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  - (bb) any action in response to the obsolescence of goods;
  - (cc) a sale pursuant to a liquidation or sequestration procedure; or
  - (dd) a sale in good faith in discontinuance of business in the *goods or services* concerned.
- (c) the insertion of the following subsections after subsection (2) —
- “(3) When determining whether the differential treatment is likely or unlikely to have the effect of preventing or lessening competition referred to in subsection (2)(a), consideration must be given to the effect on *small businesses* and *firms* controlled or owned by historically disadvantaged persons.
- (4) The provisions of subsections (1) to (3), read with the changes required by the context, apply to a dominant *firm* as the purchaser of *goods or services*.”

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

5 The Principal Act is hereby amended by the —

- (a) substitution of subparagraph (ii) in subsection (3)(b) for the following subparagraph—
  - “(ii) promotion of the **[ability of]** effective entry into, participation in and expansion within a market by *small business*, or *firms* controlled or owned by historically disadvantaged persons **[, to become competitive]**;

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

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

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

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

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

- 7 The Principal Act is hereby amended by —

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

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

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

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

- (ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); **[or]and**
- (b) **[otherwise,]** determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).
- (b) the substitution of paragraphs (g) and (h) in subsection (2) for the following and the insertion of the following paragraphs in subsection (2) after paragraph (h) —
- “(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; **[and]**
- (h) whether the merger will result in the removal of an effective competitor[.];
- (i) the extent of shareholding by a party to the merger in another *firm* or other *firms* in related markets;
- (j) the extent of to which a party to the merger is related to another *firm* or other *firms* in related markets, including through common members or directors; and
- (k) any other mergers engaged in by a *party to the merger* in the preceding three years.”
- (c) the substitution of paragraphs (c) and (d) in subsection (3) for the following and the insertion of the following paragraph in subsection (2) after paragraph (d)—
- “(c) the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to **[become competitive]** effectively enter into, participate in and expand within the market;  
**[and]**

- (d) the ability of national industries to compete in international markets;  
and
- (e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons in the *firms* in the market.

### Insertion of section 12B in Act 89 of 1998

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

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

- (1) In this section, a “series of transactions” are two or more transactions during a three-year period that result in a merger.
- (2) This subsection applies to—
  - (a) any transaction by which a person acquires control of a *firm* in terms of section 12(2)(a) to (f); and
  - (b) any transaction which—
    - (i) enables that person to control the *firm* in terms of section 12(2)(g);
    - (ii) enables that person to do so to a greater degree; or
    - (iii) is a direct or indirect step towards enabling that person to do so.
- (3) A merger that occurs by way of a series of transactions may, if the Competition Commission considers it appropriate, be treated for the purposes of section 12A as having occurred simultaneously on the date on which the latest of them occurred.
- (4) A transaction that takes place after a series of transactions that has already resulted in a person acquiring control of a *firm* in terms of section 12(2)(a) to (f) must be disregarded for the purposes of subsection (3).”

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

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

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

(1) The Competition Commission may —

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

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

(ii) — the approval was obtained by deceit; or

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

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

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

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

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

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

- (a) \_\_\_\_\_ revoke its own decision to approve or conditionally approve a merger, and section 15, read with the changes required by the context, applies to a revocation in terms of this subsection; or
- (b) make any appropriate order regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) and (c).
- (4) The Competition Tribunal must—
- (a) publish a notice of a decision made in terms of subsection (2) or (3)(a) in the *Gazette*; and
- (b) issue written reasons for any such decision.”

#### **Amendment of section 17 in Act 89 of 1998**

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

- “(1) Within 20 business days after notice of a decision by the Competition Tribunal in terms of section 16, an appeal from that decision may be made to the Competition Appeal Court, subject to its rules, by —
- (a) any party to the merger; **[or]**
- (b) the Competition Commission;
- (c) the Minister, or
- (d) a person who, in terms of section 13A (2), is required to be given notice of the merger, provided the person had been a participant in the proceedings of the Competition Tribunal.”

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

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

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

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

**Insertion of section 21A into Act 75 of 1997**

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

**“21A Impact Studies**

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

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

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

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

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

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

- (7) The Competition Tribunal must determine the objection referred to in subsection (6) and may make any appropriate order after having considered all relevant information, including—
- (a) the nature and extent of the information requested;
  - (b) the purpose and scope of the impact study;
  - (c) the relevance of the information requested to the impact study.”

### **Amendment of section 22 of Act 89 of 1998**

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

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

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

- (a) provide for the delegation to a deputy commissioner or another staff member of the Commission of —
  - (i) any of the Commissioner’s powers, functions or duties conferred or imposed upon the Commissioner under *this Act*, except those referred to in sections 24 and 25(1)(b); and
  - (ii) any of the Competition Commission’s powers, functions or duties conferred or imposed upon the Commission under *this Act*, except those referred to in section 15; and
- (b) in appropriate circumstances, include the power to sub-delegate a delegated power.

(3C) The Commissioner may —

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

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

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

### Amendment of section 25 of Act 89 of 1998

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

“(1) \_\_\_\_\_ The Commissioner may —

- (a) appoint staff, or contract with other persons, to assist the Competition Commission in carrying out its functions; and
- (b) in consultation with the *Minister* and the Minister of Finance, determine the remuneration, allowances, benefits, and other terms and conditions of **[appointment]** employment of each member of the staff.

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

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

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

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

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

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

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

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

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

17 The Principal Act is hereby amended by —

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

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

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

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

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

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

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

- (a) extending or reducing [that period] a prescribed period in terms of this Act; [or]
- (b) condoning late performance of an act that is subject to [that period] a prescribed period in terms of this Act; [.]
- (c) granting access to information contemplated in sections 44 to 45A and any conditions that should be attached to the access order; and
- (d) compelling discovery of documents.

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

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

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

In this Chapter [.]—

- (1) “[m] Market inquiry” means a formal inquiry in respect of the general state of competition in a market for particular *goods or services*, without necessarily referring to the conduct or activities of any particular named *firm*.
- (2) An adverse effect on competition is established if any feature, or combination of features, of a market for *goods or services* prevents, restricts or distorts competition in that market.
- (3) Any reference to a feature of a market for *goods or services* includes —
  - (a) the structure of that market or any aspect of that structure, including;
    - (i) the level and trends of concentration and ownership in the market;

- (ii) the barriers to entry in the market;
  - (iii) the regulation of the market, including the instruments in place to foster to transformation in the market;
  - (iv) past or current advantage arising from state support or other privileges of *firms* in the market;
- (b) the outcomes observed in the market, including—
  - (i) prices;
  - (ii) concentration;
  - (iii) customer choice;
  - (iv) quality of *goods and services*;
  - (v) innovation;
  - (vi) employment;
  - (vii) entry into the market; or
  - (viii) exit from the market;
- (c) conduct, whether in or outside the market which is the subject of the inquiry, by a *firm* or *firms* that supply or acquire *goods or services* in the market concerned;
- (d) conscious parallel or co-ordinated conduct by two or more *firms* in a concentrated market without the *firms* having an agreement between or among themselves; or
- (e) conduct relating to the market which is the subject of the inquiry of any customers of *firms* who supply or acquire good or services.

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

19 The Principal Act is hereby amended by —

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

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

- (i) if it has reason to believe that any feature or combination of features of a market for any goods or services prevents, distorts or restricts competition within that market; or
- (ii) to achieve the purposes of this Act.

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

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

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

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

“(3A) For purposes of this Chapter—

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

section 44(1), determine whether or 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 decisions in subsections (1) and (2), the Competition Commission must give the party claiming the information to be confidential, notice of its intention to make its determination and consider the representations, if any, made to it by that person.

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

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

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

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

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

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

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

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

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

- (1) In a market inquiry, the Competition Commission must decide whether any feature, or combination of features, of each relevant market for any goods or services prevents, restricts or distorts competition within that market.
- (2) In making its decision in terms of subsection (1), the Competition Commission must have regard to the impact of the adverse effect on competition on small businesses, or firms controlled or owned by historically disadvantaged persons.
- (3) If the Competition Commission decides that there is an adverse effect on competition, it must determine—

  - (a) the action that must be taken in terms of section 43D;
  - (b) whether it must make recommendations to any Minister, regulatory authority or affected firm to take action to remedy, mitigate or prevent the adverse effect on competition;
  - (c) if any action must be taken in terms of paragraph (b), the action that must be taken in respect of what must be remedied, mitigated or prevented.
- (4) In determining the matters in subsection (3), the Competition Commission must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable.”

**Insertion of section 43D in Act 89 of 1998**

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

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

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

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

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

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

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

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

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

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

- (2) Section 21 (3), read with the changes required by the context, applies to a report to the Minister in terms of subsection (1).
- (3) On the basis of information obtained during a market inquiry, the Competition Commission may—
  - (a) initiate a complaint and enter into a consent order with any respondent, in accordance with section 49D, with or without conducting any further investigation;
  - (b) initiate a complaint against any firm for further investigation, in accordance with Part C of Chapter 5;
  - (c) initiate and refer a complaint directly to the Competition Tribunal without further investigation;
  - (d) take any other action within its powers in terms of this Act recommended in the report of the market inquiry; or
  - (e) take no further action.

### Insertion of section 43F in Act 89 of 1998

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

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

- (1) Any person referred to in section 43G (1) who is aggrieved by the determination of the Competition Commission in terms of section 43D may, within the prescribed period, appeal against that determination to the Competition Tribunal in accordance with the Rules of the Competition Tribunal.
- (2) In determining an appeal in terms of subsection (1), the Competition Tribunal may—
  - (a) confirm the determination of the Competition Commission;

- (b) amend or set aside the determination, in whole or in part; or
- (c) make any determination or order that is appropriate in the circumstances.
- (3) If the Competition Tribunal sets aside the decision of the Competition Commission, in whole or in part, it may remit the matter, or part of the matter, to the Competition Commission for further inquiry in terms of this Chapter.
- (4) Any remittal to the Competition Commission in terms of subsection (3) must be completed within six months from the date of the order of the Competition Tribunal.
- (5) Any person aggrieved by a determination or order of the Competition Tribunal in terms of subsection (2) may appeal against that determination or order to the Competition Appeal Court.”

#### **Insertion of section 43G in Act 89 of 1998**

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

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

- (1) In accordance with the procedures adopted by the inquiry, the following persons may participate in a market inquiry —
- (a) the Competition Commission;
- (b) the Minister;
- (c) at the request of the Minister, any Minister responsible for the sector that includes or is materially affected by the market that is the subject of the inquiry;
- (d) firms in the market that is the subject of the inquiry;

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

(f) any other person—

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

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

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

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

#### **Amendment of section 44 in Act 89 of 1998**

25 The Principal Act is hereby amended by—

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

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

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

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

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

- (b) if it finds that the information is confidential, make any appropriate determination concerning access to that information.”
- (c) the insertion of the following subsections after subsection (3) —
- “(4) The Competition Commission may not make a determination in terms of subsection (3) before it has given the claimant the *prescribed* notice of its intention to make this determination and considered the claimant’s representations, if any.”
- (5) A person contemplated in subsection (1) who is aggrieved by the determination of the Competition Commission in terms of subsection (3) may, within the *prescribed* period of the Commission’s decision, refer the decision to the Competition Tribunal.
- (6) The Competition Tribunal may confirm or substitute the Competition Commission’s determination or substitute it with another appropriate ruling.
- (7) In respect of confidential information submitted to the Competition Tribunal, the Tribunal may —
- (a) determine whether the information is confidential information;  
and
- (b) if it finds that the information is confidential, make any appropriate determination concerning access to that information.
- (8) A person aggrieved by the ruling of the Competition Tribunal in terms of subsections (6) or (7) may, within the *prescribed* period and in accordance with the Competition Appeal Court’s rules—
- (a) refer the Tribunal’s ruling to the Competition Appeal Court, if the Tribunal grants leave to appeal; and
- (b) petition the President of the Competition Appeal Court for leave to refer the Tribunal’s ruling to the Competition Appeal Court, if the Tribunal refuses leave to appeal.

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

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

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

### **Amendment of section 45 in Act 89 of 1998**

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

#### **“45. Disclosure of information.**

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

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

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

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

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

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

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

- (a) the Competition Tribunal has determined is confidential information; or
- (b) is the subject of a claim in terms of this section.]

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

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

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

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

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

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

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

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

- “**49E. Leniency.**

- (1) The Competition Commission must develop, and publish in the *Gazette*, a policy on leniency, including the types of leniency that may be granted, criteria for granting leniency, the procedures to apply for leniency and the possible conditions that may be attached to a decision to grant leniency.
- (2) The Competition Commission may grant leniency, with or without conditions, in terms of its leniency policy.”

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

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

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

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

30 The Principal Act is hereby amended by—

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

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

- (i) interdicting any prohibited practice;
- (ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;
- (iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;
- (iv) ordering divestiture, subject to section 60;

- (v) declaring conduct of a *firm* to be a prohibited practice in terms of this Act, for purposes of section 65;
  - (vi) declaring the whole or any part of an agreement to be void;
  - (vii) ordering access to an essential facility on terms reasonably required;”
- (b) the substitution of paragraph (c) in subsection (1) for the following—
- “(c) subject to sections 13 (6), **[and]** 14 (2) and 43B (4)(b), condone, on good cause shown, any non-compliance of—
- (i) the Competition Commission or Competition Tribunal rules; or
  - (ii) a time limit set out in *this Act*.”

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

31 The Principal Act is hereby amended by —

- (a) the substitution of paragraph (a) in subsection (1) for the following —
  - “(a) for a *prohibited practice* in terms of section 4 (1), 5 (1) and (2), 8 (1) or 9 (1);”
- (b) the deletion of paragraph (b) in subsection (1)
- (c) the substitution of paragraph (d) in subsection (3) for the following —
  - “(a) the market circumstances in which the contravention took place, including whether, and to what extent, the contravention had an impact upon *small businesses* and firms owned or controlled by historically disadvantaged persons;”
- (d) the insertion after subsection (3) of the following:
  - “(3A) An administrative penalty imposed upon a *firm* that contravened *this Act* may be extended to one or more other *firms* if those *firms*

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

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

32 The Principal Act is hereby amended by the —

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

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

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

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

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

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

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

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

34 The Principal Act is hereby amended by the —

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

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

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

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

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

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

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

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

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

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

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

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

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

**Amendment of section 79 in Act 89 of 1998**

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

**“79. Guidelines**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **MEMORANDUM ON THE OBJECTS OF THE COMPETITION AMENDMENT BILL, 2017**

### **1. INTRODUCTION**

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

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

1. The main objective of these amendments is to address two persistent structural constraints on the South African economy: the high levels of economic concentration in the economy and the skewed ownership profile of the economy. This is done through:
  - 1.1. strengthening the provisions of the Competition Act relating to prohibited practices, especially abuse of dominance, price discrimination and mergers;
  - 1.2. requiring special attention to be given to the impact of anti-competitive conduct on small businesses and firms owned by historically disadvantaged persons;
  - 1.3. strengthening the provisions relating to market inquiries so that:(a) the outcomes of these inquiries result in action that promotes competition; (b) there is guidance on how to evaluate the adverse features of a market; and, (c) requiring special attention upon small businesses and firms owned by historically disadvantaged persons;
  - 1.4. providing the Executive with effective means of participating in competition related proceedings and the power to initiate market inquiries into a sector; and
  - 1.5. promoting the administrative efficacy of the Competition Commission, market inquiries and the Competition Tribunal.

### 3. SUMMARY OF THE BILL

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

##### 1. Clause 1– Amendment of Section 1

- 1.1. Clause 1 amends the definition “exclusionary act” by expanding its ambit to include not only *barriers to entry* and *expansion* within a market, but also to *participation in* a market.
- 1.2. Clause 1 also updates the definitions of *Minister* and *small business*.

#### AMENDMENTS TO CHAPTER 2 – PROHIBITED PRACTICES

##### AMENDMENT TO PART A – RESTRICTIVE PRACTICES

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

- 2.1. This amendment reflects the factual position that collusive agreements in concentrated markets may be achieved and monitored through the allocation of market shares.
- 2.2. Collusion in concentrated markets with stable, large market shares is usually easier because there are only a few firms to coordinate.
- 2.3. This amendment enhances enforcement of cartel activity in concentrated markets, which in turn, should create opportunities for entry and expansion in the market. This will benefit small businesses and firms controlled or owned by historically disadvantaged persons by presenting them with opportunities for entry into the market.

##### AMENDMENTS TO PART B – ABUSE OF DOMINANT POSITION

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

- 3.1. Section 8 prohibits abuse of dominance by a firm that is dominant in a market.<sup>1</sup> Section 8 is especially important when dealing with concentrated markets.
- 3.2. Subsection (a), now subsection (1)(a), is amended by the deletion of the words “to the detriment of consumers”. It is not only consumers that

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<sup>1</sup>Section 7 outlines when a firm is a dominant firm.

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

- 3.3. Subsection (1)(d)(v), which prohibits predatory pricing<sup>2</sup>, is amended to accommodate a more general standard (“their relevant cost benchmark”). This enables flexibility and case specific determinations of the applicable and relevant cost benchmark.
- 3.4. The subsection also includes as possible benchmarks the practice of selling goods or services below their average avoidable cost<sup>3</sup> or long run average incremental cost<sup>4</sup>. The inclusion of these standard economic benchmarks is important because the failure of a dominant firm to cover its average avoidable costs or long run average incremental cost suggests that the dominant firm is sacrificing profits in the short-term, and therefore, may be involved in exclusionary conduct.
- 3.5. Subsection (1)(d)(iv) is introduced to prevent unreasonable conditions unrelated to the object of a contract being placed on the seller.
- 3.6. Subsection (1)(d)(vii) is inserted to include the practice of engaging in a margin squeeze.<sup>5</sup>
- 3.7. Subsection (1)(d)(viii) is introduced to protect suppliers to dominant firms from being required, through the abuse of dominance, to sell their goods or services at excessively low prices. (This addresses the problem of monopsonies.)
- 3.8. Subsection (2) is inserted to place the burden on the dominant firm to show that the price is reasonable after a *prima facie* case is established.
- 3.9. The determination of excessive prices is complex and often case specific. Subsection (3) mandates the Commission to provide guidelines on how to determine excessive prices.

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

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

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

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

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

- 4.1. Section 9 deals with price discrimination by a dominant firm.
- 4.2. The deletion of subsection (1)(a) and its inclusion in subsection (2) means that the dominant firm must show that the action of price discrimination is not likely to have an effect of preventing or lessening competition.
- 4.3. Subsection (3) requires that special attention be given to small businesses and firms owned or controlled by historically disadvantaged persons.
- 4.4. The addition of subsection (4) means that the prohibition of price discrimination will also apply to a dominant firm vis-à-vis its suppliers.

#### AMENDMENTS TO PART C – EXEMPTIONS FROM APPLICATION OF THE CHAPTER

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

- 5.1. The amendment to section 10(3)(b)(ii) makes the entry, participation in and expansion of small businesses and firms owned or controlled by historically disadvantaged persons an important consideration in the process of determining exemptions. This will also address the concern that these firms frequently exit the market.
- 5.2. The amendment to section 10(3)(b)(iv) extends the set of objectives in which an exemption from the application of Chapter 2 may be granted to include the economic development of an industry designated by the Minister.

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

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

## AMENDMENTS TO CHAPTER 3 – MERGER CONTROL

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

- 7.1. The amendment adds the requirement that consideration be given to cross-shareholdings and cross-directorships by the merging parties. These are the mechanisms by which unseen, creeping concentration, and the erection and maintenance of strategic barriers to entry are possible.
- 7.2. The amendment also proposes amending section 12A (2) to require disclosure of merger activity engaged in by the merging parties in the preceding three years to identify markets in which, and firms by which, creeping concentrations are being pursued. These requirements would reveal merger activity that may have fallen below the current thresholds for scrutiny by the competition authorities.
- 7.3. The proposed amendments also seek to explicitly create public interest grounds in merger control that address ownership, control and the support of small businesses and firms owned or controlled by historically disadvantaged persons.
- 7.4. These amendments will require consideration of these structural features in every merger, and the identification of measures to ameliorate any identified and credible concerns.
- 7.5. Co-ordination among horizontal competitors may occur through a common shareholder, and that similar complex and overlapping ownership structures may increase concentration. Therefore, there is an amendment to ensure disclosure and scrutiny of these relationships during merger proceedings.

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

- 8.1. This amendment enables the Commission to consider transactions occurring within a three-year period that result in a change of control or which are steps towards a change of control, to be scrutinised in terms of section 12A as if they occurred simultaneously.
- 8.2. This ensures that the creeping acquisition of control is subject to the appropriate scrutiny and analysis by the competition authorities.

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

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

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

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

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

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

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

**AMENDMENTS TO CHAPTER 3 – COMPETITION COMMISSION, TRIBUNAL AND COURT**

**AMENDMENTS TO PART A – THE COMPETITION COMMISSION**

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

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

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

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

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

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

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

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

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

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

AMENDMENTS TO PART B – THE COMPETITION TRIBUNAL

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

Section 26 deals with the constitution of the Competition Tribunal. The amendment provides for the appointment of acting Tribunal members. This is necessary in the light of the Tribunal's workload and the fact that permanent seats on the Tribunal are sometimes vacant.

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

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

AMENDMENTS TO CHAPTER 4A – MARKET INQUIRIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### AMENDMENTS TO CHAPTER 5 – INVESTIGATION AND ADJUDICATION PROCESS

#### AMENDMENTS TO PART A – CONFIDENTIAL INFORMATION

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

- 19.1. These clauses amend the sections relating to information that is claimed to be confidential and access to information that is confidential. Often disputes relating to the disclosure of information are time consuming and delay the speedy determination of the main matter. The amendments streamline the determination of these issues.
- 19.2. The new section 45 (3) provides the Minister with the right of access to confidential information and makes this right itself subject to honouring the confidentiality provisions of the Act. This gives effect to the Minister's right to intervene and make representations in the public interest. The same applies to other Ministers or regulatory authorities who are involved in the proceedings, although the Tribunal may override this right.

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

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

AMENDMENT TO PART C – COMPLAINT PROCEDURES

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

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

AMENDMENTS TO PART D – TRIBUNAL HEARINGS AND ORDERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### AMENDMENTS TO CHAPTER 6 – ENFORCEMENT

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

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

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

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.

#### AMENDMENT TO CHAPTER 7 – OFFENCES

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

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

#### AMENDMENTS TO CHAPTER 8 – GENERAL PROVISIONS

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

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

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

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

## **4. OTHER DEPARTMENTS AND BODIES CONSULTED**

- 4.1 A Panel of legal and economic experts was constituted, which included senior members of both the Competition Commission and Competition Tribunal. In addition, separate consultations have been held with the two institutions.
- 4.2 The Economic Sectors and Employment Cluster was consulted and proposed certain changes to the Bill that have been effected.
- 4.3 Engagements with members of the legal profession have been held to set out government's approach to competition matters, including on the public interest provisions of the Competition Act and to ascertain various approaches that are favoured on competition matters. Consultations have also taken place on the issue of regulation of economic concentration matters in law.

## **5. COMMUNICATIONS IMPLICATIONS**

- 5.1 The release of the Bill for public comment can be expected to result in significant public debate on economic concentration.
- 5.2 It is intended that, once the Bill is approved for public release by Cabinet, an extensive communication exercise would be conducted, led by the Minister and the expert panel.

## **6. FINANCIAL IMPLICATIONS**

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

## 7. PARLIAMENTARY PROCEDURE

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

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