

REPUBLIC OF SOUTH AFRICA

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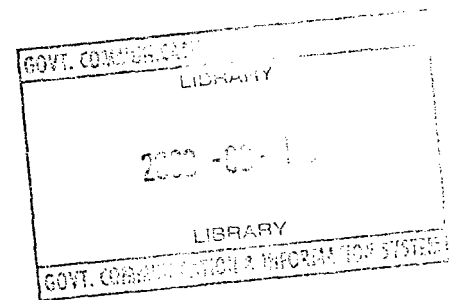
# COMPETITION SECOND AMENDMENT BILL

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(As amended by *the Portfolio Committee on Trade and Industry (National Assembly)*)  
(The *English* text is the *official text* of the *Bill*)

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(MINISTER OF TRADE AND INDUSTRY)



[B 41 B—2000]

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**GENERAL EXPLANATORY NOTE:**

- [                    ]    Words in bold type in square brackets indicate omissions from existing enactments.
- \_\_\_\_\_            Words underlined with a solid line indicate insertions in existing enactments.
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**BILL**

To amend the Competition Act, 1998, so as to define certain expressions, to amend certain definitions and to delete a definition; to further regulate the prohibition of restrictive horizontal practices; to allow for more frequent determination of the thresholds for the application of the said Act; to further regulate certain exemptions; to make fresh provision for merger control; to further regulate the functions of the Competition Tribunal; to provide expressly that the Commissioner is the accounting authority of the Competition Commission for purposes of the Public Finance Management Act, 1999; to further regulate investigation and adjudication procedures and enforcement of decisions, judgments and orders of the Competition Commission, Competition Tribunal and Competition Appeal Court; to regulate the relationship between the Competition Commission and other agencies and to provide for concurrent jurisdiction; and to effect certain consequential amendments; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 1 of Act 89 of 1998**

1. Section 1 of the Competition Act, 1998 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion in subsection (1) before the definition of “agreement” of the following definition:

“ **‘acquiring firm’** means a *firm*—

(a) that, as a result of a transaction in any circumstances set out in section 12, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another firm;

(b) that has direct or indirect control over the whole or part of the business of a *firm* contemplated in paragraph (a); or

(c) the whole or part of whose business is directly or indirectly controlled by a *firm* contemplated in paragraph (a) or (b);”;

(b) by the substitution in subsection (1) for the definition of “agreement” of the following definition:

“ **‘agreement’**, when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable;”;

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- (c) by the insertion in subsection (1) after the definition of “civil court” of the following definition:  
 “**‘complainant’** means a person who has submitted a complaint in terms of section 49 B(2)(b);”;
- (d) by the deletion in subsection (1) of the definition of “interest”; 5
- (e) by the insertion in subsection (1) after the definition of “market power” of the following definition:  
 “**‘members’ interest’** has the meaning set out in the Close Corporations Act, 1984 (Act No. 69 of 1984);”;
- (f) by the insertion in subsection (1) after the definition of “organ of state” of the following definition:  
 “**‘party to a merger’** means an acquiring *firm* or a *target firm*;”;
- (g) by the substitution in subsection (1) for the definition of “prescribed” of the following definition:  
 “**‘prescribed’** means prescribed [from time to time] by regulation [in terms of section 78];”;
- (h) by the insertion in subsection (1) after the definition of “prescribed” of the following definition:  
 “**‘primary acquiring firm’** means any *firm* contemplated in paragraph (a) of the definition of ‘acquiring firm’; 20  
**‘primary target firm’** means any *firm* contemplated in paragraph (a), (b) or (c) of the definition of ‘target firm’;”;
- (i) by the insertion in subsection (1) after the definition of “public regulation” of the following definition:  
 “**‘registered trade union’** means a trade union registered in terms of section 96 of the Labour Relations Act, 1995 (Act No. 66 of 1995);”;
- (j) by the insertion in subsection (1) after the definition of “small business” of the following definition:  
 “**‘target firm’** means a *firm*—  
 (a) the whole or part of whose business would be directly or indirectly controlled by an acquiring *firm* as a result of a transaction in any circumstances set out in section 12; 30  
 (b) that, as a result of a transaction in any circumstances set out in section 12, would directly or indirectly transfer direct or indirect control of the whole or part of, its business to an acquiring *firm*; or 35  
 (c) the whole or part of whose business is directly or indirectly controlled, by a *firm* contemplated in paragraph (a) or (b);”;
- (k) by the insertion of the following subsection after subsection(1):  
 “(1 A) When a particular number of business days is provided for performing an act, the number of days must be calculated by— 40  
 (a) excluding the first day, any public holiday, Saturday and Sunday; and  
 (b) including the last day.”.

### Amendment of section 3 of Act 89 of 1998

#### 2. Section 3 of the principal Act is hereby amended—

- (a) by the addition in subsection (1) of the word “and” at the end of paragraph (b) 45  
 and the deletion in the said subsection of paragraphs (c) and (d); and
- (b) by the insertion after subsection (1) of the following subsection:  
 “(1 A) (a) In so far as *this Act* applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of *this Act*, *this Act* must be construed as establishing concurrent jurisdiction in respect of that conduct. 50  
 (b) The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21(1)(h) and 81(1) and (2).” 55

**Amendment of section 4 of Act 89 of 1998**

3. Section 4 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“An agreement between, or concerted practice by, *firms*, or a decision by 5  
an association of *firms*, is prohibited if it is between parties in a  
horizontal relationship and if—”;

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

“(a) **[it is between parties in a horizontal relationship and]** it has the 10  
effect of substantially preventing, or lessening, competition in a market,  
unless a party to the agreement, *concerted* practice, or decision can  
prove that any technological, efficiency or other pro-competitive gain  
resulting from it outweighs that effect; or”:

(c) by the substitution in subsection (2) for paragraph (a) of the following 15  
paragraph:

“(a) any one of those *firms* owns a **[substantial shareholding,  
interest or similar right]** significant interest in the other, or they have at  
least one director or substantial shareholder in common; and”;

(d) by the substitution in subsection (4) for the words preceding paragraph (a) of 20  
the following words:

“For **[the]** purposes of **[subsection subsections (2) and (3). ‘director’  
means—**”.

**Substitution of section 6 of Act 89 of 1998**

4. The following section is hereby substituted for section 6 of the principal Act: 25

**“Restrictive application of Part**

6. ( 1 ) The Minister, in consultation with the Competition Commission,  
must determine—

(a) a threshold of annual turnover, or assets, in the Republic, either in  
general or in relation to specific industries, below which this Part does 30  
not apply to a *firm*; and

(b) a method for the calculation of annual turnover or assets to be applied  
in relation to that threshold.

(2) The Minister may make a new determination in terms of subsection  
(1) in consultation with the Competition Commission. 35

(3) Before making a determination contemplated in this section, the  
Minister, in consultation with the Competition Commission, must publish  
in the *Gazette* a notice—

(a) setting out the proposed threshold and method of calculation for  
purposes of this section; and 40

(b) inviting written submissions on that proposal.

(4) Within six months after publishing a notice in terms of subsection (3).  
the Minister, in consultation with the Competition Commission, must  
publish in the *Gazette* a notice—

(a) setting out the threshold and method of calculation for purposes of this  
section; and 45

(b) the effective date of that threshold.”.

**Substitution of section 10 of Act 89 of 1998**

5. The following section is hereby substituted for section 10 of the principal Act:

**“Exemptions**

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10. ( 1 ) A *firm* may apply [o the Competition Commission to exempt [an  
agreement, **or practice, or category** of **either** agreements, **or practices]**  
from the application of this Chapter—

- (a) an agreement or practice, if that agreement or practice meets the requirements of subsection (3): or
- (b) a category of agreements or practices, if that category of agreements or practices meets the requirements of subsection (3).
- (2) Upon receiving an application in terms of subsection (1), the Competition Commission **[may]** must—
- (7) **[advise the applicant in writing that the agreement, or practice, or category of either agreements, or practices, does not constitute a prohibited practice in terms of this Chapter]** grant a conditional or unconditional exemption for a specified term, if the agreement or practice concerned, or category of agreements or practices concerned, meets the requirements of subsection (3); or
- (b) **[grant a conditional or unconditional exemption for a specified term]** refuse to grant an exemption, if—
- (i) the agreement or practice concerned, or category of [either] agreements or practices concerned, does not meet the requirements of subsection (3); or
- (ii) the agreement or practice, or category of agreements or practices, does not constitute a prohibited practice in terms of this Chapter.
- [(c) refuse to grant an exemption]**
- (3) The Competition Commission may grant an exemption in terms of subsection [(2)(b)] (2)(a) only if—
- (a) any restriction imposed on the *firms* concerned by the agreement or practice concerned, or category of agreements or practices concerned, is required to attain an objective mentioned in paragraph (b); and
- (b) the agreement or practice concerned, or category of [either] agreements or practices concerned, contributes to any of the following objectives:
- (i) maintenance or promotion of exports;
- (ii) promotion of the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to become competitive;
- (iii) change in productive capacity necessary to stop decline in an industry: or
- (iv) the economic stability of any industry designated by the Minister, after consulting the Minister responsible for that industry.
- (4) **[In addition to the provisions of subsections (2) and (3)]** A firm may apply to the Competition Commission [may exempt] to exempt from the application of this Chapter an agreement or practice, or category of [either] agreements or practices, that relates to the exercise of intellectual property rights, including a right acquired or protected in terms of the Performers' Protection Act, 1967 (Act No. 11 of 1967), the Plant Breeders' Rights Act, 1976 (Act No. 15 of 1976), the Patents Act, 1978 (Act No. 57 of 1978), the Copyright Act, 1978 (Act No. 98 of 1978), the Trade Marks Act, 1993 (Act No. 194 of 1993), and the Designs Act, 1993 (Act No. 195 of 1993).
- (4A) Upon receiving an application in terms of subsection (4), the Competition Commission may grant an exemption for a specified term.
- (5) The Competition Commission may revoke **[its written advice given]** in terms of subsection (2)(a) **or** an exemption granted in terms of subsection [(2)(7)] (2)(a) or subsection (4A) if—
- (a) **[the advice was given, or]** the exemption was granted on the basis of false or incorrect information;
- (b) a condition for the exemption is not fulfilled; or
- (c) the reason for granting the exemption no longer exists.
- (6) Before granting an exemption in terms of subsection (2) or [(4)] (4A), or revoking an exemption in terms of subsection (5), the Competition Commission **[must]**—
- (a) must give notice in the *Gazette* of the application for an exemption, or of its intention to revoke that exemption; [and]
- (b) must allow interested parties [30] 20 business days from the date of that notice to make written representations as to why the exemption should not be granted or revoked; and

(c) may conduct an investigation into the agreement or practice concerned, or category of agreements or practices conceded.

(7) The Competition Commission, [MUST] by notice in the Gazette, must give notice of any exemption granted, refused or revoked in terms of this section.

(8) The *firm* concerned, or any other person with a substantial [material] financial interest affected by a decision of the Competition Commission in terms of subsection [(2)(b) or (c), or subsections (4)1 (2), (4A) or (5)], may appeal that decision to the Competition Tribunal, in the prescribed manner.

(9) At any time after refusing to grant an exemption in terms of subsection (2)(b)(ii), the Competition Commission—

(a) may withdraw its notice of refusal to grant the exemption, in the prescribed manner; and

(b) if it does withdraw its notice of refusal, must reconsider the application for exemption.”.

Substitution of Chapter 3 of Act 89 of 1998

6. The following Chapter is hereby substituted for Chapter 3 of the principal Act:

### “CHAPTER 3

#### MERGER CONTROL

##### Thresholds and categories of mergers

11. (1) The Minister, in consultation with the Competition Commission, must determine—

(a) a lower and a higher threshold of combined annual turnover or assets, or a lower and a higher threshold of combinations of turnover and assets, in the Republic, in general or in relation to specific industries, for purposes of determining categories of mergers contemplated in subsection (5); and

(b) a method for the calculation of annual turnover or assets to be applied in relation to each of those thresholds.

(2) The Minister may make a new determination in terms of subsection (1) in consultation with the Competition Commission.

(3) Before making a determination contemplated in this section, the Minister, in consultation with the Competition Commission, must publish in the *Gazette* a notice—

(a) setting out the proposed threshold and method of calculation for purposes of this section; and

(b) inviting written submissions on that proposal.

(4) Within six months after publishing a notice in terms of subsection (3), the Minister, in consultation with the Competition Commission, must publish in the *Gazette* a notice—

(a) setting out the new threshold and method of calculation for purposes of this section; and

(b) the effective date of that threshold.

(5) For purposes of this Chapter—

(a) ‘**a small merger**’ means a merger or proposed merger with a value at or below the lower threshold established in terms of subsection (1)(a);

(b) ‘**an intermediate merger**’ means a merger or proposed merger with a value between the lower and higher thresholds established in terms of subsection (1)(a); and

(c) ‘**a large merger**’ means a merger or proposed merger with a value at or above the higher threshold established in terms of subsection (1)(a).

##### Merger defined

12. (1)(a) For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.

- (b) A merger contemplated in paragraph (a) may be achieved in any manner, including through—
- (i) purchase or lease of the shares, an interest or assets of the other *firm* in question: or
  - (ii) amalgamation or other combination with the other *firm* in question. 5
- (2) A person controls a firm if that person—
- (a) beneficially owns more than one half of the issued share capital of the *firm*;
  - (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the *firm*, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person; 10
  - (c) is able to appoint or to veto the appointment of a majority of the directors of the *firm*;
  - (d) is a holding company, and the *firm* is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973); 15
  - (e) in the case of a *firm* that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust; 20
  - (f) in the case of a close corporation, owns the majority of members' *interest* or controls directly or has the right to control the majority of members' votes in the close corporation; or
  - (g) has the ability to materially influence the policy of the *firm* in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f). 25

### Consideration of mergers

- 12A. (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— 30
- (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 35
    - (ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or 40
  - (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). 45
- (2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the *firms* in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including— 50
- (a,) the actual and potential level of import competition in the market;
  - (b) the ease of entry into the market, including tariff and regulatory barriers;

- (c) the level and trends of concentration, and history of collusion, in the market;
- (d) the degree of countervailing power in the market;
- (e) the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (f) the nature and extent of vertical integration in the market;
- (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.

(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on—

- (a) a particular industrial sector or region;
- (b) employment;
- (c) the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to become competitive; and
- (d) the ability of national industries to compete in international markets.

### Small merger notification and implementation

#### 13. (1) A party to a small merger—

- (a) is not required to notify the Competition Commission of that merger unless the Commission requires it to do so in terms of subsection (3); and
- (b) may implement that merger without approval, unless required to notify the Competition Commission in terms of subsection (3).

(2) A party to a small merger may voluntarily notify the Competition Commission of that merger at any time.

(3) Within six months after a small merger is implemented, the Competition Commission may require the parties to that merger to notify the Commission of that merger in the prescribed manner and form if, in the opinion of the Commission, having regard to the provisions of section 12A, the merger—

- (a) may substantially prevent or lessen competition; or
- (b) cannot be justified on public interest grounds.

(4) A party to a merger contemplated in subsection (3) may take no further steps to implement that merger until the merger has been approved or conditionally approved.

(5) Within 20 business days after all parties to a small merger have fulfilled all their notification requirements in the prescribed manner and form, the Competition Commission—

- (a) may extend the period in which it has to consider the proposed merger by a single period not exceeding 40 business days and, in that case, must issue an extension certificate to any party who notified it of the merger; or
- (b) after having considered the merger in terms of section 12A, must issue a certificate in the prescribed form—
  - (i) approving the merger;
  - (ii) approving the merger subject to any conditions;
  - (iii) prohibiting implementation of the merger, if it has not been implemented; or
  - (iv) declaring the merger to be prohibited.

(6) If, upon the expiry of the 20 business day period provided for in subsection (5), the Competition Commission has not issued any of the certificates referred to in that subsection or, upon the expiry of an extension period contemplated in subsection (5)(a), the Commission has not issued a certificate referred to in subsection (5)(b), the merger must be regarded as having been approved, subject to section 15.



- (7) The Competition Commission must—
- (a) publish a notice of the decision in the *Gazette*; and
  - (b) issue written reasons for the decision if—
    - (i) it prohibits or conditionally approves the merger; or
    - (ii) requested to do so by a party to the merger.

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### Notification and implementation of other mergers

**13A. (1)** A party to an intermediate or a large merger must notify the Competition Commission of that merger, in the *prescribed* manner and form.

(2) In the case of an intermediate or a large merger, the *primary acquiring firm* and the *primary target firm* must each provide a copy of the notice contemplated in subsection (1) to—

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- (a) any registered *trade union* that represents a substantial number of its employees; or
- (b) the employees concerned or representatives of the employees concerned, if there are no such registered *trade unions*.

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(3) The parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17.

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### Merger investigations

**13B. (1)** The Competition Commission may direct an inspector to investigate any merger, and may designate one or more persons to assist the inspector.

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(2) The Competition Commission may require any *party to a merger* to provide additional information in respect of the merger.

(3) Any person, whether or not a party to or a participant in merger proceedings, may voluntarily file any document, affidavit, statement or other relevant information in respect of that merger.

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### Competition Commission intermediate merger proceedings

**14. (1)** Within 20 business days after all parties to an intermediate merger have fulfilled all their notification requirements in the *prescribed* manner and form, the Competition Commission—

(a) may extend the period in which it has to consider the proposed merger by a single period not exceeding 40 business days and, in that case, must issue an extension certificate to any party who notified it of the merger; or

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(b) after having considered the merger in terms of section 12A, must issue a certificate in the prescribed form—

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- (i) approving the merger;
- (ii) approving the merger subject to any conditions; or
- (iii) prohibiting implementation of the merger.

(2) If, upon the expiry of the 20 business day period provided for in subsection (1), the Competition Commission has not issued any of the certificates referred to in that subsection or, upon the expiry of an extension period contemplated in subsection (1)(u), the Commission has not issued a certificate referred to in subsection (1)(b), the merger must be regarded as having been approved, subject to section 15.

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(3) The Competition Commission must—

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- (a) publish a notice of the decision in the *Gazette*; and
- (b) issue written reasons for the decision if—
  - (i) it prohibits or conditionally approves the merger; or
  - (ii) requested to do so by a party to the merger.

### Competition Commission large merger proceedings

**14A. (1)** After receiving notice of a large merger, the Competition Commission—

- (a) must refer the notice to the Competition Tribunal and to the *Minister*; and
- (b) within 40 business days after all parties to a large merger have fulfilled their prescribed notification requirements, must forward to the Competition Tribunal and the Minister a written recommendation, with reasons, whether or not implementation of the merger should be—
  - (i) approved;
  - (ii) approved subject to any conditions; or
  - (iii) prohibited.

(2) The Competition Tribunal may extend the period for making a recommendation in respect of a particular merger upon an application by the Competition Commission, but the Tribunal may not grant an extension of more than 15 business days at a time.

(3) If, upon the expiry of the period contemplated in subsection (1), or an extended period contemplated in subsection (2), the Competition Commission has neither applied for an extension or further extension, as the case may be, nor forwarded a recommendation to the Competition Tribunal, any party to the merger may apply to the Tribunal to begin the consideration of the merger without a recommendation from the Commission.

(4) Upon receipt of an application by a party contemplated in subsection (3), the Tribunal must set a date for proceedings in respect of that merger.

### Revocation of merger approval

**15. (1)** The Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger if—

- (a) the decision was based on incorrect information for which a party to the merger is responsible;
- (b) the approval was obtained by deceit; or
- (c) a *firm* concerned has breached an obligation attached to the decision.

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

### Competition Tribunal merger proceedings

**16. (1)** If the Competition Commission approves—

- (a) a small or intermediate merger subject to any conditions, or prohibits such merger, any party to the merger, by written notice and in the prescribed form, may request the Competition Tribunal to consider the conditions or prohibited merger; or
- (b) an intermediate merger, or approves such merger subject to any conditions, a person who in terms of section 13A(2) is required to be given notice of the merger, by written notice and in the prescribed form, may request the Competition Tribunal to consider the approval or conditional approval, provided the person had been a participant in the proceedings of the Competition Commission.

(2) Upon receiving a referral of a large merger and recommendation from the Competition Commission in terms of section 14A(1), or a request in terms of subsection (1), the Competition Tribunal must consider the merger in terms of section 12A and the recommendation or request, as the case may be, and within the prescribed time—

- (a) approve the merger;
- (b) approve the merger subject to any conditions; or
- (c) prohibit implementation of the merger.

(3) Upon application by the Competition Commission, the Competition Tribunal may revoke its own decision to approve or conditionally approve a merger, and section 15, read with the changes required by the context, applies to 2 revocation in terms of this subsection.

- (4) The Competition Tribunal must—
- (a) publish a notice of a decision made in terms of subsection (2) or (3) in the *Gazette*; and
- (b) issue written reasons for any such decision.

#### Competition Appeal Court merger proceedings

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

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(2) The Competition Appeal Court may—

- (a) set aside the decision of the Competition Tribunal;
- (b) amend the decision by ordering or removing restrictions, or by including or deleting conditions; or
- (c) confirm the decision.

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(3) If the Competition Appeal Court sets aside a decision of the Competition Tribunal, the Court must—

- (a) approve the merger;
- (b) approve the merger subject to any conditions; or
- (c) prohibit implementation of the merger.

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#### Intervention in merger proceedings

**18. (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 Competition Appeal Court, in the prescribed manner.

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(2) Despite anything to the contrary in *this Act*, 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), if the—

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(a) merger constitutes—

- (i) an acquisition of shares for which permission is required in terms of section 37 of the Banks Act, 1990 (Act No. 94 of 1990); or
- (ii) a transaction for which consent is required in terms of section 54 of the Banks Act, 1990 (Act No. 94 of 1990); and

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(b) Minister of Finance has, in the prescribed manner, issued a notice to the Commissioner specifying the names of the parties to the merger and certifying that—

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(i) the merger is a merger contemplated in paragraph (a)(i) or (ii); and

(ii) it is in the public interest that the merger is subject to the jurisdiction of the Banks Act, 1990 (Act No. 94 of 1990), only.

(3) Sections 13(6) and 14(2) do not apply to a merger in respect of which the Minister of Finance has issued a certificate contemplated in subsection (2).”.

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#### Amendment of section 19 of Act 89 of 1998

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

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

#### Amendment of section 21 of Act 89 of 1998

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

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(a) by the substitution in subsection (3) for paragraphs (a) and (b) of the following paragraphs, respectively:

“(u) within [14] 10 business days after receiving that report from the Competition Commission **[if Parliament is in session at that time]; or**

**(b) if Parliament is not [in session] then sitting, within [14] 10 business days after the commencement of the next [session] sitting.”;** and 5

(b) by the substitution in subsection (4) for the words preceding paragraph (a) of the following words:

“The Minister, **[may]** in consultation with the **[Competition Commission] Commissioner** and by notice in the Gazette, may prescribe regulations for matters relating to the functions of the Commission, including—”. 10

Amendment of section 24 of Act 89 of 1998

9. Section 24 of the principal Act is hereby amended by the substitution in subsection (4) for the words preceding paragraph (a) of the following words:

“When an inspector performs any function in terms of **[Chapter 5] this Act**, the inspector must—”. 15

Amendment of section 26 of Act 89 of 1998

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

“(2) The Competition Tribunal consists of a Chairperson and not less than three, but not more than ten, 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 [which must be published by the *Minister* in the *Gazette*].” 20 25

**Substitution of section 27 of Act 89 of 1998**

**11. The following section is hereby substituted for section 27 of the principal Act:**

**“Functions of Competition Tribunal**

**27. (1) [Upon a matter being referred to it in terms of *this Act*, the] The Competition Tribunal may—** 30

(a) **[grant an exemption from a relevant provision of *this Act*] adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and, if so, to impose any remedy provided for in this Act;**

(b) **[authorise a merger, with or without conditions, or prohibit a merger] adjudicate on any other matter that may, in terms of *this Act*, be considered by it, and make any order provided for in this Act;** 35

(c) **[adjudicate in relation to any conduct prohibited in terms of Chapter 2 or 3, by determining whether prohibited conduct has occurred, and if so, impose a remedy provided for in Chapter 6; or] hear appeals from, or review any decision of, the Competition Commission that may in terms of *this Act* be referred to it; and** 40

(d) **[grant an order for costs in terms of section 57] make any ruling or order necessary or incidental to the performance of its functions in terms of *this Act*.** 45

(2) Section 21(4), read with the changes required by the context, applies to the Competition Tribunal, and the reference in that section to the Commissioner must be construed as a reference to the Chairperson of the Tribunal.”

Amendment of section 31 of Act 89 of 1998

12. Section 31 of the principal Act is hereby amended by the substitution for subsection (5) of the following subsections:

- “(5) If the Competition Tribunal may extend or reduce a prescribed period in terms of this Act, the Chairperson of the Tribunal or another member of the Tribunal assigned by the Chairperson, sitting alone, may make an order---
  - (a) extending or reducing that period; or
  - (b) condoning late performance of an act that is subject to that period.
- (6) A decision of the Chairperson or other person contemplated in subsection (5), or of a majority of the members of a panel in any other matter, is the decision of the Tribunal.”.

Amendment of section 40 of Act 89 of 1998

13. Section 40 of the principal Act is hereby amended---

- (a) by the substitution for subsection (7) of the following subsection:
  - “(7) The Commissioner is the accounting authority of the Competition Commission for purposes of the Public Finance Management Act, 1999 (Act No. 1 of 1999).”; and
- (b) by the deletion of subsection (8).

Amendment of section 41 of Act 89 of 1998

14. Section 41 of the principal Act is hereby amended by the substitution in subsection (2) for paragraphs (a) and (b) of the following paragraphs, respectively:

- “(a) within [14] 10 business days after receiving that report from the Competition Commission [if Parliament is in session at that time]; or
- (b) if Parliament is not [in session] then sitting, within [14] 10 business days after the commencement of the next [session] sitting.”.

Substitution of Chapters 5 and 6 of Act 89 of 1998

15. The following Chapters are hereby substituted for Chapters 5 and 6 of the principal Act, respectively:

“CHAPTER 5

INVESTIGATION AND ADJUDICATION PROCEDURES 30

PART A

Confidential information

Right of informants to claim confidentiality

- 44. (1)** (a) A person, when submitting information to the Competition Commission or the Competition Tribunal, may identify information that the person claims to be confidential information. 35
- (b) Any claim contemplated in paragraph (a) must be supported by a written statement in the prescribed form, explaining why the information is confidential.
- (2) The Competition Commission is bound by a claim contemplated in subsection (1), but may at any time during its proceedings refer the claim to the Competition Tribunal to determine whether or not the information is confidential information. 40
- (3) The Competition Tribunal may---
  - (a) determine whether or not the information is confidential; and 45
  - (b) if it finds that the information is confidential, make any appropriate order concerning access to that information.

**Disclosure of information**

45. (1) A person who seeks access to information that is subject to a claim 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.

(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.

(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.

**Restricted use of information**

45A. (1) (a) When making any decision in terms of this Act, the Competition Commission, subject to paragraph (b), may take *confidential* information into account in making its decision.

(b) If the Commission’s reasons for the decision would reveal any *confidential* information, the Commission must provide a copy of the proposed reasons to the party concerned at least 10 business days before publishing those reasons.

(2) A party may apply to the Competition Tribunal within the period contemplated in subsection (1)(b) after receiving a copy of the proposed reasons, subject to its rules, for an appropriate order to protect the confidentiality of the relevant information.

(3) A party concerned may appeal against a decision of the Competition Tribunal in terms of subsection (2) to the Competition Appeal Court, subject to its rules.

(4) If a party applies to the Competition Tribunal in terms of subsection (2), the Competition Commission may not publish the proposed reasons until the Tribunal or the Competition Appeal Court, as the case may be, has made an order regarding the matter.

PART B

Powers of search and summons

Authority to enter and search under warrant

46. (1) A judge of the High Court, a regional magistrate or “a magistrate may issue a warrant to enter and search any premises that are within the jurisdiction of that judge or magistrate, if, from information on oath or affirmation, there are reasonable grounds to believe that—

- (a) a *prohibited practice* has taken place, is taking place or is likely to take place on or in those premises; or
- (b) anything connected with an investigation [into that prohibited practice] in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises.

(2) A warrant to enter and search may be issued at any time and must specifically—

- (a) identify the *premises* that may be entered and searched; and
- (b) authorise an inspector or a police officer to enter and search the premises and to do anything listed in section 48.

(3) A warrant to enter and search is valid until one of the following events occurs:

- (a) The warrant is executed;
- (b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;
- (c) the purpose for issuing it has lapsed: or
- (d) the expiry of one month after the date it was issued.

(4) A warrant to enter and search may be executed only during the day, unless the judge, regional magistrate or magistrate who issued it authorises that it may be executed at night at a time that is reasonable in the circumstances.

(5) A person authorised by warrant issued in terms of subsection (2) may enter and search premises named in that warrant.

(6) Immediately before commencing with the execution of a warrant, a person executing that warrant must—

- (a) if the owner, or person in control, of the premises to be searched is present—
  - (i) provide identification to that person and explain to that person the authority by which the warrant is being executed; and
  - (ii) hand a copy of the warrant to that person or to the person named in it; or
- (b) if none of those persons is present, affix a copy of the warrant to the premises in a prominent and visible place.

#### **Authority to enter and search without warrant**

47. (1) An inspector who is not authorised by a warrant in terms of section 46(2) may enter and search premises other than a private dwelling.

(2) Immediately before entering and searching in terms of this section, the inspector conducting the search must provide identification to the owner or person in control of the premises and explain to that person the authority by which the search is being conducted, and must **[either]**—

- (a) **get permission from that person to enter and search the** premises; or
- (b) believe on reasonable grounds that a warrant would be issued under section 46 if applied for, and that the delay that would ensue by first obtaining a warrant would defeat the objector purpose of the entry and search.

(3) An entry and search without a warrant may be carried out only during the day, unless doing it at night is justifiable and necessary in the circumstances.

#### **Powers to enter and search**

**48. (1) A person who is authorised under section 46 or 47 to enter and search premises may—**

- (a) enter upon or into those premises;
- (b) search those premises;
- (c) search any person on those premises if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation;
- (d) examine any article or document that is on or in those premises that has a bearing on the investigation;
- (e) request information about any article or document from the owner of, or person in control of, the premises or from any person who has

- control of the article or document, or from any other person who may have the information;
  - (f) take extracts from, or make copies of, any book or document that is on or in the premises that has a bearing on the investigation;
  - (g) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to-
    - (i) search any data contained in or available to that computer system;
    - (ii) reproduce any record from that data; and
    - (iii) seize any output from that computer for examination and copying; and
  - (h) attach and, if necessary, remove from the premises for examination and safekeeping, anything that has a bearing on the investigation.
- (2) Section [45(5)] 49A(3) applies to an answer given or statement made to an inspector in terms of this section.
- (3) An inspector authorised to conduct an entry and search in terms of section 46 or 47 may be accompanied and assisted by a police officer.

**Conduct of entry and search**

- 49. (1)** A person who enters and searches any premises under section 48 must conduct the entry and search with strict regard for decency and order, and with regard for each person’s right to dignity, freedom, security and privacy.
- (2) During any search under section 48(1)(c), only a female inspector or police officer may search a female person, and only a male inspector or police officer may search a male person.
- (3) A person who enters and searches *premises* under section 48, must before questioning anyone—
- (a) advise that person of the right to be assisted at the time by an advocate or attorney; and
  - (b) allow that person to exercise that right.
- (4) A person who removes anything from premises being searched must—
- (a) issue a receipt for it to the owner of, or person in control of, the premises; and
  - (b) return it as soon as practicable after achieving the purpose for which it was removed.
- (5) During a search, a person may refuse to permit the inspection or removal of an article or document on the grounds that it contains privileged information.
- (6) If the owner or person in control of an article or document refuses in terms of subsection (5) to give that article or document to the person conducting the search, the person conducting the search may request the registrar or sheriff of the High Court that has jurisdiction to attach and remove the article or document for safe custody until that court determines whether or not the information is privileged.
- (7) A police officer who is authorised to enter and search premises under section 46, or who is assisting an inspector who is authorised to enter and search premises under section 46 or 47, may overcome resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window of the premises.
- (8) Before using force in terms of subsection (7), a police officer must audibly demand admission and must announce the purpose of the entry, unless it is reasonable to believe that doing so may induce someone to destroy or dispose of an article or document that is the object of the search.
- (9) The Competition Commission may compensate anyone who suffers damage because of a forced entry during a search when no one responsible for the premises was present.



## Summons

**49A. (1)** At any time during an investigation in terms of *this* Act, the Commissioner may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject— 5

(a) to appear before the Commissioner or a person authorised by the Commissioner, to be interrogated at a time and place specified in the summons; or

(b) at a time and place specified in the summons, to deliver or produce to the Commissioner, or a person authorised by the Commissioner, any book, document or other object specified in the summons. 10

(2) A person questioned by an inspector conducting an investigation, or by the Commissioner or other person in terms of subsection (1), must answer each question truthfully and to the best of that person's ability, but the person is not obliged to answer any question if the answer is self-incriminating. 15

(3) No self-incriminating answer given or statement made to a person exercising any power in terms of this section is admissible as evidence against the person who gave the answer or made the statement in criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 72 or section 73(2)(d), and then only to the extent that the answer or statement is relevant to prove the offence charged. 20

## PART C 25

### Complaint procedures

#### Initiating complaint

**49B. (1)** The Commissioner may initiate a complaint against an alleged prohibited practice.

(2) Any person may— 30

(a) submit information concerning an alleged prohibited practice to the Competition Commission, in any manner or form; or

(b) submit a complaint against an alleged prohibited practice to the Competition Commission, in the prescribed form.

(3) Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable. 35

(4) At any time during an investigation, the Commissioner may designate one or more persons to assist the inspector.

#### Interim relief 40

**49C. (1)** At any time, whether or not a hearing has commenced into an alleged prohibited practice, the complainant may apply to the Competition Tribunal for an interim order in respect of the alleged practice.

(2) The Competition Tribunal—

(a) must give the respondent a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and 45

(b) may grant an interim order if it is reasonable and just to do so, having regard to the following factors:

(i) The evidence relating to the alleged prohibited *practice*;

(ii) the need to prevent serious or irreparable damage to the applicant; and 50

(iii) the balance of convenience.

(3) In any proceedings in terms of this section, the standard of proof is the same as the standard of proof in a High Court on a common law application for an interim interdict.

(4) An interim order in terms of this section may not extend beyond the earlier of ~~the—~~

- (a) conclusion of a hearing into the alleged prohibited practice; or
- (b) **date that is six** months after the date of issue of the interim order.

(5) If an interim order has been granted, and a hearing into that matter has not been concluded within six months after the date of that order, the Competition Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months.

(6) Any party to an application may apply to the Competition Appeal Court to review a decision of the Competition Tribunal in terms of this section.

(7) The applicant may appeal to the Competition Appeal Court against a refusal by the Competition Tribunal to grant an interim order in terms of this section.

(8) The respondent may appeal to the Competition Appeal Court in terms of this section against any order of the Competition Tribunal that has a final or irreversible effect.

#### Consent orders

49D. (1) If, during, on or after the completion of the investigation of a complaint, the Competition Commission and the respondent 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).

(2) After hearing a motion for a consent order, the Competition Tribunal must—

- (a) make the order as agreed to and proposed by the Competition Commission and the *respondent*;
- (b) indicate any changes that must be made in the draft order before it will make the order; or
- (c) refuse to make the order.

(3) With the consent of a complainant, a consent order may include an award of damages to the complainant.

(4) A consent order does not preclude a complainant from applying for—

- (a) a declaration in terms of section 58(1)(a)(v) or (vi); or
- (b) an award of civil damages in terms of section 65, unless the consent order includes an award of damages to the complainant.

#### Outcome of complaint

50. (1) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.

(2) Within one year after a complaint was submitted to it, the Commissioner must—

- (a) subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established; or
- (b) in any other case, issue a notice of non-referral to the *complainant* in the prescribed form.

(3) When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2)(a), it—

- (a) may—
  - (i) refer all the particulars of the complaint as submitted by the complainant
  - (ii) refer only some of the particulars of the complaint as submitted by the complainant; or

- (iii) add particulars to the complaint as submitted by the complainant; and
- (b) must issue a notice of non-referral as contemplated in subsection (2)(b) in respect of any particular of the complaint not referred to the Competition Tribunal. 5
- (4) In a particular case—
  - (a) the Competition Commission and the complainant may agree to extend the period allowed in subsection (2); or
  - (b) on application by the Competition Commission made before the end of the period contemplated in paragraph (a), the Competition Tribunal may extend that period. 10
- (5) If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2) or the extended period contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period. 15

**Referral to Competition Tribunal**

- 51. (1) If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant [concerned] may refer the [matter] complaint directly to the Competition Tribunal, subject to its rules of procedure. 20**
- (2) A referral to the Competition Tribunal, whether by the Competition Commission in terms of section [50(a)] 50(1) or by a complainant in terms of subsection (1), must be in the prescribed form.**
- (3) The Chairperson of the Competition Tribunal must, by notice in the 25 Gazette, publish each referral made to the Tribunal.
- (4) The notice published in terms of subsection (3) must include—
  - (a) the name of the [*firm whose conduct is the subject of the referral*] respondent; and
  - (b) the nature of the conduct that is the subject of the referral. 30

**PART D**

**Tribunal hearings and orders**

**Hearings before Competition Tribunal**

- 52. (1) The Competition Tribunal must conduct a hearing, subject to its rules, into every matter referred to it in terms of [section 50(a) or section 35 51(1)] this Act. 35**
- (2) Subject to subsections (3) and (4), the Competition Tribunal—**
  - (a) must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice; and
  - (b) may conduct its hearings informally or in an inquisitorial manner. 40
- (2A) Despite subsection (2)(a), the Chairperson of the Tribunal may order that a matter be heard—
  - (a) in chambers, if no oral evidence will be heard, or that oral submissions be made at the hearing; or
  - (b) by telephone or video conference, if it is in the interests of justice and expediency to do so. 45
- (3) Despite subsection (2), the Tribunal member presiding at a hearing may exclude members of the public, or specific persons or categories of persons, from attending the proceedings—
  - (a) if evidence to be presented is *confidential* information, but only to the extent that the information cannot otherwise be protected; 50
  - (b) if the proper conduct of the hearing requires it; or
  - (c) for any other reason that would be justifiable in civil proceedings in a High Court.

(4) At the conclusion of a hearing, the Competition Tribunal must make any order permitted in terms of [Chapter 6] this Act, and must issue written reasons for its decision.

(5) The Competition Tribunal must provide the participants and other members of the public reasonable access to the record of each hearing, 5 subject to any ruling to protect confidential information made in terms of subsection (3)(a).

### Right to participate in hearing

**53. The following persons may participate in a hearing [contemplated in section 53], in person or through a representative, and may put questions to 10 witnesses and inspect any books, documents or items presented at the hearing:**

(a) If the hearing is in terms of Part C—

(i) the Commissioner, or any person appointed by the Commissioner; 15

[(b)](ii) the complainant, if—

(aa) the complainant referred the complaint to the Competition Tribunal; or

(bb) in the opinion of the presiding member of the Competition Tribunal, the complainant's interest is not adequately represented by another participant, and then only to the extent required for the complainant's interest to be adequately represented; 20

[(c)](iii) the [firm whose conduct forms the basis of the hearing] respondent; and 25

[(d)](iv) any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Competition Tribunal, that interest is adequately represented by another participant, but only to the extent required for the complainant's interest to be adequately represented; 30

(b) if the hearing is in terms of section 10 or Schedule 1—

(i) the applicant for an exemption;

(ii) the Competition Commission;

(iii) the appellant, if the appellant is not the applicant for an exemption; 35

(iv) an interested person contemplated in section 10(8) who submitted a representation to the Competition Commission, unless, in the opinion of the presiding member of the Competition Tribunal, that person's interest is adequately represented by another participant, but only to the extent required for the person's interest to be adequately represented; and 40

(v) the Minister or member of the Executive Council if consulted in terms of Schedule 1;

(c) if the hearing is in terms of Chapter 3—

(i) any party to the merger; 45

(ii) the Competition Commission;

(iii) any person who was entitled to receive a notice in terms of section 13A(2), and who indicated to the Commission an intention to participate, in the prescribed form;

(iv) the Minister, if the Minister has indicated an intention to participate; and 50

(v) any other person whom the Tribunal recognised as a participant; and

(d) if the hearing is in terms of Part A—

(i) the person who owns the information that is the subject of the hearing; 55

- (ii) any person who sought disclosure of the information that is the subject of the hearing;
- (iii) the Competition Commission; and
- (iv) any other person whom the Tribunal recognised as a participant.

**Powers of member presiding at hearing**

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54. The member of the Competition Tribunal presiding at a hearing may—

- (a) direct or summon any person to appear at any specified time and place;
- (b) question any person under oath or affirmation;
- (c) summon or order any person—
  - (i) to produce any book, document or item necessary for the purposes of the hearing; or
  - (ii) to perform any other act in relation to *this* Act; [and]
- (d) give directions prohibiting or restricting the publication of any evidence given to the Competition Tribunal;
- (e) accept oral submissions from any participant; and
- (f) accept any other information that is submitted by a participant.

**Rules of procedure**

55. (1) Subject to the Competition Tribunal’s rules of procedure, the Tribunal member presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case, and the requirements of section 52(2).

(2) The Tribunal may condone any technical irregularities arising in any of its proceedings.

- (3) The Tribunal may—
  - (a) accept as evidence any relevant oral testimony, document or other thing, whether or not—
    - (i) it is given or proven under oath or affirmation; or
    - (ii) would be admissible as evidence in court; but
  - (b) refuse to accept any oral testimony, document or other thing that is unduly repetitious.

**Witnesses**

56. (1) Every person giving evidence at a hearing of the Competition Tribunal must answer any relevant question.

(2) The law regarding a witness’ privilege in a criminal case in a court of law applies equally to a person who provides information during a hearing.

(3) The Competition Tribunal may order a person to answer any question, or to produce any article or document, even if it is self-incriminating to do so.

(4) Section [45(5)1 49A(3)] applies to evidence given by a witness in terms of this section.

**costs**

57. (1) Subject to subsection (2) and the Competition Tribunal’s rules of procedure, each party participating in a hearing must bear its own costs.

- (2) If the Competition Tribunal—
  - (a) has not made a finding against a respondent, the Tribunal member presiding at a hearing may award costs to the respondent, and against a *complainant* who referred the complaint in terms of section 51 (1 ); or
  - (b) has made a finding against a respondent, the Tribunal member presiding at a hearing may award costs against the respondent, and to a complainant who referred the complaint in terms of section 51(1).

## Orders of Competition Tribunal

**58. (1)** In addition to its other powers in terms of *this* Act, the Competition Tribunal may—

- (a) make an appropriate order in relation to a prohibited practice, 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) confirm a consent agreement in terms of section 49D as an order of the Tribunal; or
- (c) subject to sections 13(6) and 14(2), 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.

(2) At any time, the Competition Tribunal may adjourn a hearing for a reasonable period of time, if there is reason to believe that the hearing relates to a prohibited practice that might qualify for exemption in terms of section 10.

(3) Despite any other provision of *this* Act, if the Competition Tribunal adjourns a hearing in terms of subsection (2), the *respondent* may apply for an exemption during that adjournment.

**Administrative penalties**

**59. (1)** The Competition Tribunal may impose an administrative penalty only—

- (a) for a prohibited practice in terms of section 4(1)(b), 5(2) or 8(a), (b) or (d);
- (b) for a prohibited practice in terms of section 4(1)(a), 5(1), 8(c) or 9(1), if the conduct is substantially a repeat by the same *firm* of conduct previously found by the Competition Tribunal to be a prohibited practice;
- (c) for contravention of, or failure to comply with, an interim or final order of the Competition Tribunal or the Competition Appeal Court; or
- (d) if the parties to a merger have—
  - (i) failed to give notice of the merger as required by Chapter 3;
  - (ii) proceeded to implement the merger in contravention of a decision by the Competition Commission or Competition Tribunal to prohibit that merger;
  - (iii) proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Competition Commission in terms of section 13 or 14, or the Competition Tribunal in terms of section 16; or
  - (iv) proceeded to implement the merger without the approval of the Competition Commission or Competition Tribunal, as required by this Act.

(2) An administrative penalty imposed in terms of subsection(1) may not exceed 10 per cent of the *firm's* annual turnover in the Republic and its exports from the Republic during the *firm's* preceding financial year.

- (3) When determining an appropriate penalty, the Competition Tribunal must consider the following factors:
- (a) the nature, duration, gravity and extent of the contravention;
  - (b) any loss or damage suffered as a result of the contravention;
  - (c) the behaviour of the respondent;
  - (d) the market circumstances in which the contravention took place;
  - (e) the level of profit derived from the contravention;
  - (f) the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal; and
  - (g) whether the respondent has previously been found in contravention of *this Act*.
- (4) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the Constitution.

### Divestiture

60. (1) If a merger is implemented in contravention of Chapter 3, the Competition Tribunal may—
- (a) order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger; or
  - (b) declare void any provision of an agreement to which the merger was subject.
- (2) The Competition Tribunal, in addition to or in lieu of making an order under section 58, may make an order directing any *firm*, or any other person, to sell any shares, interest or assets of the *firm* if—
- (a) it has contravened section 8, and
  - (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.
- (3) An order made by the Competition Tribunal in terms of subsection (2) is of no force or effect unless confirmed by the Competition Appeal Court.
- (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.

## Part E

### Appeals and reviews to Competition Appeal Court

#### Appeals

61. (1) A person affected by a decision of the Competition Tribunal may appeal against, or apply to the Competition Appeal Court to review, that decision in accordance with the Rules of the Competition Appeal Court if, in terms of section 37, the Court has jurisdiction to consider that appeal or review that matter.
- (2) The Competition Appeal Court may make an order for the payment of costs against any party in the hearing, or against any person who represented a party in the hearing, according to the requirements of the law and fairness.

#### Appellate jurisdiction

62. (1) The Competition Tribunal and Competition Appeal Court share exclusive jurisdiction in respect of the following matters:

- (a) Interpretation and application of Chapters 2, 3 and 5, other than—  
 (i) a question or matter referred to in subsection (2); or  
 (ii) a review of a certificate issued by the Minister of Finance in terms of section 18(2); and
- (b) the functions referred to in sections 21(1), 27(1) and 37, other than a question or matter referred to in subsection (2).
- (2) In addition to any other jurisdiction granted in *this Act* to the Competition Appeal Court, the Court has jurisdiction over—  
 (a) the question whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of *this Act*;  
 (b) any constitutional matter arising in terms of this Act; and  
 (c) the question whether a matter falls within the exclusive jurisdiction granted under subsection (1).
- (3) The jurisdiction of the ‘Competition Appeal Court—  
 (a) is final over a matter within its exclusive jurisdiction in terms of subsection (1); and  
 (b) is neither exclusive nor final in respect of a matter within its jurisdiction in terms of subsection (2).
- (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 respective rules.
- (5) For greater certainty, the Competition Tribunal and the Competition Appeal Court have no jurisdiction over the assessment of the amount, and awarding, of damages arising out of a prohibited practice.

### Leave to appeal

63. (1) The right to an appeal in terms of section 62(4)—  
 (a) is subject to any law that—  
 (i) specifically limits the right of appeal set out in that section; or  
 (ii) specifically grants, limits or excludes any right of appeal;  
 (b) is not limited by monetary value of the matter in dispute; and  
 (c) exists even if the matter in dispute is incapable of being valued in money.
- (2) 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  
 (b) if the Competition Appeal Court refuses leave, with leave of the Supreme Court of Appeal or the Constitutional Court, as the case may be.
- (3) A court granting leave to appeal in terms of this section may attach any appropriate conditions, including a condition that the applicant provide security for the costs of the appeal.
- (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.
- (5) An application to the Competition Appeal Court for leave to appeal must be made in the manner and form required by the Competition Appeal Court Rules.
- (6) An application to the Constitutional Court for leave to appeal must be made in the manner and form required by its Rules.
- (7) Section 21( 1A) to (3)(e) of the Supreme Court Act, 1959 (Act No. 59 of 1959), read with the changes required by the context, applies to an application to the Supreme Court of Appeal for leave to appeal in terms of this Act.
- (8) A person applying to the Supreme Court of Appeal for leave to appeal under *this Act* must give notice of the application to the registrar of the Competition Appeal Court.



## CHAPTER 6

## ENFORCEMENT

**Status and enforcement of orders**

64. (1) Any decision, judgment or order of the Competition Commission, Competition Tribunal or Competition Appeal Court may be served, 5 executed and enforced as if it were an order of the High Court.

(2) The Competition Commission may institute proceedings in the High Court on its own behalf for recovery of an administrative penalty imposed by the Competition Tribunal.

(3) Proceedings under subsection (2) may not be initiated more than three 10 years after the imposition of the administrative penalty.

**Civil actions and jurisdiction**

65. (1) Nothing in this Act renders void a provision of an agreement that, in terms of *this* Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision 15 to be void.

(2) If, in any action in a civil *court*, a party raises an issue concerning conduct that is prohibited in terms of this *Act*, that court must not consider that issue on its merits, and—

(a) if the issue raised is one in respect of which the Competition Tribunal 20 or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

(b) otherwise, the court must refer that issue to the Tribunal to be 25 considered on its merits, if the court is satisfied that—

(i) the issue has not been raised in a frivolous or vexatious manner; and

(ii) the resolution of that issue is required to determine the final outcome of the action.

**[(3) The Competition Tribunal and the Competition Appeal Court 30 share exclusive jurisdiction in respect of the following matters:**

**(a) Interpretation and application of the provisions of Chapters 2,3, and 6, other than this section; and**

**(b) the functions referred to in sections 21(1), 27(1) and 37(1).**

**(4) The Competition Appeal Court has final jurisdiction in respect of 35 any matter referred to in subsection (3) that may be appealed to it or reviewed by it.**

**(5) For greater certainty, the Competition Tribunal and the Competition Appeal Court have no jurisdiction over the assessment of the amount, and awarding, of damages arising out of a prohibited 40 practice.]**

**(6) A person who has suffered loss or damage as a result of a prohibited practice—**

(a) may not commence an action in a *civil court* for the assessment of the amount or awarding of damage: if that person has been awarded 45 damages in a consent order confirmed in terms of section [63(1)] 49D(1); or

(b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or 50 the Judge President of the Competition Appeal Court, in the prescribed form—

(i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of *this* Act;

(ii) stating the date of the Tribunal or Competition Appeal Court finding; and

(iii) setting out the section of *this Act* in terms of which the Tribunal or the Competition Appeal Court made its finding.

(7) A certificate referred to in subsection (6)(b) is conclusive proof of its contents, and is binding on a *civil* court.

(8) An appeal or application for review against an order made by the Competition Tribunal in terms of section [60] 58 suspends any right to commence an action in a civil court with respect to the same matter.

(9) A person's right to bring a claim for damages arising out of a prohibited practice comes into existence—

(a) on the date that the Competition Tribunal made a determination in respect of a matter that affects that person; or

(b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.

(10) For the purposes of section 2A(2)(a) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), interest on a debt in relation to a claim for damages in terms of *this Act* will commence on the date of issue of the certificate referred to in subsection (6).

#### Variation of order

**66. The Competition Tribunal, or the Competition Appeal Court, acting of its own accord or on application of a person affected by a decision or order, may vary or rescind its decision or order—**

(a) erroneously sought or granted in the absence of a party affected by it;

(b) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or

(c) made or granted as a result of a mistake common to all of the parties to the proceedings.

#### Limitations of bringing action

**67. (1) A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.**

(2) A complaint may not be [initiated] referred to the Competition Tribunal against any firm that [is, or] has been a respondent in completed proceedings before the Tribunal under the same or another section of this Act relating substantially to the same conduct.

#### Standard of proof

**68. In any proceedings in terms of [Chapter 3 or this Chapter] this Act, other than proceedings in terms of section 49C or criminal proceedings, the standard of proof is on a balance of probabilities.”.**

#### Amendment of section 71 of Act 89 of 1998

**16. Section 71 of the principal Act is hereby amended by the substitution for the words preceding paragraph (a) of the following words:**

“A person commits an offence who, having been summoned in terms of section 49A, or directed or summoned to attend a hearing—”.

#### Amendment of section 72 of Act 89 of 1998

**17. Section 72 of the principal Act is hereby amended by the substitution for paragraph (a) of the following paragraph:**

“(a) subject to section 49A(3) or 56, fails to answer any question fully and to the best of that person's ability; or”.

**Amendment of section 73 of Act 89 of 1998**

**18. Section 73 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:**

“(1) A person commits an offence who contravenes or fails to comply with an interim or final order of the Competition Tribunal or the Competition Appeal court.” 5

**Repeal of section 76 of Act 89 of 1998**

**19. Section 76 of the principal Act is hereby repealed.**

**Substitution of section 82 of Act 89 of 1998**

**20. The following section is hereby substituted for section 82 of the principal Act:** 10

“Relationship with other agencies

82. (1) A regulatory authority which, in terms of any public regulation, has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 within a particular sector—

(a) must negotiate agreements with the Competition Commission, as anticipated in section 21(1)(h); and 15

(b) in respect of a particular matter within its jurisdiction, may exercise its jurisdiction by way of such an agreement.

(2) Subsection (1)(a) and (b), read with the changes required by the context, applies to the Competition Commission. 20

(3) In addition to the matters contemplated in section 21(1)(h), an agreement in terms of subsection (1) must—

(a) identify and establish procedures for the management of areas of concurrent jurisdiction; 25

(b) promote co-operation between the *regulatory* authority and the Competition Commission;

(c) provide for the exchange of information and the protection of confidential information; and

(d) be published in the Gazette.

(4) The President may assign to the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purpose of this Act, to exchange information with a similar foreign agency.” 30

**Amendment of Schedule 1 to Act 89 of 1998**

**21. Schedule 1 to the principal Act is hereby amended—** 35

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

“EXEMPTION OF PROFESSIONAL RULES”; and

(b) by the substitution for Part A of the following Part:

“PART A

1. A professional association whose rules contain a restriction that has the effect of substantially preventing or lessening competition in a market may apply in the prescribed manner to the Competition Commission for an exemption in terms of item 2. 40

2. The Competition Commission may exempt all or part of the rules of a professional association from the provisions of Part A of Chapter 2 of this Act for a specified period if, having regard to internationally applied norms, any restriction contained in those rules that has the effect of substantially preventing or lessening competition in a market is reasonably required to maintain— 45

(a) professional standards; or 50

(b) the ordinary function of the profession.

3. Upon receiving an application in terms of item 1, the Competition Commission must—

- (a) publish a notice of the application in the *Gazette*;
  - (b) allow interested parties 20 business days from the date of that notice to make representations concerning the application; and
  - (c) consult the responsible Minister, or member of the Executive Council concerning the application. 5
4. After considering the application and any submissions or other information received in relation to the application, and consulting with the responsible Minister or member of the Executive Council, the Commission must—
- (a) either grant an exemption or reject the application by issuing a notice in the prescribed form to the applicant, 10
  - (b) give written reasons for its decision; and
  - (c) publish a notice of that decision in the *Gazette*.
5. The Competition Commission, in the prescribed manner, may revoke an exemption granted under item 4 on good cause shown, at any time after it has— 15
- (a) given notice in the *Gazette* of its intention to revoke the exemption;
  - (b) allowed interested parties 20 business days from the date of that notice to make representations concerning the exemption; and
  - (c) consulted the responsible Minister, or member of the Executive Council. 20
6. A professional rule is exempt, or its exemption revoked, only as of the date on which notice of the exemption or revocation, as the case may be, is published in the *Gazette*.
7. The Competition Commission must maintain for public inspection a record of all professional rules that have received exemption, or for which exemption has been revoked. 25
8. A professional association, or any other person with a substantial interest affected by a decision of the Competition Commission in terms of item 4 may appeal against that decision to the Competition Tribunal in the prescribed manner and form. 30
9. In this Schedule—
- ‘professional association’ means an association referred to in Part B of this Schedule;**
- ‘professional rules’ means rules regulating a professional association that are binding on its members;** 35
- ‘rules’ includes *public regulations*, codes of practice and statements of principle.”.**

**Amendment of Preamble to Act 89 of 1998**

22. The Preamble to the principal Act is hereby amended by the substitution for the first paragraph of the following paragraph: 40

“That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy. **[weak enforcement of] inadequate’ restraints against anti-competitive trade practices, and unjust restrictions on full and free participation** in the economy by all 45 South Africans.”.

**Transitional provisions**

23. (1) In this section—
- (a) **“principal Act” means the Competition Act, 1998 (Act No. 89 of 1998), as it existed immediately before the commencement of this Act; and** 50
  - (b) **“principal Act as amended” means the principal Act as amended by this Act.**
- (2) Despite section 6(3) and (4), and section 11(3) and (4), Of the principal Act as amended, the Minister of Trade and Industry may at the commencement of this Act publish in the *Gazette* a notice determining a new threshold and method of calculation 55 under each of those sections, respectively.
- (3) A determination in terms of subsection (2) takes effect on the date of commencement of this Act, and if it is a determination under—

- (a) section 6 of the principal Act as amended. applies to any proceedings that were pending before the Competition Commission, Competition Tribunal or Competition Appeal Court immediately before the date of commencement of this Act; or
- (b) section 11 of the principal Act as amended, applies to any proceedings that were pending before the Competition Commission immediately before the date of commencement of this Act.
- (4) A recommendation made by the Competition Commission in terms of section 14(3) of the principal Act must be regarded as having been a decision made under section 14(1)(b) of the principal Act as amended, if— 10
- (a) as a result of subsection (3)(b), the merger is classified as an intermediate merger; and
- (b) the Competition Tribunal had not made an order in respect of the merger at the date of commencement of this Act.
- (5) Any proceedings that were pending before the Competition Commission, Competition Tribunal or Competition Appeal Court before the date of commencement of this Act must be proceeded with in terms of the principal Act as amended, except to the extent that a regulation under section 21 (4) or 27(2) of the principal Act as amended. or a rule of the Competition Appeal Court, provides otherwise. 15
- (6) For greater clarity, section 18(2) and (3) of the principal Act as amended applies 20 to a merger that was pending before the Competition Commission or the Competition Tribunal immediately before the date of commencement of this Act.

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

24. This Act is called the Competition Second Amendment Act, 2000, and takes effect on a date fixed by the President by proclamation in the Gazette. 25

**MEMORANDUM ON THE OBJECTS OF THE COMPETITION  
SECOND AMENDMENT BILL, 2000**

1. The Competition Act, 1998 (Act No. 89 of 1998) (“the Act”), came into operation on 1 September 1999, introducing a new regime for the management and conduct of competition policy within South Africa. As the institutions established by the Act, and the public, have begun to work with the Act, experience has revealed certain difficulties in putting the policy of the Act into action.

2. The Competition Commissioner and the Competition Tribunal have considered various issues that have been brought to their attention by their own staff, the public and the opinions of external advisers. The Commissioner and the Tribunal have agreed for the present to focus on matters that must be addressed to give full effect to the policy and purposes set out in the Act, leaving aside any reconsideration of policy itself. Several amendments are proposed to fine-tune the Act. The proposed amendments fall into the following four general categories, each discussed in more detail below:

- (a) Changes to the jurisdiction of the Act;
- (b) changes to the structures and functions of the Competition Commission, Competition Tribunal or Competition Appeal Court;
- (c) changes to procedures; and
- (d) miscellaneous changes.

2.1 Changes to the jurisdiction of the Act.

2.1.1 Section 3(d) of the Act at present provides as follows:

“3. This Act applies to all economic activity within, or having an effect within, the Republic, except—

- (a) . . .
- (b) . . .
- (c) . . .

(d) acts subject to or authorised by public regulation; or . . .“

Paragraph (d) has led to uncertainty and confusion about the jurisdiction of the Act in respect to entities that are subject to industry specific regulation in terms of other legislation. By deleting the paragraph the proposed amendment resolves the confusion by clarifying that the Act has jurisdiction over competition matters arising within such industries.

2.1.2 Chapter 3 of the present Act establishes a scheme of review and approval applicable to mergers over a certain size as determined by regulation. The threshold initially prescribed appears to be significantly low, resulting in a large volume of reviews of mergers that do not present significant competition policy concerns. Superficially, that concern can be addressed by raising the threshold, which the Commission recommends. However, a higher threshold would exempt some mergers that do present significant competition policy concerns. The proposed amendments to Chapter 3 seek to resolve this issue by—

- . creating a third category of (small) mergers, which generally are exempt from notification and which may be implemented without approval; and
- authorizing the Competition Commission to review a small merger if it appears to present significant competition policy concerns.

2.2 Changes to the structures and functions of the Competition Commission, Competition Tribunal or Competition Appeal Court.

2.2.1 There are no proposed changes to the structure of the Competition Commission.

(a) The Commission is, however, given express authority to investigate mergers and applications for exemptions. In the Act this authority is probably implicit, given the Commission’s responsibilities in those areas. The absence of an express authority has led to informal challenges and assertions that certain powers (e.g. search and summons) may not extend to such investigations. The proposed amendments will place all Commission investigations on a common footing of statutory authority.

(b) As discussed under paragraph 2.1.2 above the proposed amendments will result in the Commission having the power to intervene in small mergers on a discretionary basis.

2.2.2 There are no proposed changes to the structure of the Competition Tribunal.

(a) Under the Act, the Tribunal’s functions are framed in relation to specific procedures. It has become apparent that matters coming to the Tribunal are not all so

readily categorised, and uncertainties have arisen about the authority of the Tribunal to deal with any procedure not expressly listed or referred to in **section 27**. The proposed amendments resolve this by substituting a new list of functions, framed in functional rather than categorical terms, and including a new incidental powers clause.

(b) Under the Act, a full panel of the Tribunal is required to hear every matter. It is in the interest of efficiency, both for the Tribunal as well as the public, that a single member be able to hear certain technical or procedural issues. The proposed amendments provide a limited authority to do this.

### 2.2.3 The Competition Appeal Court.

(a) The Act provides for the Court to be comprised of at least three judges of the High Court, and two other (lay) members. Concerns have been expressed over this model on both functional and constitutional grounds. Specifically, questions have been raised over—

- (i) the value of lay members, whose expertise assists in fact finding, to an appellate body; and
- (ii) the constitutional status of the lay members, who on the one hand appear to be judges within the meaning of the Constitution, but have not been afforded the elements required to protect judicial independence.

The proposed amendments resolve these issues by providing that the Court comprises of at least three judges, each of whom must be a **judge** of the High Court.

(b) Amendments to the Act to clarify the general appellate and review jurisdiction of the Court are also proposed.

(c) Under the Act, the full Court is required to hear every matter. It is in the interest of efficiency, for the Court as well as the public, that a single judge be able to hear certain technical or procedural issues. The proposed amendments provide a limited authority to do this.

(d) Section 65(4) of the Act limits appeals from decisions of the Competition Appeal Court. Those provisions must be read subject to the Constitution, which of course vests final authority over constitutional matters in the Constitutional Court. The proposed amendments acknowledge and clarify the right of appeal from decisions of the Competition Appeal Court.

## 2.3 Changes to procedures.

### 2.3.1 Thresholds.

The Act establishes two schemes in terms of which the Minister, by regulation, determines thresholds to limit the application of specific provisions of the Act. Section 6 allows for a threshold to limit the application of abuse of dominance provisions, while section 11 does the same for merger control. Once a threshold has been established, five years must elapse before it can be changed. For reasons already discussed, it is desirable to change the merger threshold as soon as possible. It appears as well that greater flexibility in determining thresholds would allow for a more responsive approach to management of competition policy. The proposed amendments remove the five year waiting period, and allow the Minister to change either threshold at any time, subject to requirements of—

- . at least six months public notice of a proposed change; and
- an invitation for public submissions on any proposed change.

### 2.3.2 Exemptions.

(a) At present, section 10(2)(U) of the Act establishes a scheme under which the Competition Commission may advise an applicant for exemption in writing that a particular practice is not prohibited under the Act. This scheme could result in firms seeking to secure from the Commission what amounts to a legally binding opinion, which would necessarily be given on an insufficient factual basis. The proposed amendments include provisions to resolve this by replacing the option of an “advice letter” with a simple refusal to issue an exemption in such cases.

(b) Section 11 of the Act authorises exemptions relating to the exercise of intellectual property rights acquired or protected in terms of various other Acts. There is no express provision for such exemptions to be time limited, and it has been suggested that the Competition Commission must accordingly grant permanent exemptions under section 11. The proposals include a provision that all exemptions are for a specified term.

### 2.3.3 Mergers.

(a) The Act places procedural obligations on “parties to a merger”. That term is undefined, leaving it to be determined factually in each case. This has caused confusion in practice as to who bears a duty under the Act. The proposed amendments resolve this by introducing a comprehensive definition of “party to a merger”, so that it is clear who has a duty to notify and meet other procedural requirements.

(b) New procedures are also proposed for small mergers, as a consequence of the extension of jurisdiction discussed above.

### 2.3.4 Complaints.

(a) Under the Act, a complainant seeking interim relief from a prohibited practice, pending consideration of their complaint, must wait until the Competition Commission has accepted the complaint before proceeding to the Competition Tribunal for an interim order. This places complainants at a disadvantage resulting from delay, and the Commission under pressure to act precipitously. The proposals resolve this by allowing a complainant to seek interim relief immediately upon filing a complaint.

(b) The test for granting interim relief under the Act has been criticised as differing from prevailing practice in the High Courts. Proposed amendments bring the Act into line with common law practice in this regard.

(c) The Act does not clearly address whether an interim relief order may be appealed. The proposals clarify this point.

(d) The Act leaves open the time within which the Commission must act on a complaint. The proposals introduce a one year limit, but allow for that time to be extended by consent or by order of the Tribunal.

### 2.3.5 Confidential information.

The Act protects confidential information, but does not provide a process for determining claims that information is confidential. The proposed provisions introduce a process by which the Competition Tribunal adjudicates such claims, subject to appeal to the Competition Appeal Court.

### 2.3.6 Hearings and Orders.

The Act stipulates who has the right to participate in Competition Tribunal hearings of complaints, but does not expressly do the same for other matters. The proposed provisions, based on the Competition Tribunal Rules, address this.

2.3.7 The Act authorises the Competition Tribunal to impose administrative penalties for several contravention of the Act, but not for the breach of an order of the Competition Tribunal or Competition Appeal Court. Such breaches may be addressed only by criminal prosecution, which is inconsistent with the general decriminalizing policy of the Act. Proposed changes will allow the Tribunal to impose an administrative fine for breach of its orders or those of the Competition Appeal Court.

### 2.4 Miscellaneous changes.

These changes are additions or changes for improved clarity or certainty, consequential changes, including corrections to punctuation and relocation of sections.

## 3. CONSULTATION

The issues surrounding the proposed amendment to section 3(1)(d) were discussed at a recent conference convened by the Competition Commission and Competition Tribunal for this purpose. All government departments, statutory bodies, state-owned enterprises, sector regulators and relevant parliamentary committees were invited to this meeting and most attended. In addition, detailed discussions have been held with and detailed submissions have been received from the National Electricity Regulator, the Independent Broadcasting Authority, Telkom, the Department of Finance and the South African Reserve Bank. Although no final agreements have been reached with sector regulators on the issue of competition jurisdiction there have been encouraging responses to proposals for further discussions on this issue. Subsequent to the submission of the Cabinet Memorandum on this Bill there have been consultations with a nationally representative focus group of legal practitioners and Nedlac. These consultations proved very fruitful and comments arising from them were taken into account in finalizing this Bill.



#### **4. FINANCIAL IMPLICATIONS FOR STATE**

There are no direct financial implications for the State arising from this Bill. The only possible financial implication that might arise is a change in the filing fees collected by the Competition Commission once changes to existing thresholds are introduced. As these thresholds have not yet been fixed, there is no way of quantifying the exact nature of this change in filing fees.

#### **5. PARLIAMENTARY PROCEDURE**

The State Law Advisers and the Department of Trade and Industry 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.