

REPUBLIC OF SOUTH AFRICA

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# COMPETITION AMENDMENT BILL

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*(As amended by the Portfolio Committee on Economic Development (National Assembly))  
(The English text is the official text of the Bill)*

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(MINISTER OF ECONOMIC DEVELOPMENT)

**[B 23B—2018]**

ISBN 978-1-4850-0520-9

No. of copies printed ..... 800

## 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.

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# 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 and vertical practices, abuse of dominance and price discrimination and to strengthen the penalty regime; to introduce greater flexibility in the granting of exemptions which promote transformation and growth; to strengthen the role of market inquiries and merger processes in the promotion of competition and economic transformation through addressing the structures and de-concentration of markets; to protect and stimulate the growth of small and medium businesses and firms owned and controlled by historically disadvantaged persons while at the same time protecting and promoting employment, employment security and worker ownership; to facilitate the effective participation of the National Executive within proceedings contemplated in the Act, including making provision for the National Executive intervention in respect of mergers that affect the national security interests of the Republic; to mandate the Competition Commission to act in accordance with the results of a market inquiry; to amend the process by which market inquiries are initiated and promote greater efficiency regarding the conduct of market inquiries; to clarify and foster greater certainty regarding the determination of confidential information and access to confidential information; to provide the Competition Commission with the powers to conduct impact studies on prior decisions; to promote the administrative efficiency of the Competition Commission and Competition Tribunal; and to provide for matters connected therewith.

**B**E 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 39 of 2000 and section 1 of Act 1 of 2009**

1. Section 1 of the Competition Act, 1998 (Act No. 89 of 1998) (hereinafter referred to as “the principal Act”), is hereby amended—

(a) by the insertion after the definition of “*agreement*” of the following definitions:

“**average avoidable cost**” means the sum of all costs, including variable costs and product-specific fixed costs, that could have been avoided if the *firm* ceased producing an identified amount of additional output, divided by the quantity of the additional output;

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- ‘**average variable cost**’ means the sum of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of that product;”;
- (b) by the deletion of the definition of “excessive price”;
- (c) by the substitution for the definition of “exclusionary act” of the following definition: 5  
 “‘**exclusionary act**’ means an act that impedes or prevents a *firm* from entering into, *participating in* or expanding within [,] a market;”;
- (d) by the insertion after the definition of “*firm*” of the following definition: 10  
 “‘**foreign acquiring firm**’ means an *acquiring firm*—  
 (a) which was incorporated, established or formed under the laws of a country other than the Republic; or  
 (b) whose place of effective management is outside the Republic;”;
- (e) by the insertion after the definition of “*interest*” of the following definition: 15  
 “‘**margin squeeze**’ occurs when the margin between the price at which a vertically integrated *firm*, which is dominant in an input market, sells a downstream product, and the price at which it sells the key input to competitors, is too small to allow downstream competitors to *participate effectively*;”;
- (f) by the insertion after the definition of “*market power*” of the following definition: 20  
 “‘**medium-sized business**’ means a medium-sized *firm* as determined by the *Minister* by notice in the *Gazette*;”;
- (g) by the substitution for the definition of “Minister” of the following definition: 25  
 “‘**Minister**’ means the *Minister [of Trade and Industry]* responsible for the administration of *this Act*;”;
- (h) by the insertion after the definition of “*organ of state*” of the following definition: 30  
 “‘**participate**’ refers to the ability of or opportunity for *firms* to sustain themselves in the market, and “**participation**” has a corresponding meaning;”;
- (i) by the insertion after the definition of “*party to a merger*” of the following definition: 35  
 “‘**predatory prices**’ means prices for *goods or services* below the *firm’s average avoidable cost* or *average variable cost*;”;
- (j) by the substitution for the definition of “prohibited practice” of the following definition: 40  
 “‘**prohibited practice**’ means a practice prohibited in terms of Chapter 2 [or Chapter 2A];”;
- (k) by the insertion after the definition of “*restrictive vertical practice*” of the following definition: 45  
 “‘**small and medium business**’ means either a *small business* or a *medium-sized business*;”;
- (l) by the substitution for the definition of “small business” of the following definition: 50  
 “‘**small business**’ [has the meaning] means a small *firm* determined by the *Minister* by notice in the *Gazette*, or if no determination has been made, as set out in the National Small Business Act, 1996 (Act No. 102 of 1996);”;
- (m) by the insertion after the definition of “*vertical relationship*” of the following definition: 55  
 “‘**workers**’ means employees as defined in the Labour Relations Act, 1995 (Act No. 66 of 1995), and in the context of ownership, refers to ownership of a broad-base of workers;”.

**Amendment of section 2 of Act 89 of 1998, as amended by section 2 of Act 39 of 2000 and section 2 of Act 1 of 2009** 55

2. Section 2 of the principal Act is hereby amended by the substitution for paragraph (g) of the following paragraph:

- “(g) to detect and address conditions in the market for any particular [**goods or services**] *goods or services*, or any behaviour within such a market, that tends 60

to [prevent] impede, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic; and”.

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

3. Section 4 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1)(b) for subparagraph (ii) of the following subparagraph: 5
- “(ii) dividing markets by allocating market shares, customers, suppliers, territories[,], or specific types of *goods or services*; or”; and
- (b) by the addition after subsection (5) of the following subsection: 10
- “(6) The Minister must make regulations in terms of section 78 regarding the application of this section.”.

**Amendment of section 5 of Act 89 of 1998**

4. Section 5 of the principal Act is hereby amended by the addition after subsection (3) of the following subsection: 15
- “(4) The Minister must make regulations in terms of section 78 regarding the application of this section.”.

**Substitution of section 8 of Act 89 of 1998**

5. The following section is hereby substituted for section 8 of the principal Act:

**“Abuse of dominance prohibited” 20**

8. (1) It is prohibited for a dominant *firm* to—
- (a) charge an [excessive price] excessive price to the detriment of consumers or customers;
- (b) refuse to give a competitor access to an *essential facility* when it is economically feasible to do so; 25
- (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— 30
- (i) requiring or inducing a supplier or customer to not deal with a competitor;
- (ii) refusing to supply scarce [goods] goods or services to a competitor or customer when supplying those [goods] goods or services is economically feasible; 35
- (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; 40
- (iv) selling *goods or services* [below their marginal or average variable cost; or] at predatory prices;
- (v) buying-up a scarce supply of intermediate goods or resources required by a competitor; or
- (vi) engaging in a *margin squeeze*. 45
- (2) If there is a *prima facie* case of abuse of dominance because the dominant *firm* charged an excessive price, the dominant *firm* must show that the price was reasonable.
- (3) Any person determining whether a price is an *excessive price* must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include— 50
- (a) the *respondent’s* price-cost margin, internal rate of return, return on capital invested or profit history;
- (b) the *respondent’s* prices for the *goods or services*— 55

- (i) in markets in which there are competing products;
  - (ii) to customers in other geographic markets;
  - (iii) for similar products in other markets; and
  - (iv) historically;
- (c) relevant comparator *firm's* prices and level of profits for the *goods or services* in a competitive market for those *goods or services*; 5
- (d) the length of time the prices have been charged at that level;
- (e) the structural characteristics of the relevant market, including the extent of the *respondent's* market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the *respondent's* own commercial efficiency or investment, such as direct or indirect state support for a *firm* or *firms* in the market; and 10
- (f) any regulations made by the *Minister*, in terms of section 78 regarding the calculation and determination of an excessive price. 15
- (4) (a) It is prohibited for a dominant *firm* in a sector designated by the *Minister* in terms of paragraph (d) to directly or indirectly, require from or impose on a supplier that is a *small and medium business* or a *firm* controlled or owned by historically disadvantaged persons, unfair—
- (i) prices; or
  - (ii) other trading conditions. 20
- (b) It is prohibited for a dominant *firm* in a sector designated by the *Minister* in terms of paragraph (d) to avoid purchasing, or refuse to purchase, *goods or services* from a supplier that is a *small and medium business* or a *firm* controlled or owned by historically disadvantaged persons in order to circumvent the operation of paragraph (a). 25
- (c) If there is a *prima facie* case of a contravention of paragraph (a) or (b), the dominant *firm* alleged to be in contravention must show that—
- (i) in the case of paragraph (a), the price or other trading condition is not unfair; and
  - (ii) in the case of paragraph (b), it has not avoided purchasing, or refused to purchase, *goods or services* from a supplier referred to in paragraph (b) in order to circumvent the operation of paragraph (a). 30
- (d) The *Minister* must, in terms of section 78, make regulations—
- (i) designating the sectors, and in respect of *firms* owned or controlled by historically disadvantaged persons, the benchmarks for determining the *firms*, to which this subsection will apply; and 35
  - (ii) setting out the relevant factors and benchmarks in those sectors for determining whether prices and other trading conditions contemplated in paragraph (a) are unfair.”. 40

#### **Amendment of section 9 of Act 89 of 1998** 40

#### **6. Section 9 of the principal Act is hereby amended—**

- (a) by the substitution for the heading of the section of the following heading:  
**‘Price discrimination by dominant firm as seller prohibited’;**
- (b) by the substitution in subsection (1) for paragraph (a) of the following paragraph: 45  
“(a) it is likely to have the effect of—  
  - (i) substantially preventing or lessening competition; or
  - (ii) impeding the ability of *small and medium businesses* or *firms* controlled or owned by historically disadvantaged persons, to participate effectively;” 50
- (c) by the insertion after subsection (1) of the following subsection:  
“(1A) It is prohibited for a dominant *firm* to avoid selling, or refuse to sell, *goods or services* to a purchaser that is a *small and medium business* or a *firm* controlled or owned by historically disadvantaged persons in order to circumvent the operation of subsection (1)(a)(ii).” 55
- (d) by the substitution for subsection (2) of the following subsection:  
“(2) Despite subsection (1), but subject to subsection (3), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of [that] subsection (1) is not prohibited price discrimination if the dominant *firm* establishes that the differential treatment— 60

- (a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from—
- (i) the differing places to which[,] *goods or services* are supplied to different purchasers; 5
  - (ii) methods by which[,] *goods or services* are supplied to different purchasers; or
  - (iii) quantities in which[,] *goods or services* are supplied to different purchasers;
- (b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or 10
- (c) is in response to changing conditions affecting the market for the *goods or services* concerned, including—
- (i) any action in response to the actual or imminent deterioration of perishable goods; 15
  - (ii) any action in response to the obsolescence of goods;
  - (iii) a sale pursuant to a liquidation or sequestration procedure; or
  - (iv) a sale in good faith in discontinuance of business in the *goods or services* concerned”; and
- (e) by the addition of the following subsections after subsection (2): 20
- “(3) If there is a *prima facie* case of a contravention of section (1)(a)(ii)—
- (a) subsection (2)(a)(iii) is not applicable; and
  - (b) the dominant *firm* must, subject to regulations issued under section 9(4), show that its action did not impede the ability of *small and medium businesses* and *firms* controlled or owned by historically disadvantaged persons to *participate* effectively. 25
- (3A) If there is a *prima facie* case of a contravention of subsection (1A), the dominant *firm* alleged to be in contravention must show that it has not avoided selling, or refused to sell, *goods or services* to a purchaser referred to in subsection (1A) in order to circumvent the operation of subsection (1)(a)(ii). 30
- (4) The Minister must make regulations in terms of section 78—
- (a) to give effect to this section, including the benchmarks for determining the application of this section to *firms* owned and controlled by historically disadvantaged persons; and 35
  - (b) setting out the relevant factors and benchmarks for determining whether a dominant *firm's* action is price discrimination that impedes the *participation* of *small and medium businesses* and *firms* controlled or owned by historically disadvantaged persons.”. 40

#### Amendment of section 10 of Act 89 of 1998

#### 7. Section 10 of the principal Act is hereby amended—

- (a) by the insertion after subsection (2) of the following subsection:
- “(2A) Unless the Competition Commission and the applicant agree otherwise, the Competition Commission must grant or refuse to grant the exemption referred to in subsection (2) within one year of the receipt of the application or within such period as may be *prescribed* in terms of section 78.”; 45
- (b) by the substitution in subsection (3)(b) for subparagraph (ii) of the following subparagraph: 50
- “(ii) promotion of the [**ability of**] effective entry into, *participation in* or expansion within a market by *small [business,] and medium businesses*, or *firms* controlled or owned by historically disadvantaged persons [**, to become competitive**];”;
- (c) by the deletion in subsection (3)(b) of “or” at the end of subparagraph (iii) and the substitution for subparagraph (iv) of the following subparagraph: 55
- “(iv) the economic development, growth, transformation or stability of any industry designated by the *Minister*, after consulting the Minister responsible for that industry[.]; or”;
- (d) by the addition in subsection (3)(b) of the following subparagraph: 60
- “(v) competitiveness and efficiency gains that promote employment or industrial expansion.”; and

(e) by the addition of the following subsection after subsection (9):

“(10) The *Minister* may, after consultation with the Competition Commission, and in order to give effect to the purposes of *this Act* as set out in section 2, issue *regulations* in terms of section 78 exempting a category of *agreements* or practices from the application of this Chapter.” 5

**Repeal of Chapter 2A of Act 89 of 1998, as inserted by section 4 of Act 1 of 2009**

8. Chapter 2A of the principal Act is hereby repealed.

**Amendment of section 12A of Act 89 of 1998, as inserted by section 6 of Act 39 of 2000** 10

9. Section 12A of the principal Act is hereby amended—

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

“(1) Whenever 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, 15 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](a) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater 20 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](b) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection 25 (3);or

(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) by the insertion after subsection (1) of the following subsection: 30

“(1A) Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).”;

(c) by the substitution in subsection (2) for paragraphs (g) and (h) of the following 35 paragraphs, respectively:

“(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[.];” 40

(d) by the addition in subsection (2) after paragraph (h) of the following paragraphs:

“(i) the extent of ownership by a party to the merger in another *firm* or other *firms* in related markets; 45

(j) the extent 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 a merger* for such period as may be stipulated by the Competition Commission.”;

(e) by the substitution in subsection (3) for paragraphs (c) and (d) of the following 50 paragraphs, respectively:

“(c) the ability of *small and medium businesses*, or *firms* controlled or owned by historically disadvantaged persons, to **[become competitive]** effectively enter into, participate in or expand within the market; **[and]** 55

(d) the ability of national industries to compete in international markets[.]; and”;

- (f) by the addition in subsection (3) after paragraph (d) of the following paragraph:

“(e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.”.

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

10. Section 15 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:

“**Revocation of merger approval and enforcement of merger conditions**”; and

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- (b) by the substitution for subsection (1) of the following subsection:

“(1) The Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) and (c) if—

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

(b) the approval was obtained by deceit; or

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(c) a firm concerned has breached an obligation attached to the decision.”.

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

11. Section 16 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection: 25

“(3) Upon application by the Competition Commission, the Competition Tribunal may revoke its own decision to approve or conditionally approve a merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) or (c), and section 15, read with the changes required by the context, applies to a revocation or other decision in terms of this subsection.”.

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**Amendment of section 17 of Act 89 of 1998, as amended by section 6 of Act 39 of 2000**

12. Section 17 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 35

“(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] 40

(b) the Competition Commission;

(c) the Minister on matters raised in terms of section 12A(3), where the Minister participated in the Competition Commission’s or Competition Tribunal’s proceedings in terms of section 18 or on application for leave to appeal to the Competition Appeal Court; or 45

(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.”.

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**Amendment of section 18 of Act 89 of 1998, as amended by section 6 of Act 39 of 2000**

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13. Section 18 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) In order to make representations on any public interest ground referred to in section 12A(3), the Minister may participate as a party in any [intermediate or



large] merger proceedings before the Competition Commission, Competition Tribunal or the Competition Appeal Court, in the *prescribed* manner.”.

**Insertion of section 18A in Act 89 of 1998**

14. The following section is hereby inserted after section 18 of the principal Act:

**“Intervention in merger proceedings involving *foreign acquiring firm* 5**

**18A.** (1) The President must constitute a Committee which must be responsible for considering in terms of this section whether the implementation of a merger involving a *foreign acquiring firm* may have an adverse effect on the national security interests of the Republic.

(2) The Committee contemplated in subsection (1) must consist of such Cabinet Members and other public officials as may be determined and appointed by the President. 10

(3) The President must identify and publish in the *Gazette* a list of national security interests of the Republic, including the markets, industries, *goods or services*, sectors or regions in which a merger involving a *foreign acquiring firm* must be notified to the committee referred to in subsection (1), in terms of subsection (6). 15

(4) In determining what constitutes national security interests for purposes of *this Act*, the President must take into account all relevant factors, including the potential impact of a merger transaction— 20

(a) on the Republic’s defence capabilities and interests;

(b) on the use or transfer of sensitive technology or know-how outside of the Republic;

(c) on the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of citizens and the effective functioning of government; 25

(d) on the supply of critical *goods or services* to citizens, or the supply of *goods or services* to government;

(e) to enable foreign surveillance or espionage, or hinder current or future intelligence or law enforcement operations; 30

(f) on the Republic’s international interests, including foreign relationships;

(g) to enable or facilitate the activities of illicit actors, such as terrorists, terrorist organisations or organised crime; and 35

(h) on the economic and social stability of the Republic.

(5) The President must issue regulations governing—

(a) the notification, processes, procedure and timeframes to be followed by the Committee referred to in subsection (1) when performing its functions under this section; and 40

(b) access to information concerning the merger, including *confidential information*.

(6) A *foreign acquiring firm* which is required to notify the Competition Commission in terms of section 13A(1) of an intended merger must, at the time of the notification of the merger to the Competition Commission, file a notice with the Committee referred to in subsection (1) in the *prescribed* form and manner if the merger relates to the list of national security interests of the Republic as identified by the President in terms of subsection (3). 45

(7) Within 60 days of receipt by the Committee referred to in subsection (1) of a notice in terms of subsection (6), or such further period which the President may agree to, on good cause shown, the Committee must consider and decide on whether the merger involving a *foreign acquiring firm* may have an adverse effect on the national security interests of the Republic identified by the President in terms of subsection (3). 50

(8) The Committee referred to in subsection (1) may take into account other relevant factors, including whether the *foreign acquiring firm* is a *firm* controlled by a foreign government. 55

(9) During its consideration of a merger in terms of this section, the Committee may consult and seek the advice of the Competition Commission or any other relevant *regulatory authority* or public institution.

(10) The Minister must, within 30 days of the decision contemplated in subsection (7)—

- (a) publish a notice in the *Gazette* of the decision to permit, permit with conditions or prohibit the implementation of a merger; and
- (b) inform the National Assembly, in appropriate detail, of the decision.

(11) The Competition Commission may not consider a merger in terms of section 12A, and the Competition Tribunal may not consider a merger in terms of section 16(2), if the *foreign acquiring firm* failed to notify the Committee in terms of subsection (6).

(12) The Competition Commission may not make a decision in terms of section 13(5)(b) or 14(1)(b), and the Competition Tribunal may not make an order in terms of section 16(2), where the *Minister* has published a notice in the *Gazette* prohibiting the implementation of the merger on national security grounds.

(13) (a) The Committee may revoke its approval of the merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, if—

- (i) the approval 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 approval.

(b) If the Committee revokes its permission in terms of paragraph (a), the Competition Commission's or Competition Tribunal's approval or conditional approval of the merger is deemed to be revoked.

(c) Unless the Committee determines otherwise, the Competition Commission's or Competition Tribunal's approval or conditional approval of a merger involving a *foreign acquiring firm* is deemed to be revoked if the *foreign acquiring firm* failed to notify the Committee in terms of subsection (6).

(14) The Competition Tribunal may impose an administrative penalty, in accordance with the provisions of section 59(3), on the parties to a merger involving a *foreign acquiring firm* for any contravention contemplated in section 59(1)(d), read with the changes required by the context.

(15) The President may delegate any power or function conferred on him or her under subsection (3) or (4) to any Cabinet Member.”.

**Amendment of section 19 of Act 89 of 1998, as amended by section 7 of Act 39 of 2000**

15. Section 19 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The Competition Commission consists of the Commissioner and [one] two or more Deputy Commissioners, appointed by the *Minister* in terms of *this Act*.”.

**Amendment of section 21 of Act 89 of 1998, as amended by section 8 of Act 39 of 2000**

16. Section 21 of the principal Act is hereby amended—

(a) by the insertion in subsection (1) after paragraph (g) of the following paragraphs:

- “(gA) initiate and conduct market inquiries in terms of Chapter 4A;
- (gB) conduct impact studies in terms of section 21A;
- (gC) grant or refuse applications for leniency in terms of section 49E;
- (gD) develop a policy regarding the granting of leniency to any *firm* contemplated in section 50;
- (gE) issue guidelines in terms of section 79; and
- (gF) issue advisory opinions in terms of section 79A;”;

- (b) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:  
 “The *Minister* must table in [the National Assembly] Parliament any report submitted in terms of subsection (1)(k) or section 43E(1), and any report submitted in terms of subsection (2) if that report deals with a substantial matter relating to the purposes of *this Act*—”.

**Insertion of section 21A in Act 89 of 1998**

17. The following section is hereby inserted after section 21 of the principal Act:

**“Impact Studies**

- 21A.** (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. 10
- (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* within 15 business days after submitting it to the *Minister*. 15
- (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. 20
- (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. 25
- (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— 30
- (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**

18. Section 22 of the principal Act is hereby amended by the insertion after subsection (3) of the following subsections: 35

- “(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. 40
- (3B) The delegation 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 45
    - (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. 50
- (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; 55

- (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 23 of Act 89 of 1998**

19. Section 23 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) The *Minister* must designate—
- (a) a Deputy Commissioner to perform the functions of the Commissioner whenever—
- [(a)] (i) the Commissioner is unable for any reason to perform the functions of the Commissioner; or
- [(b)](ii) the office of Commissioner is vacant; and
- (b) one or more full-time or part-time Deputy Commissioners who are responsible for conducting market inquiries.”.

#### **Substitution of section 25 of Act 89 of 1998**

20. The following section is hereby substituted for section 25 of the principal Act:

#### **“Staff of Competition Commission**

25. (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.”.

#### **Amendment of section 26 of Act 89 of 1998, as amended by section 10 of Act 39 of 2000**

21. Section 26 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) (a) The Competition Tribunal consists of a Chairperson and not less than three, but not more than [ten] 14, 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* 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 of Act 89 of 1998, as amended by section 12 of Act 39 of 2000**

22. Section 31 of the principal Act is hereby amended—

- (a) by the substitution for subsection (2) of 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 26(2)(b); and
- (c) designate a member of the panel to preside over the panel’s proceedings.”; and
- (b) by the substitution for subsection (5) of the following subsection:
- “(5) **[If the Competition Tribunal may extend or reduce a prescribed period in terms of this Act, the]** 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 must be attached to the access order; and
- (d) compelling discovery of documents.”.

**Substitution of section 43A of Act 89 of 1998, as amended by section 6 of Act 1 of 2009**

23. The following section is hereby substituted for section 43A of the principal Act:

**“Interpretation and Application of this Chapter**

- 43A. (1)** In this Chapter, “market inquiry” means a formal inquiry in respect of the general state of competition, the levels of concentration in and structure of 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* impedes, 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, the regulation of the market, including the instruments in place to foster transformation in the market and past or current advantage that is not due to the *respondent’s* own commercial efforts or investment, such as direct or indirect state support for a *firm* or *firms* in the market;
- (b) the outcomes observed in the market, including—
- (i) levels of concentration and ownership;
- (ii) prices, customer choice, the quality of *goods or services* and innovation;
- (iii) employment;
- (iv) entry into and exit from the market;
- (v) the ability of national industries to compete in international markets;
- (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 *goods or services*.” 5

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

24. Section 43B of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading: 10  
**“Initiating and conducting market inquiries”;**
- (b) by the substitution for subsection (1) of the following subsection: 10  
 “(1) (a) The Competition Commission, acting within its functions set out in section 21(1), **[and 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)] (6)~~— 15  
 (i) if it has reason to believe that any feature or combination of features of a market for any *goods or services* **[prevents]** impedes, distorts or restricts competition within that market; or  
 (ii) to achieve the purposes of *this Act*.  
 (b) The *Minister* may, after consultation with the Competition 20  
 Commission and after consideration of the factors in paragraph (a) (i) and (ii), require the Competition Commission to conduct a market inquiry contemplated in paragraph (a) during a specified period.”;
- (c) by the substitution for subsection (2) of the following subsection: 25  
 “(2) 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 **[information]** written representations to the market inquiry.”; 30
- (d) by the insertion after subsection (2) of the following subsections: 35  
 “(2A) Before publishing the notice referred to in subsection (2), the Competition Commission must notify and consult with the relevant *regulatory authority* if the intended market inquiry will investigate a sector over which the *regulatory authority* has jurisdiction in terms of any public regulation.  
 (2B) The Competition Commission must appoint a Deputy Commissioner referred to in section 23(2)(b) to chair a market inquiry and may appoint one or more additional suitably qualified persons to the panel that conducts the market inquiry.”; 40
- (e) by the insertion in subsection (3) after paragraph (c) of the following paragraph: 45  
 “(cA) Sections 49A(1), 52(2), 52(2A), 52(3), 55 and 56, read with the changes required by the context, apply to the conduct of a market inquiry, but for the purposes of this section, a reference in any of those sections to the Competition Tribunal, Chairperson of the Competition Tribunal or to a person “presiding at a hearing” must be regarded as referring to the Competition Commission.”; 50
- (f) by the insertion after subsection (3) of the following subsection: 50  
 “(3A) For purposes of this Chapter— 50  
 (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 not the 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; 55  
 (c) before making the decision in paragraph (a) or (b), 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; 60

- (d) any person aggrieved by the determination of the Competition Commission in terms of this subsection may within 15 business days of the determination, appeal against the determination to the Competition Tribunal.”;
- (g) by the substitution for subsection (4) of the following subsection: 5  
 “(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).”; and 10
- (h) by the substitution for subsection (6) of the following subsection:  
 “(6) [The] Subject to subsections (4) and (5), the Competition Commission must complete a market inquiry by publishing a report 15  
 contemplated in [section 43C] sections 43D and 43E, within the time set out in the terms of reference [contemplated] referred to in subsection (2).”.

### Repeal of section 43C of Act 89 of 1998

25. Section 43C of the principal Act is hereby repealed. 20

### Insertion of sections 43C to 43G in Act 89 of 1998

26. The following sections are hereby inserted after section 43B of the principal Act:

#### “Matters to be decided at market inquiry

- 43C.** (1) In a market inquiry, the Competition Commission must decide— 25  
 (a) whether any feature, including structure and levels of concentration, of each relevant market for any *goods or services* impedes, restricts or distorts competition within that market; and  
 (b) on the procedures to be followed at the market inquiry. 30  
 (2) In making its decision in terms of subsection (1)(a), the Competition Commission must have regard to the impact of the adverse effect on competition on *small and medium 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— 35  
 (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; 40  
 (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. 45

#### Duty to remedy adverse effects on competition

- 43D.** (1) Subject to the provisions of any law, the Competition Commission may, in relation to each adverse effect on competition, take action to remedy, mitigate or prevent the adverse effect on competition. 50  
 (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), and the Competition Tribunal may make an appropriate order in relation thereto.  
 (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 55

a material change in circumstances since the preparation of the report or the Competition Commission has a justifiable reason for deciding differently.

(4) Any action in terms of subsection (1) must be reasonable and practicable, taking into account relevant factors, including—

- (a) the nature and extent of the adverse effect on competition;
- (b) the nature and extent of the remedial action;
- (c) the relation between the adverse effect on competition and the remedial action;
- (d) the likely effect of the remedial action on competition in the market that is the subject of the market inquiry and any related markets;
- (e) the availability of less restrictive means to remedy, mitigate or prevent the adverse effect on competition; and
- (f) any other relevant factor arising from any information obtained by the Competition Commission during the market inquiry.

### Outcome of market inquiry

**43E.** (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 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.

(4) Before the completion of the market inquiry, the Competition Commission must take appropriate steps to communicate, and where necessary on a confidential basis, to any person who is materially affected by any provisional finding, decision, remedial action or recommendation of the market inquiry in terms of this section and call for comments from them.

(5) The Competition Commission must have regard to any further information or submissions received in terms of subsection (4) when deciding the action or making the recommendation in terms of section 43D(1) and (2).

### Appeals against decisions made under this Chapter

**43F.** (1) The *Minister*, or any person referred to in section 43G(1) who is materially and adversely affected 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) The Competition Tribunal may, on good cause shown, extend the period referred to in subsection (4) for one further period of six months.

(6) Any person referred to in subsection (1) who is 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.

### Participation in and representations to market inquiry

**43G.** (1) In accordance with the procedures adopted by the inquiry, the following persons may participate in a market inquiry—

- (a) *firms*, including *small and medium businesses*, in the market that is the subject of the inquiry;
- (b) 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 (a);
- (c) officials and staff of the Competition Commission or witnesses, who in the opinion of the Commission, would substantially assist with the work of the inquiry;
- (d) a *regulatory authority* referred to in section 82(1);
- (e) the *Minister*;
- (f) 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; and
- (g) any other person—
  - (i) who has a material interest in the market inquiry;
  - (ii) whose interest is, in the opinion of the Competition Commission, not adequately represented by another participant; and
  - (iii) who would, in the opinion of the Competition Commission, substantially assist with the work of the inquiry.

(2) The Competition Commission must take reasonable steps to promote the participation of *small and medium businesses*, who have a material interest in the inquiry and are, in the opinion of the Competition Commission, not adequately represented.

(3) Subject to the procedures and time periods adopted for 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).

(4) Subject to the procedures and time periods adopted for the inquiry, participants referred to in subsection (1) may be required to respond to surveys and questionnaires, requests for information and submissions issued by the Commission.”.

### Amendment of section 44 of Act 89 of 1998, as substituted by section 15 of Act 39 of 2000

27. Section 44 of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

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

(b) by the substitution for subsection (3) of the following subsection:

“(3) 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.”; and
- (c) by the addition after subsection (3) of the following subsections:
- “(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 the determination and has 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 subsection (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.”.

#### Substitution of section 45 of Act 89 of 1998

28. The following section is hereby substituted for section 45 of the principal Act:

##### “Disclosure of information

45. (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*, which information may only be used for the purposes of *this Act* unless required to be disclosed in terms of any other law or the *Minister* has reasonable grounds to believe the information discloses a potential criminal offence; and 5
- (b) any other relevant Minister and any relevant *regulatory authority* may have access to a *firm's confidential information* unless the Tribunal determines otherwise, which information may only be used for the purposes of *this Act* unless required to be disclosed in terms of any other law or the Minister has reasonable grounds to believe the information discloses a potential criminal offence. 10
- (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.”. 15

**Amendment of section 49D of Act 89 of 1998, as inserted by section 15 of Act 39 of 2000** 20

29. Section 49D of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(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).” 25

**Insertion of section 49E in Act 89 of 1998**

30. The following section is hereby inserted after section 49D of the principal Act: 30

**“Leniency**

**49E.** (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. 35

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

**Amendment of section 54 of Act 89 of 1998, as amended by section 15 of Act 39 of 2000** 40

31. Section 54 of the principal Act is hereby amended by the insertion after paragraph (d) of the following paragraph:

“(dA) amend or withdraw any direction or summons referred to in subsection (a), (c) or (d);”.

**Amendment of section 58 of Act 89 of 1998, as amended by section 15 of Act 39 of 2000 and section 9 of Act 1 of 2009** 45

32. Section 58 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1)(a) for the words preceding subparagraph (i) of the following words:  
 “make an appropriate order in relation to a *prohibited practice* or an appeal referred to in section 43F, including—”; and 50

- (b) by the substitution in subsection (1)(c) for the words preceding subparagraph (i) of the following words:  
 “subject to sections 13(6) **[and]**, 14(2) and 43B(4)(b), condone, on good cause shown, any non-compliance of—”.

**Amendment of section 59 of Act 89 of 1998, as amended by section 10 of Act 1 of 2009** 5

33. Section 59 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:  
 “(a) for a *prohibited practice* in terms of section **[4(1)(b), 5(2) or 8(a), 10 (b) or (d)]** 4(1), 5(1) and (2), 8(1), 8(4), 9(1) or 9(1A);”;
- (b) by the deletion of paragraph (b);
- (c) by the insertion after subsection (2) of the following subsection:  
 “(2A) An administrative penalty imposed in terms of subsection (1) may not exceed 25 per cent of the *firm’s* annual turnover in the Republic and its exports from the Republic during the *firm’s* preceding financial year if the conduct is substantially a repeat by the same *firm* of conduct previously found by the Competition Tribunal to be a *prohibited practice*.”; 15
- (d) by the substitution for subsection (3) of the following subsection: 20  
 “(3) 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*; 25  
 (d) the market circumstances in which the contravention took place, including whether, and to what extent, the contravention had an impact upon *small and medium businesses* and *firms* owned or controlled by historically disadvantaged persons;  
 (e) the level of profit derived from the contravention; 30  
 (f) the degree to which the *respondent* has co-operated with the Competition Commission and the Competition Tribunal; **[and]**  
 (g) whether the *respondent* has previously been found in contravention of *this Act*; and  
 (h) whether the conduct has previously been found to be a contravention of *this Act* or is substantially the same as conduct regarding which Guidelines have been issued by the Competition Commission in terms of section 79.”; and 35
- (e) by the insertion after subsection (3) of the following subsection: 40  
 “(3A) In determining the extent of the administrative penalty to be imposed, the Competition Tribunal may—  
 (a) increase the administrative penalty referred to in subsections (2) and (2A) to include the turnover of any *firm* or *firms* that control the *respondent*, where the controlling *firm* or *firms* knew or should reasonably have known that the *respondent* was engaging in the prohibited conduct; and 45  
 (b) on notice to the controlling *firm* or *firms*, order that the controlling *firm* or *firms* be jointly and severally liable for the payment of the administrative penalty imposed.”.

**Amendment of section 60 of Act 89 of 1998, as amended by section 15 of Act 39 of 2000** 50

34. Section 60 of the principal Act is hereby amended—

- (a) by the substitution in subsection (2) for paragraph (b) of the following paragraph:  
 “(b) the *prohibited practice*— 55  
 (i) cannot adequately be remedied in terms of another provision of *this Act*; **[or]**  
 (ii) is substantially a repeat by that *firm* of conduct previously found by the Tribunal to be a *prohibited practice* [**;** or”;

- (b) by the addition in subsection (2) of the following paragraph:  
 “(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.”; 5
- (c) by the substitution for subsection (3) of the following subsection:  
 “(3) An order made by the Competition Tribunal in terms of subsection (2), except an order made in terms of section 43D(2), is of no force or effect unless confirmed by the Competition Appeal Court.”; and 10
- (d) by the substitution for subsection (4) of the following subsection:  
 “(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*.”. 10

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

35. Section 62 of the principal Act is hereby amended—
- (a) by the insertion after subsection (2) of the following subsection:  
 “(2A) Despite subsections (1)(a) and (2)(b), neither the Competition Tribunal nor the Competition Appeal Court has jurisdiction over matters regulated by section 18A, except section 18A(14).”; and 20
- (b) by the substitution for subsection (4) of the following subsection:  
 “(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.”. 25

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

36. Section 63 of the principal Act is hereby amended—
- (a) by the substitution for subsection (2) of the following subsection: 30  
 “(2) **[An]** 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 leave of the Competition Appeal Court; or** 35  
 (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]** Constitutional Court with the leave of the Constitutional Court.”;  
 (b) by the substitution for subsection (4) of the following subsection: 40  
 “(4) If the Competition Appeal Court, when refusing leave to appeal, made an order of costs against the applicant, **[the Supreme Court of Appeal or]** the Constitutional Court may vary that order on granting leave to appeal.”; and  
 (c) by the deletion of subsections (7) and (8). 45

**Amendment of section 67 of Act 89 of 1998**

37. Section 67 of the principal Act is hereby amended by the substitution for subsection (1) of 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.” 50

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

38. Section 74 of the principal Act is hereby amended by the substitution for paragraph (b) of the following paragraph: 55

“(b) in any other 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 78 of Act 89 of 1998

39. The following section is hereby substituted for section 78 of the principal Act: 5

“(1) The *Minister*, by notice in the *Gazette*, may make *regulations* that are required to give effect to the purposes of *this Act*.

(2) Before making the *regulations* referred to in sections 4, 5, 8, and 9, the *Minister* must consult the Competition Commission and publish a notice in the *Gazette*— 10

- (a) stating that draft regulations have been prepared;
- (b) specifying the place, which may include a website, where a copy of the draft regulations may be obtained;
- (c) inviting interested parties to submit written comments on the draft regulations within a reasonable period; and 15
- (d) consider any comments submitted within the period contemplated in paragraph (c).”.

#### Amendment of section 79 of Act 89 of 1998

40. The following section is hereby substituted for section 79 of the principal Act:

“**Guidelines** 20

79. (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 [prepared in terms of] referred to in subsection (1) [— 25  
(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— 30

- (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 35
  - (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.”. 40

#### Insertion of section 79A in Act 89 of 1998

41. The following section is hereby inserted after section 79 of the principal Act:

“**Advisory opinions of Commission**

79A. The *Minister* may, after consultation with the Competition 45  
Commission, issue *regulations* to provide for non-binding advisory  
opinions to be issued by the Competition Commission, including the fees  
payable in respect of a non-binding opinion.”.

#### Amendment of section 82 of Act 89 of 1998

42. Section 82 of the principal Act is hereby amended by the substitution in subsection 50  
(1) for the words preceding paragraph (a) of the following words:

“A *regulatory authority* which, in terms of any *public regulation*, has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 or on matters set out in Chapter 4A within a particular sector—”.

#### **Amendment of section 83 of Act 89 of 1998**

43. Section 83 of the principal Act is hereby amended by the addition after subsection (2) of the following subsection: 5

“(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), remains in effect.”. 10

#### **Substitution of certain expression in Act 89 of 1998**

44. The principal Act is hereby amended by the substitution for the expression “*excessive price*”, wherever it occurs, of the expression “excessive price”.

#### **Amendment of Arrangement of Sections of Act 89 of 1998**

45. The Arrangement of Sections of the principal Act is hereby amended— 15

- (a) by the substitution for item 9 of the following item:
  - “9. Price discrimination by dominant firm as seller prohibited”;
- (b) by the substitution for item 15 of the following item:
  - “15. Revocation of merger approval and enforcement of merger conditions”; 20
- (c) by the insertion after item 18 of the following item:
  - “18A. Intervention in merger proceedings involving foreign acquiring firm”;
- (d) by the insertion after item 21 of the following item:
  - “21A. Impact Studies”; 25
- (e) by the substitution for item 43B of the following item:
  - “43B. Initiating and conducting market inquiries”;
- (f) by the substitution for item 43C of the following item:
  - “43C. Matters to be decided at market inquiry”;
- (g) by the insertion after item 43C of the following items: 30
  - “43D. Duty to remedy adverse effects on competition
  - 43E. Outcome of market inquiry
  - 43F. Appeals against decisions made under this Chapter
  - 43G. Participation in and representations to market inquiry”;
- (g) by the insertion after item 49D of the following item: 35
  - “49E. Leniency”; and
- (h) by the insertion after item 79 of the following item:
  - “79A. Advisory opinions of Commission”.

#### **Short title and commencement**

46. This Act is called the Competition Amendment Act, 2018, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 40

## **MEMORANDUM ON THE OBJECTS OF THE COMPETITION AMENDMENT BILL, 2018**

### **1. INTRODUCTION**

- 1.1 The Competition Act, 1998 (Act No. 89 of 1998) (“the Act”), provides the legislative framework for the regulation of competition in the South African economy. The Act sets up independent competition authorities to investigate and penalise anti-competitive conduct and regulate mergers and acquisitions.
- 1.2 In addition, there are numerous public interest issues, such as employment and the promotion of small and medium businesses and firms that are owned or controlled by historically disadvantaged persons that must be considered together with the competition issues.

### **2. OBJECTS OF THE BILL**

- 2.1 The main objective of these amendments is to address two persistent structural constraints on the South African economy, namely, the high levels of economic concentration in the economy and the skewed ownership profile of the economy.
- 2.2 This is done through—
  - (a) strengthening or clarifying the provisions of the Act relating to prohibited practices, restricted horizontal and vertical practices, abuse of dominance and price discrimination and mergers;
  - (b) requiring special attention to be given to the impact of anti-competitive conduct on small and medium businesses and firms owned or controlled by historically disadvantaged persons;
  - (c) strengthening the provisions relating to market inquiries so that—
    - (i) the outcomes of these inquiries result in action that promotes competition;
    - (ii) there is guidance on how to evaluate the adverse features of a market; and
    - (iii) requiring special attention on small and medium businesses and firms owned by historically disadvantaged persons;
  - (d) providing the national executive with effective means of participating in competition related proceedings and the power to initiate market inquiries into a sector and to intervene in mergers that affect the national security interests of the Republic; and
  - (e) promoting the administrative efficacy of the Competition Commission (“Commission”), market inquiries and the Competition Tribunal (“Tribunal”).

### **3. SUMMARY OF PROVISIONS OF THE BILL**

#### **3.1 Clause 1**

- 3.1.1 Clause 1 of the Bill seeks to insert the definitions of “average avoidable cost” and “average variable cost” in section 1 of the Act.
- 3.1.2 The clause seeks to delete the definition of “excessive price”. The definition was not helpful. Instead, the introduction of the proposed section 8(3) provides guidance on how an excessive price should be determined.
- 3.1.3 The clause seeks to amend the definition of “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. In the interests of greater clarity, the term “participate” is also defined.



- 3.1.4 The clause seeks to insert the definition of “foreign acquiring firm” in section 1 of the Act, which is required for the proposed new section 18A of the Act.
- 3.1.5 The clause seeks to insert the definition of “margin squeeze” in section 1 of the Act, which is important in determining whether a dominant firm has abused its dominance by engaging in exclusionary acts. See the proposed amendments to section 8 (1)(d)(vi).
- 3.1.6 The clause seeks to insert the definition of “medium-sized business” in section 1 of the Act to refer to a medium-sized firm as determined by the Minister by notice in the *Gazette*.
- 3.1.7 As noted above, the clause seeks to insert the definition of “participate” in section 1 of the Act.
- 3.1.8 The clause seeks to insert the definition of “predatory prices” with reference to the concepts of “average avoidable cost” and “average variable cost”, which are defined as noted above. These definitions are important in determining whether a dominant firm has abused its dominance by engaging in exclusionary acts. See the proposed amendments to section 8(1)(d)(iv).
- 3.1.9 Clause 1 also seeks to update the definitions of “Minister” and “small business”. It seeks to introduce the definition “small and medium businesses”.
- 3.1.10 Lastly, the clause seeks to insert the definition of “worker” with reference to the Labour Relations Act, 1995 (Act No. 66 of 1995), and in relation to broad-based worker ownership.

### **3.2 Clauses 2, 3 and 4**

- 3.2.1 Clause 2 of the Bill seeks to amend section 2 of the Act by substituting paragraph (g) thereof to effect a technical correction.
- 3.2.2 Clause 3 of the Bill deals with a proposed amendment to section 4(1)(b)(ii) which reflects the factual position that collusive agreements in concentrated markets may be achieved and monitored through the allocation of market shares.
- 3.2.3 Clause 3 further seeks to add a new section 4(6) to the Act which requires the Minister to make regulations, in terms of section 78 of the Act, regarding the application of section 4 (restrictive horizontal practices).
- 3.2.4 Clause 4 of the Bill seeks to add subsection (4) to the Act which requires the Minister to make regulations, in terms of section 78 of the Act, regarding the application of section 5 (restrictive vertical practices).
- 3.2.5 The regulations, contemplated in the proposed section 4(6) and 5(4), regarding the prohibited practices will promote clarity, consistency and certainty regarding the application of these sections.

### **3.3 Clause 5**

- 3.3.1 Clause 5 of the Bill seeks to substitute section 8 of the Act. Section 8 prohibits abuse of dominance by a firm that is dominant in a market. Section 8 is especially important when dealing with concentrated markets.

- 3.3.2 In paragraph (a) (which the Bill proposes to make subsection (1)(a)), with regard to the reference to “consumers” is added “ or customers”. It is not only consumers that should be protected from excessive prices, but also customers involved in commercial transactions.
- 3.3.3 Subsection (1)(d)(ii) widens the ambit of the subsection to include “services” and widens its application to not only competitors, but also to customers.
- 3.3.4 Subsection (1)(d)(iv) prohibits predatory pricing. A predatory price is determined with respect to average avoidable cost or average variable cost. The inclusion of these standard economic benchmarks is important because the failure of a dominant firm to cover its average avoidable cost or average variable cost suggests that the dominant firm is sacrificing profits in the short-term, and therefore, may be involved in exclusionary conduct.
- 3.3.5 Section 8(1)(d)(vi) is inserted to include the practice of engaging in a margin squeeze.
- 3.3.6 Section 8(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.
- 3.3.7 The determination of excessive prices is complex and often case specific. Section 8(3) provides a test for determine if a price that is higher than a competitive price is unreasonable, by taking into account a list of relevant factors to determine whether the price difference is excessive. It further empowers the Minister to make regulations regarding the determination or calculation of an excessive price.
- 3.3.8 Section 8(4)(a) is introduced to protect suppliers to dominant firms, especially small and medium businesses or a firm owned or controlled by historically disadvantaged persons, from being required, through the abuse of dominance, to sell their goods or services at prices that impede their ability to participate effectively. This seeks to address the problem of *monopolies* by making such conduct a prohibited practice. Section 8(4)(b) is introduced to make it a prohibited practice for a dominant firm in a sector designated by the Minister to avoid or refuse to purchase goods or services from a supplier that is a small or medium business or a firm controlled or owned by historically disadvantaged persons in order to circumvent the provisions of section 8(4)(a). In order to foster clarity, consistency and certainty, the Minister is required in section 8(4) to make regulations, in terms of section 78, designating sectors to which section 8 will apply and setting out the relevant factors and benchmarks for determining whether the charging of predatory prices impedes the ability of a non-dominant firm, especially a small and medium business or a firm owned or controlled by historically disadvantaged persons to participate in a market.

#### 3.4 Clause 6

- 3.4.1 Clause 6 of the Bill seeks to amend section 9 of the Act. Section 9 deals with price discrimination by a dominant firm as a seller.
- 3.4.2 To prove price discrimination, it requires the complainant to prove, amongst others, that the price discrimination is “likely to have the effect of substantially preventing or lessening competition” (section 9(1)(a)). The inclusion of the word “substantially” has meant that small and medium businesses are often unable to show prohibited price discrimination because the effect on small businesses is not considered to be “substantial” prevention of lessening competition. This means that at present, section 9 favours complainants that are

large firms because they can more easily demonstrate a substantial effect. Therefore, the Bill proposes the addition of a section 9(1)(a)(ii) to provide for the complainant to be able to prove that the price discrimination is “likely to have the effect of impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged person to participate effectively.

- 3.4.3 The proposed section 9(3) requires the dominant firm, where there is a prima facie case of a contravention of section 9(1)(a)(ii), to show that its action of price differentiation does not impede the participation of small and medium businesses and firms owned or controlled by historically disadvantaged persons.
- 3.4.4 The proposed section 9(4) requires the Minister to make regulations, in terms of section 78, to give effect to section 9 and setting out the relevant factors and benchmarks for determining whether a dominant firm’s action is price discrimination that impedes the participation of small and medium businesses and firms owned or controlled by historically disadvantaged persons.

### 3.5 Clause 7

- 3.5.1 Clause 7 of the Bill seeks to amend section 10 of the Act. The amendment to section 10(3)(b)(ii) makes the entry, participation in and expansion of small or medium businesses or firms owned or controlled by historically disadvantaged persons an important consideration in the process of determining exemptions. This will also address the concern that these firms frequently exit the market.
- 3.5.2 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, growth and transformation of an industry designated by the Minister.
- 3.5.3 The proposed new section 10(3)(b)(v) provides an additional ground for the Commission to exempt an agreement or practice, or a category of agreements or practices, from the application of Chapter 2 of the Act. This ground is “competitiveness and efficiency gains that promote employment or industrial expansion”.
- 3.5.4 The new section 10(10) empowers the Minister to exempt a category of agreements or practices from the application of Chapter 2 through the promulgation of regulations. These exemptions must give effect to the purposes of the Act, which are set out in section 2.

### 3.6 Clause 8

- 3.6.1 Clause 8 of the Bill seeks to repeal Chapter 2A of the Act. Section 10A dealt with the prohibition or regulation of a complex monopoly in the current Act. This provision has not come into operation. This section is complex and is likely to be the subject of substantial litigation, including constitutional attacks upon its validity. It is also rigid and does not effectively deal with concentrated markets.
- 3.6.2 The strengthening of the market inquiry provisions 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.

### 3.7 Clause 9

- 3.7.1 Clause 9 of the Bill seeks to amend section 12A of the Act. The deletion of subsection (1)(b) and the insertion of subsection (1A) means that when the Competition Commission and Tribunal consider a merger which they conclude will not substantially prevent or lessen competition, they must still consider the public interest issues relating to the merger. The reason for this is that the merger may need to be prevented, or conditions attached to it, where there are negative public interest outcomes from the contemplated merger. This amendment gives better effect to the jurisprudence and to the initial meaning of section 12A (1).
- 3.7.2 The addition of paragraphs (i) to (k) in subsection (2) means that consideration must be given to cross-ownership and cross-directorships of the merging parties and the merged entity as well previous mergers engaged in by one or more of the parties to the merger. These are the mechanisms by which unseen, creeping concentration, and the erection and maintenance of strategic barriers to entry are possible.
- 3.7.3 The proposed amendments to subsection (3) seek to explicitly create public interest grounds in merger control that deal with ownership, control and the support of small and medium businesses and firms owned or controlled by historically disadvantaged persons as well as the ownership in firms by workers in those firms.

### 3.8 Clause 10

Clause 10 of the Bill seeks to amend section 15 of the Act. Section 15 regulates the 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 Commission may make an appropriate order regarding any condition imposed upon the merger, including those relating to employment, small and medium businesses and firms owned or controlled by historically disadvantaged persons.

### 3.9 Clause 11

Clause 11 seeks to amend section 16 of the Act. The amendment provides the Tribunal with a similar power to make any appropriate order regarding any condition relating to a merger, including the issues referred to in section 12A(3)(b) and (c).

### 3.10 Clause 12

Clause 12 of the Bill seeks to amend section 17 of the Act. This amendment provides the Commission and, in defined circumstances, the Minister with the right of appeal against a merger decision of the Tribunal. This amendment addresses a *lacuna* in the Act.

### 3.11 Clause 13

Clause 13 of the Bill seeks to amend section 18 of the Act. The proposed amendment seeks to remove the reference to "intermediate or large" merger in section 18(1), thereby allowing the Minister to intervene in relation to any merger proceedings on public interest grounds referred to in section 12A3 of the Act.

### 3.12 Clause 14

Clause 14 seeks to insert the new section 18A in the Act. This amendment provides the President the powers to constitute a Committee comprised of

Ministers and officials determined and appointed by the President with powers to intervene in respect to a merger where the acquiring firm is foreign, and the merger may adversely affect the country's national security interests. The amendment also provides for the determination of national security interests as well as the issuing of regulations that will govern access to information, including confidential information, and the process, procedures and timeframes associated with the consideration of these kinds of mergers. The Minister is required to publish a notice in the *Gazette* on any decisions taken by the Committee and to inform the National Assembly, in appropriate detail, of the Committee's decision.

### **3.13 Clause 15**

Clause 15 of the Bill seeks to amend section 19 of the Act. This amendment provides for the Commission to consist of the Competition Commissioner and at least two Deputy Commissioners. One or more part-time or full-time Deputy Commissioners will be responsible for market inquiries. See the amendment to section 23(2).

### **3.14 Clause 16**

Clause 16 of the Bill seeks to amend section 21 of the Act. Section 21 sets out the functions of the Commission. The amendments provide for functions relating to the conducting of market inquiries and impact studies, the development of a leniency policy and making decisions about leniency applications, and the issuing of guidelines and advisory opinions. The functions relating to leniency applications give effect to case law.

### **3.15 Clause 17**

3.15.1 Clause 17 of the Bill seeks to insert a new section 21A in the Act. 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.

3.15.2 The studies will provide valuable insights into the impact of the 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.

### **3.16 Clause 18**

Clause 18 of the Bill seeks to amend section 22 of the Act. 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 his or her appointment by the Minister, provision is made for consultation with the Minister before the delegations come into effect.

### **3.17 Clause 19**

Clause 19 of the Bill seeks to amend section 23 of the Act. This amendment provides for the appointment of one or more part-time or full-time Deputy Commissioners who will be responsible for market inquiries.

### **3.18 Clause 20**

Clause 20 of the Bill seeks to amend section 25 of the Act. This amendment provides the Commissioner to designate suitably qualified and experienced staff members of the Commission to appear on behalf of the Commission in any court of law.

### 3.19 Clause 21

Clause 21 of the Bill seeks to amend section 26 of the Act. Section 26 deals with the constitution of the Tribunal. The amendment provides for the appointment of acting Tribunal members. This is necessary in the light of the Tribunal's workload during particular periods.

### 3.20 Clause 22

Clause 22 of the Bill seeks to amend section 31 of the Act. 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 applications 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 and workload.

### 3.21 Clause 23

3.21.1 Clause 23 of the Bill seeks to amend section 43A of the Act. A market inquiry's focus is on the general state of competition, levels of concentration and the structure of a market, rather than on the conduct of a particular firm. It seeks to identify features of the market that impede, restrict or distort competition in a market. This distinguishes the market inquiry process from the Commission's initiation of complaints for investigation and possible referral to the Tribunal.

3.21.2 The amendments proposed to section 43A of the Act will enhance the market inquiry process and will ensure that its outcomes include measures to address concentration, the promotion of small and medium businesses and the transformation of ownership.

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

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

3.21.5 The amendments to section 43A(3)(b) identify the following three types of market features that may be relevant to the market inquiry:

- (a) structure, including the level and trends of concentration in a market;
- (b) outcomes observed in the market, including the level and trends of concentration in a market; or
- (c) conduct by either suppliers or customers in the market. It also includes provisions similar to the complex monopoly provisions of the section 10A of the Competition Amendment Act, 2009 (Act No. 1 of 2009), which has never come into effect.

### 3.22 Clause 24

3.22.1 Clause 24 seeks to amend section 43B of the Act. The amendments provide that the Commission or the Minister may establish a market inquiry.

- 3.22.2 The remainder of section 43B sets out the procedures and processes to be followed for a market inquiry. It identifies the powers available to the Competition Commission for the conduct of the inquiry, sets the applicable time limits for the inquiry, and provides for the amendment of the terms of reference or time limits for the completion of an inquiry. The section also provides firms with protections relating to access to confidential information.
- 3.22.3 Regarding the confidentiality of information provided during a market inquiry, the Commission is empowered to determine whether a claim of confidentiality is appropriate in the first instance. If the Commission determines that the party's claim of confidentiality is invalid, the aggrieved party may appeal to the Tribunal.

### **3.23 Clause 25**

Clause 25 of the Bill seeks to repeal section 43C of the Bill. The section is replaced by a new section and its provisions are moved to the new section 43E of the Act, in amended form.

### **3.24 Clause 26**

- 3.24.1 Clause 26 inserts new sections 43C to 43G in the Act. The proposed new section 43C requires the Commission to consider and expressly decide on specific issues. This imposes a discipline on the market inquiry to ensure that it maintains focus.
- 3.24.2 This section requires the Commission to consider whether there are structural features of a market that have an adverse effect on competition, which include levels of concentration and barriers to entry for, in particular, small and medium businesses and firms owned or controlled by historically disadvantaged persons.
- 3.24.3 It also requires the inquiry to consider whether the Commission should impose a remedy, and if so, to decide upon a remedy.
- 3.24.4 The proposed new section 43D 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, which must be made by the Tribunal after recommendation of the Commission. The Commission's actions must be reasonable and practicable taking into account relevant factors such as those listed in subsection (4).
- 3.24.5 The proposed new section 43E re-enacts the section 43C indicated as being repealed above, in amended form. This amendment reinforces the duty on the Commission to make decisions regarding structural features identified as having an adverse effect of competition in a market. It also provides persons who are materially and adversely affected by a decision, with the right to be heard.
- 3.24.6 The proposed new section 43F enables an appeal (rather than a review) to the Tribunal against any decision taken by the Commission arising from the market inquiry. This enables the Tribunal to consider the merits of the Commission's decision and remedial action following a market inquiry, while limiting it to the record used by the Commission.
- 3.24.7 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.
- 3.24.8 The proposed section 43G seeks to regulate a person's participation in or representations to the market inquiry. It draws a distinction between

participation in the market inquiry and the opportunity to make representations to the market inquiry. It also empowers the inquiry to solicit information through questionnaires, requests for information and responses to submissions made by the Competition Commission. The Commission is required to take reasonable steps to promote the participation of small and medium businesses who have a material interest in a market inquiry.

### **3.25 Clauses 27 and 28**

- 3.25.1 Clauses 27 and 28 of the Bill amend the sections of the Act 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.
- 3.25.2 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 and using the information for the purposes of the Act, any other law or when the Minister has reasonable grounds to believe the information discloses a potential criminal offence. This is necessary in order to give 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 proceedings in terms of the Act. In the case of other Ministers and regulatory authorities, the Tribunal may override the right of access to confidential documents.

### **3.26 Clause 29**

Clause 29 of the Bill seeks to amend section 49D of the Act. This amendment enables parties to agree to consent orders after a market inquiry. This allows the Commission and the parties to avoid contested legal proceedings at the Tribunal.

### **3.27 Clause 30**

Clause 30 of the Bill inserts a new section 49E in the Act. Section 49E provides for the adoption of a leniency policy by the Commission and empowers it to grant leniency. This is in line with case law.

### **3.28 Clause 31**

Clause 31 of the Bill seeks to amend section 54 of the Act. This amendment provides the Tribunal with the power to amend and withdraw a direction and summons. This reflects the current case law and will prevent overly technical points about this matter.

### **3.29 Clause 32**

Clause 32 of the Bill seeks to amend section 58 of the Act. 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.

### **3.30 Clause 33**

- 3.30.1 Clause 33 of the Bill seeks to amend section 59 of the Act. Section 59 regulates the administrative penalties that the Tribunal may impose.
- 3.30.2 The amendments provide for the imposition of administrative penalties for all contraventions of the Act, even offences in respect of non-specific contraventions, which are set out in section 4(1)(a), 5(1),



8(c) or 9(1). Penalties for non-specific exclusionary acts are left to the discretion of the Tribunal. The Tribunal's decision must consider the factors listed in subsection (3).

- 3.30.3 The proposed insertion of subsection (2A) increases the maximum administrative penalty to 25% of a firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year if the conduct is substantially a repeat by the same firm of conduct previously found to be a prohibited practice.
- 3.30.4 The proposed amendment to section 59(3)(d) of the Act requires the Tribunal to take into account the impact of the contravention upon small and medium businesses and firms owned by historically disadvantaged persons when determining the quantum of the administrative penalty.
- 3.30.5 In addition, the proposed insertion of subsection (3A) allows for the administrative penalty to be increased by the turnover of any firm that controls the firm that is found to have engaged in a prohibited practice and to make the controlling firm jointly and severally liable for the penalty. This will encourage the controlling firm to institute checks upon the firm it controls.

### **3.31 Clause 34**

Clause 34 of the Bill seeks to amend section 60 of the Act. These amendments enable divestiture as a remedy following a market inquiry 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, on recommendation from the Commission. In addition, the parties and the Commission have the right of appeal to the Competition Appeal Court.

### **3.32 Clauses 35 and 36**

Clauses 35 and 36 of the Bill seek to amend sections 62 and 63 of the Act, respectively. The amendments, which deal with appeals from the Competition Appeal Court, bring the Competition Act in line with amendments to the Constitution.

### **3.33 Clause 37**

Clause 37 of the Bill seeks to amend section 67 of the Act. Section 67 regulates 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.

### **3.34 Clause 38**

Clause 38 of the Bill seeks to amend section 74 of the Act. The amendment increases the fine for offences relating to the administration of the Act from R2 000 to R10 000.

### **3.35 Clause 39**

Clause 39 of the Bill seeks to amend section 78 of the Act in order to provide for the process in respect of which the Minister makes regulations. This amendment allows for the draft regulations to be published and for public comments to be considered before the final regulations are made.

**3.36 Clause 40**

Clause 40 of the Bill seeks to amend section 79 of the Act. Section 79 concerns guidelines issued by the Commission. The amendments provide for a process of consultation before the guidelines may be published. The amendments require a body interpreting or applying the Act to take the guidelines into account even though they are not binding.

**3.37** Clause 41 Clause 41 of the Bill seeks to insert section 79A in the Act. This amendment empowers the Minister to make regulations concerning the issuing of advisory opinions by the Competition Commission.

**3.38** Clause 42 Clause 42 of the Bill seeks to amend section 82 of the Act. This section requires regulatory authorities to negotiate co-operation agreements with the Competition Commission. The amendment extends the issues that must be the subject of this agreement to matters associated with market inquiries.

**3.39** Clause 43 Clause 43 of the Bill seeks to amend section 83 of the Act. This amendment is a transitional provision and provides for the continued applicability of the Commission's present leniency policy until a new one is published in terms of section 49E of the Act.

**3.40 Clause 44**

Clause 44 of the Bill is meant to deal with the proposed deletion of the definition of "excessive price" in section 1 of the Act. The provision substitutes the italicised expression "excessive price" wherever it occurs in the Act with an un-italicised expression.

**3.41 Clause 45**

Clause 45 of the Bill seeks to amend the Arrangement of Sections.

**3.42 Clause 46**

Clause 46 of the Bill provides for the short title and commencement of the Act.

**4. OTHER DEPARTMENTS AND BODIES CONSULTED**

4.1 A panel of legal and economic experts was constituted, which included members of both the Competition Commission and Tribunal.

4.2 The Economic Sectors and Employment Cluster within government were consulted.

4.3 Following the publication of the Bill, more than 60 public submissions were received and considered. These included submissions by the social partners (business associations and organised labour), individual companies, members of the legal profession, economic consultancies and academics.

4.3 The Minister addressed a number of public conferences dealing with the theme of economic inclusion and competition, which fostered interaction with legal practitioners and academics.

4.4 Extensive consultation with key stakeholders on the contents of the Bill were held, which included five meetings at the National Economic Development and Labour Council (NEDLAC). Additional bilateral meetings were held with Business Unity South Africa (BUSA), Business Leadership South Africa (BLSA), the Black Business Council (BBC) and representatives of the labour federations represented at NEDLAC-the Congress of South African Trade Unions (COSATU), the Federation of Unions of South Africa (FEDUSA) and the National Council of Trade Unions (NACTU). Further consultations were

held with representatives of the Competition Commission, Tribunal and Competition Appeal Court. Where appropriate, changes were made to the Bill to take account of their concerns and representations.

- 4.5 A Socio-Economic Impact Assessment (SEAIS) was completed and subsequently certified by the Department of Planning, Monitoring and Evaluation (DPME).

## 5. FINANCIAL IMPLICATIONS FOR STATE

The changes proposed by the Bill will require additional capacity in the Competition Commission, for expertise to be sourced for market inquiries. The financial implications will depend on the number of market inquiries to be conducted. During 2017, adjustments were made to the filing fees charged during merger proceedings by the Commission and Tribunal, in order to strengthen the institutions' financial capacity. Discussions for further fiscal support will take place through the normal budgetary processes to address the need for additional resources.

## 6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the 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.
- 6.2 As noted above, the Bill regulates matters relating to competition within the South African economic system. The Bill does not affect the concurrent provincial legislative competences in Schedule 4 to the Constitution.
- 6.3 Section 44(1)(b)(ii) of the Constitution provides that legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution must follow the section 76 route. Section 76(3) of the Constitution further provides that a Bill that falls within a functional area listed in Schedule 4 to the Constitution or which provides for legislation envisaged in any of the sections listed in paragraphs (a) to (f) of section 76(3) must be dealt with in accordance with the procedure established by section 76(1) or (2) of the Constitution.
- 6.4 Section 44(1)(b)(iii) of the Constitution, on the other hand, provides that any other legislation must be considered in accordance with section 75 of the Constitution. Section 75 of the Constitution provides for a Bill, other than a Bill to which the procedure set out in section 74 or 76 applies, to be dealt with in accordance with the procedure set out in section 75.
- 6.5 In this regard, the Constitutional Court, in *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*<sup>4</sup>, per Ngcobo CJ, stated as follows:

“[72] To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. This naturally includes proposed legislation over which the provinces themselves have concurrent legislative power, but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in section 76(3)(a)-(f), over which the provinces have no legislative competence, as well as Bills the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in section 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)

(a)-(f), and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence.”.

- 6.6 Accordingly, the provisions of the Bill do not affect the provinces in substantial measure. The Bill's provisions further do not, in substantial measure, fall within a concurrent provincial legislative competence nor affect any of the explicit list of matters listed in section 76(3) of the Constitution. In the light of the above, therefore, the Bill should be dealt with in accordance with the procedure stipulated in section 75 of the Constitution, and should thus be tagged as a section 75 Bill.
- 6.7 The State Law Advisers 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.