upon small businesses and firms owned by historically disadvantaged persons.

24.4. The amendments also provide that an administrative penalty imposed upon a firm may be extended to other firms that form a single economic entity with the contravening firm. This will prevent the manipulation of corporate structures to avoid administrative penalties being realised.

25. **Clause 32 – Amendment of Section 60**

These amendments enable divestiture as a remedy following a market inquiry, and on terms that have regard to the purposes of the Act, with the safeguard that a divestiture remedy can only be imposed by the Tribunal, following a

recommendation from the Commission. In addition, there is the right of appeal to the Competition Appeal Court.

AMENDMENT TO PART E – APPEALS AND REVIEWS TO THE COMPETITION APPEAL COURT

26. **Clauses 33 and 34 – Amendments of Sections 62 and 63**

The amendments bring the Competition Act in line with amendments to the Constitution.

AMENDMENTS TO CHAPTER 6 – ENFORCEMENT

27. **Clause 35 – Amendment of Section 65**

Section 65 deals with, amongst other things, jurisdiction. The amendment encourages referrals of competition related matters from the High Court to the Competition Tribunal. This will not only reduce the burden on the High Courts, but also ensure that a more consistent set of competition law jurisprudence is established.

28. **Clause 36 – Amendment of Section 67**

Section67regulates the prescription of claims. The amendment clarifies the wording of the section so that firms cannot argue that the Commission is unable to investigate the matter because it has prescribed. The Commission must be able to investigate a matter to determine whether it has prescribed.

AMENDMENT TO CHAPTER 7 – OFFENCES

29. **Clause 37 – Amendment of Section 74**

The amendment increases the fine for offences relating to the administration of the Competition Act from R2 000 to R10 000.

AMENDMENTS TO CHAPTER 8 – GENERAL PROVISIONS

30. **Clause 38 – Amendment of Section 79**

Section 79 concerns guidelines issued by the Competition Commission. The amendments provide for a process of consultation before the guidelines may be published. The amendments require a body interpreting or applying the Competition Act to take the guidelines into account even though they are not binding.

31. **Clause 39 – Amendment of Section 83**

This amendment provides for the continued applicability of the Competition Commission's present leniency policy until a new one is published in terms of section 49E.

4. OTHER DEPARTMENTS AND BODIES CONSULTED

4.1 A Panel of legal and economic experts was constituted, which included senior members of both the Competition Commission and Competition Tribunal. In addition, separate consultations have been held with the two institutions.

4.2 The Economic Sectors and Employment Cluster was consulted and proposed certain changes to the Bill that have been effected.

4.3 Engagements with members of the legal profession have been held to set out government's approach to competition matters, including on the public interest provisions of the Competition Act and to ascertain various approaches that are favoured on competition matters. Consultations have also taken place on the issue of regulation of economic concentration matters in law.

5. COMMUNICATIONS IMPLICATIONS

5.1 The release of the Bill for public comment can be expected to result in significant public debate on economic concentration.

5.2 It is intended that, once the Bill is approved for public release by Cabinet, an extensive communication exercise would be conducted, led by the Minister and the expert panel.

6. FINANCIAL IMPLICATIONS

6.1 The changes proposed by the Draft Competition Amendment Bill, 2017 will require additional capacity in the Competition Commission, through expertise to be sourced for market inquiries. The financial implications will depend on the number of market inquiries to be conducted and work will be done on the expected financial implications as soon as the final architecture of the Act is approved by Cabinet.

6.2 Discussions will take place through the normal budget processes to address the need for additional resources.

7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisors and the Economic Development Department are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

7.2 The State Law Advisors are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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