

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.

(English text signed by the President)
(Assented to 13 February 2019)

ACT

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.

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

Amendment of section 1 of Act 89 of 1998, as amended by section 1 of Act 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;

- '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*;" and
- (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);" and
- (m) by the insertion after the definition of "*vertical relationship*" of the following definition: 50
 " **'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

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 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— 10

(a) by the substitution in subsection (1)(b) for subparagraph (ii) of the following subparagraph:

“(ii) dividing markets by allocating market shares, customers, suppliers, territories[,], or specific types of *goods or services*; or”; 15

and

(b) by the addition after subsection (5) of the following subsection:

“(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: 20

“(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: 25

“Abuse of dominance prohibited

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; 30
- (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— 35
 - (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;
 - (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; 45
 - (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*.
- (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. 5
- (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— 10
- (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*— 15
 - (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*;
 - (d) the length of time the prices have been charged at that level; 20
 - (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 25
 - (f) any regulations made by the *Minister*, in terms of section 78 regarding the calculation and determination of an excessive price.
- (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— 30
- (i) prices; or
 - (ii) other trading conditions.
- (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). 35
- (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— 40
- (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). 45
- (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
 - (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.”. 50

Amendment of section 9 of Act 89 of 1998

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:
 - “(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*”;
 - (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).”;
 - (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—
 - (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;
 - (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
 - (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;
 - (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”;
 - (e) by the addition of the following subsections after subsection (2):
 - “(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*.
 - (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).
 - (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

- (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.”.

Amendment of section 10 of Act 89 of 1998

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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.”;
- (b) by the substitution in subsection (3)(b) for subparagraph (ii) of the following subparagraph:
 - “(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:
 - “(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:
 - “(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.”.

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

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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, 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 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 (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: 5
 “(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 paragraphs, respectively: 10
 “(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[.];”;
- (d) by the addition in subsection (2) after paragraph (h) of the following paragraphs: 15
 “(i) the extent of ownership by a party to the merger in another *firm* or other *firms* in related markets;
 (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 20
 (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 paragraphs, respectively: 25
 “(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]
 (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: 30
 “(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.” 35

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: 40
 “**Revocation of merger approval and enforcement of merger conditions**”; and
- (b) by the substitution for subsection (1) of the following subsection: 45
 “(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—
 (a) the decision was based on incorrect information for which a party to a merger is responsible; 50
 (b) the approval was obtained by deceit; or
 (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 55

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

Amendment of section 17 of Act 89 of 1998, as amended by section 6 of Act 39 of 2000 5

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

- “(1) Within 20 business days after notice of a decision by the Competition Tribunal in terms of section 16, an appeal from that decision may be made to the Competition Appeal Court, subject to its rules, by— 10
- (a) any party to the merger; [or]
 - (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 15
 - (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.”. 20

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

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.”. 25

Insertion of section 18A in Act 89 of 1998

14. The following section is hereby inserted after section 18 of the principal Act: 30

“Intervention in merger proceedings involving foreign acquiring firm

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. 35

(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.

(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). 40

(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— 45

- (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;
- (d) on the supply of critical *goods or services* to citizens, or the supply of *goods or services* to government; 5
- (e) to enable foreign surveillance or espionage, or hinder current or future intelligence or law enforcement operations;
- (f) on the Republic's international interests, including foreign relationships; 10
- (g) to enable or facilitate the activities of illicit actors, such as terrorists, terrorist organisations or organised crime; and
- (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 15
- (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). 20
- (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). 30
- (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. 35
- (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)— 40
- (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). 45
- (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. 50

- (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.

(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*.

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

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

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

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

- (a) the nature and extent of the information requested;
- (b) the purpose and scope of the impact study; and
- (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:

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

(3B) The 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
 - (ii) any of the Competition Commission's powers, functions or duties conferred or imposed upon the Commission under *this Act*, except those referred to in section 15; and
- (b) in appropriate circumstances, include the power to sub-delegate a delegated power.

(3C) The Commissioner may—

- (a) delegate only in terms of the policy on delegations of authority;
- (b) delegate either to a specific individual or the incumbent of a specific post;
- (c) delegate subject to any conditions or restrictions that are deemed fit;
- (d) withdraw or amend a delegation made in terms of the policy on delegations of authority;
- (e) withdraw or amend any decision made by a person who exercises a power or performs a function or duty delegated in terms of the policy on delegations of authority.

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

- (a) must be in writing, unless it is impracticable in the circumstances;
- (b) does not limit or restrict the competence of the Commissioner to exercise or perform any power, function or duty that has been delegated;
- (c) does not divest the Commissioner of the responsibility concerning the exercise of the power or performance of the delegated duty; and
- (d) is subject to the limitations, conditions and directions that the policy on delegations of authority imposes.”.

Amendment of section 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 5
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 respon- 10
sible 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— 15

- (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. 20
- (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 25

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, 30
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 35
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 40
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— 45

- (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] 50
 - (b) ensure that no more than one member of the panel is an acting
member appointed in terms of section 23(2)(b); and

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

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:

5

“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)~~—

 - (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 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:

20

“(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.”;

25
 - (d) by the insertion after subsection (2) of the following subsections:

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“(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.”;

35
 - (e) by the insertion in subsection (3) after paragraph (c) of the following paragraph:

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“(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**.”;
 - (f) by the insertion after subsection (3) of the following subsection:

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“(3A) For purposes of this Chapter—

 - (a) the Competition Commission may, within 20 business days of receipt of information claimed as confidential in terms of section 44(1), determine whether or 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;
 - (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;
 - (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*.”;

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- (g) by the substitution for subsection (4) of the following subsection:
 “(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. 5
 (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
 (h) by the substitution for subsection (6) of the following subsection:
 “(6) [The] Subject to subsections (4) and (5), the Competition 10
 Commission must complete a market inquiry by publishing a report contemplated in [section 43C] sections 43D and 43E, within the time set out in the terms of reference [contemplated] referred to in subsection (2).”.

Repeal of section 43C of Act 89 of 1998 15

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

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 20
 decide—
 (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. 25
 (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 30
 on competition, it must determine—
 (a) the action that must be taken in terms of section 43D;
 (b) whether it must make recommendations to any Minister, *regulatory authority* or affected *firm* to take action to remedy, mitigate or prevent the adverse effect on competition; 35
 (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 40
 Commission must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable.

Duty to remedy adverse effects on competition

- 43D.** (1) Subject to the provisions of any law, the Competition 45
 Commission may, in relation to each adverse effect on competition, take action to remedy, mitigate or prevent the adverse effect on competition.
 (2) The action taken in terms of subsection (1) may include a recommendation by the Competition Commission to the Competition Tribunal in terms of section 60(2)(c), and the Competition Tribunal may make an appropriate order in relation thereto.
 (3) The decision of the Competition Commission in terms of subsection 50
 (1) must be consistent with the decisions of its report unless there has been a material change in circumstances since the preparation of the report or the Competition Commission has a justifiable reason for deciding differently.

- (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 40

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*. 50
- (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). 55

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

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

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).”.

Insertion of section 49E in Act 89 of 1998

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

“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.
- (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

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

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: 5
 - “make an appropriate order in relation to a *prohibited practice* or an appeal referred to in section 43F, including—”; and
 - (b) by the substitution in subsection (1)(c) for the words preceding subparagraph (i) of the following words: 10
 - “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

33. Section 59 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph: 15
 - “(a) for a *prohibited practice* in terms of section **[4(1)(b), 5(2) or 8(a), (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: 20
 - “(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*.”; 25
 - (d) by the substitution for subsection (3) of the following subsection:
 - “(3) When determining an appropriate penalty, the Competition Tribunal must consider the following factors: 30
 - (a) the nature, duration, gravity and extent of the contravention;
 - (b) any loss or damage suffered as a result of the contravention;
 - (c) the behaviour of the *respondent*;
 - (d) the market circumstances in which the contravention took place, 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; 35
 - (e) the level of profit derived from the contravention;
 - (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 40
 - (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 45
 - (e) by the insertion after subsection (3) of the following subsection:
 - “(3A) In determining the extent of the administrative penalty to be imposed, the Competition Tribunal may— 50
 - (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
 - (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.”. 55

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

34. Section 60 of the principal Act is hereby amended—
- (a) by the substitution in subsection (2) for paragraph (b) of the following paragraph: 5
- “(b) the *prohibited practice*—
- (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**”; 10
- (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.”; 15
- (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 20
- (d) by the substitution for subsection (4) of the following subsection: 20
- “(4) An order made in terms of subsection (1) or (2) may set a time for compliance, and any other terms that the Competition Tribunal considers appropriate, having regard to the commercial interests of the party concerned and the purposes of *this Act*.”.

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

35. Section 62 of the principal Act is hereby amended—
- (a) by the insertion after subsection (2) of the following subsection: 30
- “(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
- (b) by the substitution for subsection (4) of the following subsection: 35
- “(4) An appeal from a decision of the Competition Appeal Court in respect of a matter within its jurisdiction in terms of subsection (2) lies to the **[Supreme Court of Appeal or] Constitutional Court**, subject to section 63 and **[their] its** respective rules.”.

Amendment of section 63 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: 40
- “(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** 45
- (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.”; and
- (b) by the substitution for subsection (4) of the following subsection: 50
- “(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). 55

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.”. 5

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: 10

“(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: 15

“(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*— 20

- (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 25
- (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” 30

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) [**—** (a)] must be published in the *Gazette*; **but** 35

(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— 40

- (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 45
 - (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.”. 50

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 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.” 5

Amendment of section 82 of Act 89 of 1998

42. Section 82 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 10

“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: 15

“(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.” 20

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— 25

- (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”; 30
- (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”; 35
- (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: 40
 - “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”;
- (h) by the insertion after item 49D of the following item: 45
 - “49E. Leniency”; and
- (i) 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*.