

REPUBLIC OF SOUTH AFRICA

COMPETITION AMENDMENT BILL

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

(MINISTER OF TRADE AND INDUSTRY)

[B 31B—2008]

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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.

BILL

To amend the Competition Act, 1998, so as to provide certainty with regard to the concurrent jurisdiction between the Competition Commission and other regulatory authorities; to introduce provisions to address other practices that tend to prevent or distort competition in the market for any particular goods or services; to provide more guidance in relation to conducting market enquiries as a tool to identify, and make recommendations with respect to, conditions that tend to prevent, distort or restrict competition in the market for any particular goods or services; to introduce provisions to hold personally accountable those individuals who cause firms to engage in cartel conduct; and to authorise the Competition Commission to excuse a respondent to a complaint if the respondent has assisted the competition authorities in the detection and investigation of cartel conduct; and to provide for matters connected therewith.

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

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

1. Section 1 of the Competition Act, 1998 (hereinafter referred to as the principal Act), 5 is hereby amended—

- (a) by the deletion in subsection (1) of the numbering preceding each definition;
- (b) by the substitution in subsection (1) for paragraph (a) of the definition of “**acquiring firm**” of the following paragraph:

“(a) that, as a result of a [**transaction in any circumstances set out**] 10
merger as defined 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*.”;

- (c) by the insertion after the definition of “*Constitution*” of the following 15
definition:

“***deserving of leniency***”, when used with respect to a *firm* contemplated 15
in section 50, or a person contemplated in section 73A, means that the
firm or person has provided information to the Competition Commission,
or otherwise co-operated with the Commission’s investigation of an
alleged *prohibited practice* in terms of section 4(1)(b) to the satisfaction 20
of the Commission;”

- (d) by the substitution in subsection (1) for the definition of “**prohibited practice**” of the following definition:
 “**‘prohibited practice’** means a practice prohibited in terms of Chapter 2 or Chapter 2A;”;
- (e) by the substitution in subsection (1) for the definition of “**respondent**” of the following definition: 5
 “**‘respondent’** means a *firm* against whom a complaint of a *prohibited practice* has been initiated or submitted in terms of *this Act*;”;
- (f) by the substitution in subsection (1) for the definition of “**target firm**” of the following definition: 10
 “**‘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**] a merger as defined in section 12;
 (b) that, as a result of a [**transaction in any circumstances set out**] 15
 merger as defined 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
 (c) the whole or part of whose business is directly or indirectly controlled[,] by a *firm* contemplated in paragraph (a) or (b);”;
- (g) by the addition of the following subsection: 20
 “(4) For the purposes of this Act, a person is a historically disadvantaged person if that person—
 (a) is one of a category of individuals who were disadvantaged by unfair discrimination on the basis of race before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation; 25
 (b) is an association, a majority of whose members are individuals contemplated in paragraph (a);
 (c) is a juristic person, other than an association, in which the individuals contemplated in paragraph (a) own and control a majority of its issued share capital or members’ interest and are able to control a majority of its votes; or 30
 (d) is a juristic person or association in which the individuals contemplated in paragraph (a) own and control a majority of its issued share capital or members’ interest and are able to control a majority of its votes.”. 35

Amendment of section 2 of Act 89 of 1998

2. Section 2 of the principal Act is hereby amended by the deletion of the word “and” at the end of paragraph “(e)” and the addition of the following paragraphs after paragraph (f): 40

- “(g) to detect and address conditions in the market for any particular goods or services, or any behaviour within such a market, that tends to prevent, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic; and 45
 (h) to provide for consistent application of common standards and policies affecting competition within all markets and sectors of the economy.”.

Substitution of section 3 of Act 89 of 1998, as amended by section 2 of Act 39 of 2000

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

“Application of Act” 50

3. (1) Despite anything to the contrary in any other legislation, public regulation or agreement, *this Act* applies to all economic activity within, or having an effect within, the Republic, subject to subsections (2) and (3).
 (2) This Act does not apply to—
 (a) collective bargaining within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (Act No. 66 of 1995); 55

- (b) a collective agreement as defined in section 213 of the Labour Relations Act, 1995; or
- (c) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.
- (3) In so far as this Act applies to any conduct arising within an industry or sector of an industry that is subject to the jurisdiction of another *regulatory authority* in terms of any other legislation—
- (a) *this Act*, and that other legislation, must be construed as establishing concurrent jurisdiction in respect of any such conduct that is regulated in terms of both these Acts, subject to paragraph (b), such that—
- (i) any other regulatory authority contemplated in this subsection will exercise primary authority to establish conditions within the industry that it regulates as required to give effect to the relevant legislation in terms of which that authority functions, and this Act; and
- (ii) the Competition Commission will exercise primary authority to detect and investigate alleged *prohibited practices* within any industry or sector, and to review mergers within any industry or sector, in terms of this Act; and
- (b) details of the administrative manner in which any concurrent jurisdiction contemplated in paragraph (a) is to be exercised, must be determined by an agreement between the Competition Commission and that other *regulatory authority*, as provided for in sections 21(1)(h) and 82(1).”.

Insertion of Chapter 2A in Act 89 of 1998

4. The following Chapter is hereby inserted in the principal Act after section 10:

“Chapter 2A

Complex Monopoly Conduct

“Complex monopoly conduct

- 10A.** (1) Complex monopoly conduct subsists within the market for any particular goods or services if—
- (a) at least 75% of the goods or services in that market are supplied to, or by, five or fewer firms;
- (b) any two or more of the firms contemplated in paragraph (a) conduct their respective business affairs in a parallel conscious manner or co-ordinated manner, without agreement between or among themselves; and
- (c) the conduct contemplated in paragraph (b) has the effect of substantially preventing or lessening competition in that market, unless a firm engaging in the conduct can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect.
- (2) If the Competition Commission has reason to believe that complex monopoly conduct subsists within a market—
- (a) the Commission may investigate any conduct within that market without initiating or having received a complaint in terms of Chapter 5; and
- (b) Parts A and B of Chapter 5, and section 49D, each read with the changes required by the context, apply to an investigation in terms of paragraph (a).
- (3) After conducting an investigation in terms of subsection (2), the Competition Commission may apply to the Competition Tribunal for a declaratory order contemplated in subsection (4) against two or more firms if—
- (a) at least one of the firms—
- (i) has at least 20% of the relevant market; and

- (ii) are engaged in complex monopoly conduct as described in subsection (1); and
 - (b) the conduct of the firms has resulted in—
 - (i) high entry barriers to that market;
 - (ii) exclusion of other firms from the market;
 - (iii) excessive pricing within that market;
 - (iv) refusal to supply other firms within that market; or
 - (v) other market characteristics that indicate co-ordinated conduct.
- (4) If the Tribunal, after conducting a hearing in the manner required by Part D of Chapter 5, read with the changes required by the context, the Tribunal is satisfied that the requirements of subsection (3) are satisfied, the Tribunal may make an order reasonably requiring, prohibiting or setting conditions upon any particular conduct by the firm, to the extent justifiable to mitigate or ameliorate the effect of the complex monopoly conduct on the market, as contemplated in subsection (3)(b).
- (5) Contravention by a firm of an order contemplated in subsection (4) is a *prohibited practice*.”.

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

5. Section 21 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(c) investigate and evaluate alleged contraventions of Chapter 2 or 3;”;
 - (b) by the substitution in subsection (1) for paragraph (f) of the following paragraph:

“(f) negotiate and conclude consent orders in terms of section [63] 49D;”;
 - (c) by the insertion after subsection (1) of the following subsection:

“(1A) The Competition Commission may exercise jurisdiction by way of an agreement contemplated in section 3(3) and subsection (1)(h).”; and
 - (d) by the substitution for subsection (3) of the following subsection:

“(3) The *Minister* must table in the National Assembly any report submitted in terms of subsection (1)(k) or section 43C(1), and any report submitted in terms of subsection (2) if that report deals with a substantial matter relating to the purposes of *this Act*—

 - (a) within [10] 30 business days after receiving that report from the Competition Commission; or
 - (b) if Parliament is not then sitting, within [10] 30 business days after the commencement of the next sitting.”.

Insertion of Chapter 4A in Act 89 of 1998

6. The following Chapter is hereby inserted in the principal Act after section 43:

“Chapter 4A

Market inquiries 45

Interpretation and Application of this Chapter

43A. In this Chapter, “market inquiry” means a formal inquiry in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm. 50

Initiating market inquiries

43B. (1) The Competition Commission, acting within its functions set out in section 21(1), and on its own initiative, or in response to a request

from the *Minister*, may conduct a market inquiry at any time, subject to subsections (2) to (4)—

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

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

(3) The Competition Commission may conduct a market inquiry in any manner but, for greater certainty, the provisions of—

- (a) sections 44 to 45A, each read with the changes required by the context, apply to the conduct of the market inquiry and to the publication of the report of a market inquiry in terms of subsection (4);
- (b) sections 46 to 49 do not apply in respect of the conduct of a market inquiry;
- (c) section 49A, read with the changes required by the context, applies to the conduct of a market inquiry;
- (d) section 54(b), (e) and (f), each read with the changes required by the context, apply to the conduct of a market inquiry, but for the purpose of this section, a reference in any of those sections to the “Tribunal” or to a person “presiding at a hearing” must be regarded as referring to the Competition Commission; and
- (e) sections 72 and 73(2)(a), (b), (c), (d) and (f) apply to the conduct of a market inquiry, but a reference in any of those sections to ‘an investigation’ must be regarded as referring to the market inquiry.

(4) The terms of reference required in terms of subsection (2) must include, at a minimum, a statement of the scope of the inquiry, and the time within which it is expected to be completed.

(5) The Competition Commission may amend the terms of reference, including the scope of the inquiry, or the time within which it is expected to be completed, by further notice in the *Gazette*.

(6) The Competition Commission must complete a market inquiry by publishing a report contemplated in section 43C, within the time set out in the terms of reference contemplated in subsection (2).

Outcome of market inquiry

43C. (1) Upon completing a market inquiry, the Competition Commission must publish a report of the inquiry in the *Gazette*, and must submit the report to the *Minister* with or without recommendations, which may include, but not limited to—

- (a) recommendations for new or amended policy, legislation or regulations; and
- (b) recommendations to other *regulatory authorities* in respect of competition matters.

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

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

- (a) initiate a complaint and enter into a consent order with any respondent, in accordance with section 49D, with or without conducting any further investigation;
- (b) initiate a complaint against any *firm* for further investigation, in accordance with Part C of Chapter 5;
- (c) initiate and refer a complaint directly to the Competition Tribunal without further investigation;
- (d) take any other action within its powers in terms of *this Act* recommended in the report of the market inquiry; or
- (e) take no further action.”.

Amendment of section 49B of Act 89 of 1998, as amended by section 15 of Act 39 of 2000

7. Section 49B of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections:

“(1) The **[Commissioner]** Competition Commission may initiate a complaint against an alleged *prohibited practice* or an alleged implementation of a merger contrary to Chapter 3.

(2) Any person may—

- (a) submit information concerning an alleged *prohibited practice*, or an alleged implementation of a merger contrary to Chapter 3, to the Competition Commission[,] in any manner or form; or
- (b) submit a complaint against an alleged *prohibited practice*, or an alleged implementation of a merger contrary to Chapter 3, to the Competition Commission [,] in the *prescribed* form.”.

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

8. Section 50 of the principal Act is hereby amended—

(a) by the substitution for subsections (1) and (2) of the following subsections:

“(1) At any time after **[initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.]—**

(a) receiving or initiating a complaint, the Competition Commission may certify, in the prescribed manner and form, and with or without conditions, that any particular respondent, or any particular person contemplated in section 73A, is *deserving of leniency* in the circumstances, and

(b) initiating a complaint, the Commission may refer the complaint to the Competition Tribunal in respect of any respondent, to the extent that the respondent has not been certified as being *deserving of leniency* in terms of paragraph (a).

(2) Within one year after a complaint was submitted to it, or such longer time as may be agreed or allowed in terms of subsection (4), the **[Commissioner]** Competition Commission must—

(a) **[subject to subsection (3),]** refer the complaint to the Competition Tribunal, subject to subsection (3), in respect of any respondent, to the extent that the respondent has not been certified as being *deserving of leniency*, if the Commission **[it determines]** has determined that a prohibited practice, or the implementation of a merger contrary to Chapter 3, has been established; or

(b) in any other case, issue a notice of non-referral to the complainant in the prescribed form.”

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

“(b) must issue a notice of non-referral as contemplated in subsection (2)(b) in respect of any particulars of the complaint **[not referred to the Competition Tribunal]** that have not been either—

(i) referred to the Competition Tribunal in terms of subsection (2)(a); or

(ii) certified as *deserving of leniency*.”;

(c) by the substitution in subsection (4) for paragraph (b) of the following paragraph:

“(b) on application by the Competition Commission made before the end of the period **[contemplated in]** set out in subsection (2), or such longer period as agreed in terms of paragraph (a) or previously granted in terms of this paragraph, the Competition Tribunal may extend that period.”

(d) by the substitution for subsection (5) of the following subsection:

“(5) If the Competition Commission has not **[referred a complaint to the Competition Tribunal, or issued a notice of non-referral]** taken any action contemplated in subsection (3) 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.”; and

(e) by the addition of the following subsections:

“(6) A decision by the Competition Commission in terms of this section to certify that a respondent, or any other person, is deserving of leniency does not preclude the complainant, if any, 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.

(7) Nothing in this section directly or indirectly establishes any right of a person to—

(a) be certified as being deserving of leniency, in whole or in part, or with or without any conditions; or

(b) require or demand that the Competition Commission issue such a certificate, or consider doing so.”

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

9. Section 58 of the principal Act is hereby amended by the addition in subsection (1)(a) of the following subparagraph:

“(viii) imposing appropriate conditions;”.

Amendment of section 59 of Act 89 of 1998, as amended by section 15 of Act 39 of 2000

10. Section 59 of the principal Act is hereby amended by the substitution in subsection (1) of paragraphs (a) and (b) of the following paragraphs:

“(a) for a *prohibited practice* in terms of section 4(1)(b), 5(2) [or] 8(a), (b) [or], (d) or 10A(5);

(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, or previously acknowledged by the firm in a consent order, to be a prohibited practice;”.

Amendment of section 73 of Act 89 of 1998

11. Section 73 of the principal Act is hereby amended by the substitution in subsection (2) for paragraphs (c) and (d) of the following paragraphs:

“(c) does anything in connection with an investigation that would have been contempt of court or an obstruction of the course of justice if the proceedings had occurred in a court of law;

(d) knowingly provides false information to the Commission or the Tribunal;”.

Insertion of section 73A in Act 89 of 1998

12. The following section is hereby inserted in the principal Act after section 73:

“Causing or permitting firm to engage in prohibited practice

73A. (1) A person commits an offence if, while being a director of a *firm* or while engaged or purporting to be engaged by a *firm* in a position having management authority within the *firm*, such person—

(a) caused the *firm* to engage in a *prohibited practice* in terms of section 4(1)(b); or

(b) knowingly acquiesced in the *firm* engaging in a *prohibited practice* in terms of section 4(1)(b).

(2) For the purpose of subsection (1)(b), ‘knowingly acquiesced’ means having acquiesced while—

(a) having actual knowledge of the relevant conduct by the *firm*; or

(b) being in a position in which the person reasonably ought to have—

(i) had actual knowledge of the facts contemplated in paragraph (a); or

- (ii) investigated the matter to an extent that could have provided such person with actual knowledge of the facts contemplated in paragraph (a); or
 - (iii) taken other measures which, if taken, could reasonably be expected to have provided such person with actual knowledge of the facts contemplated in paragraph (a). 5
- (3) Subject to subsection (4) a person may be prosecuted for an offence in terms of this section only if—
- (a) the relevant *firm* has acknowledged, in a consent order contemplated in section 49D, that it engaged in a *prohibited practice* in terms of section 4(1)(b); or 10
 - (b) the Competition Tribunal or the Competition Appeal Court has made a finding that the relevant *firm* engaged in a *prohibited practice* in terms of section 4(1)(b).
- (4) The Competition Commission— 15
- (a) may not seek or request the prosecution of a person for an offence in terms of this section if the Competition Commission has certified that the person is *deserving of leniency* in the circumstances; and
 - (b) may make submissions to the National Prosecuting Authority in support of leniency for any person prosecuted for an offence in terms of this section, if the Competition Commission has certified that the person is *deserving of leniency* in the circumstances. 20
- (5) In any court proceedings against a person in terms of this section, an acknowledgement in a consent order contemplated in section 49D by the firm or a finding by the Competition Tribunal or the Competition Appeal Court that the *firm* has engaged in a *prohibited practice* in terms of section 4(1)(b), is in the absence of evidence to the contrary, conclusive proof of the fact that the *firm* engaged in that conduct. 25
- (6) A firm may not directly or indirectly—
- (a) pay any fine that may be imposed on a person convicted of an offence in terms of this section; or 30
 - (b) indemnify, reimburse, compensate or otherwise defray the expenses of a person incurred in defending against a prosecution in terms of this section, unless the prosecution is abandoned or the person is acquitted.” 35

Amendment of section 74 of Act 89 of 1998

- 13.** Section 74 of the principal Act is hereby amended—
- (a) by the deletion of “(1)” from the beginning of the section; and
 - (b) by the substitution for paragraph (a) of the following paragraph: 40
 - “(a) in the case of a contravention of section 73(1), or section 73A, to a fine not exceeding R500 000-00 or to imprisonment for a period not exceeding 10 years, or to both a fine and such imprisonment; or”.

Amendment of section 82 of Act 89 of 1998, as amended by Act 39 of 2000

- 14.** Section 82 of the principal Act is hereby amended—
- (a) by the deletion of subsection (2); 45
 - (b) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words: 50
 - “In addition to the matters contemplated in section 21(1)(h), an agreement contemplated in [terms of] subsection (1), section 3(3)(b) and section 21(1)(h) must—”; and

- (c) by the substitution in subsection (3) for paragraphs (a) and (d) of the following paragraphs respectively:
 - (a) identify and establish procedures including dispute resolution for the management of areas of concurrent jurisdiction;
 - (d) be published in the Gazette for public comment.".

5

Amendment of law

15. The law referred to in the Schedule is hereby amended to the extent specified in the third column thereof.

Short title and commencement of Act

16. This Act is called the Competition Amendment Act, 2008, and comes into 10 operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE**LAWS REPEALED OR AMENDED***(Section 14)*

No. and year of Act	Short title	Extent of amendment	5
Act No. 36 of 2005	Electronic Communications Act, 2005	Section 67 is hereby amended by the substitution for subsection (9) of the following subsection: “(9) [Subject to] <u>Despite</u> the provisions of this Act, the Competition Act applies to competition matters in the electronic communications industry.”.	10

MEMORANDUM ON THE OBJECTS OF THE COMPETITION AMENDMENT BILL

1. BACKGROUND

The Competition Act, 1998, came into operation on 1 September 1999, introducing a new regime for the management and conduct of competition policy within South Africa.

This Bill proposes amendments to the Competition Act, 1998 (as previously amended), to address some issues raised in the recent Department of Trade and Industry (dti) policy review.

2. OBJECTS

2.1 Concurrent jurisdiction over competition matters

Section 3 of the Act currently states that jurisdiction over competition matters is concurrent between the Competition Commission, on the one hand, and any industry regulator, on the other. The details of how the concurrent jurisdiction is to be managed are to be addressed in agreements reached between the Competition Commission and the relevant industry regulators.

Although the scheme established by section 3 has generally worked well, uncertainty continues to exist in some cases, most notably following the enactment of the Electronic Communications Act, (Act 36 of 2005) (“EC Act”), section 67(9) of which states that the Competition Act is subject to the EC Act. With the enactment of that section, there are now two inconsistent provisions touching on the question of over-lapping regulatory authority. In order to remove any uncertainty, it is desirable to propose amendments that will rationalise the provisions, clarify the general competition policy and more clearly delineate the authority of the relevant regulators.

It is proposed that as a matter of general policy—

- (a) the Competition Act should be the central governing statement of competition policy in the Republic, with recognition that other, industry-specific legislation will often play an important role in fine-tuning the general policy for specific application to particular industries; and
- (b) the Competition Act should continue to provide for a flexible mechanism for establishing the details by which over-lapping jurisdiction on competition matters is to be managed.

To give effect to this policy, this Bill proposes to amend sections 2 and 3 of the Competition Act, 1998, and further proposes a consequential amendment to the EC Act, to bring the two Acts into harmony.

The relevant amendment to section 2 of the Competition Act, 1998, appears in clause 2 of the Bill. It proposes the insertion of a new paragraph (*h*) into the list of stated purposes of the Competition Act. This new statement of purpose clarifies the general policy set out in paragraph (*a*) above, and at the same time provides a policy foundation for the specific proposals that follow as amendments to section 3 of the Competition Act, 1998.

The amendments to section 3 of the Competition Act, 1998, appear in clause 3 of the Bill. It proposes a complete substitution of a new section 3 to replace the current version. But the changes are perhaps less radical than the editing may imply. Most of the current version of the section is retained, though the current subsection (2) (which is an interpretative clause) has migrated to become part of section 1 of the Act.

The substantive changes effected by this amendment are found in the proposed subsection (3), which provides a clear statement that—

- (a) jurisdiction is concurrent in any case in which legislation assigns responsibility for competition matters within an industry to a sector regulator;
- (b) the concurrent jurisdiction is to be managed in terms of a Memorandum of Agreement between the Competition Commission and the relevant sector regulator;
- (c) if there are any conflicts between the sector specific legislation and the Competition Act which a Memorandum of Agreement does not resolve, the Competition Act will prevail, but only to the extent of the unresolved conflict.

Finally, clause 15 of this Bill includes a consequential amendment to the EC Act, altering section 67 (9) of that Act to bring it into harmony with the provisions discussed above.

2.2 Complex monopolies

Chapter 2 of the Competition Act, 1998, prohibits certain anti-competitive conduct if two or more firms engage in the conduct as a concerted practice, or pursuant to an agreement between them. The Competition Policy review argued that the requirement of a formal agreement or a concerted practice impedes the ability of the Competition Commission to investigate, act to interdict, or seek a remedy for, complex monopolies that result in a substantial prevention or lessening of competition. The policy review called for amendments to the Act to equip the competition authorities to intervene in such cases to better realise the policy of the Act.

This has been addressed in the Bill—

- (a) by an amendment to section 2 of the Competition Act, 1998, found in clause 2 of the Bill, which adds a new paragraph (g) to the enumerated purposes of the Act, relating to the detection and remediation of such conduct; and
- (b) by the insertion of a new section 10A into the Competition Act, 1998, found in clause 4 of the Bill.

The new section 10A defines a complex monopoly for the purpose of the Act, and prohibits participation in such a monopoly if it has the effect of substantially preventing or lessening competition.

2.3 Market inquiries

Clause 6 of the Bill will insert a short new chapter 4B (sections 43A to 43C) into the Competition Act, 1998.

The proposed new provisions provide a definition of a market inquiry, provide for the initiation of such an inquiry at any time by the Competition Commission, and provide for powers for the Competition Commission to allow it to proceed promptly against firms on the strength of information obtained through such an inquiry.

The proposal integrates selected existing provisions of the Act (concerning summoning, evidentiary, procedural and legal safeguards) into the powers of a market inquiry.

The formal outcome of an inquiry must be reported to the Minister, with or without recommendations.

However, the matter does not end there. The Competition Commission is specifically empowered to act on inquiry findings to move forward by initiating complaints and referring them to the Competition Tribunal to seek adverse findings against a firm.

2.4 Personal responsibility of directors and officers of firms

The Competition Policy review proposed amendments to introduce a scheme of personal culpability, and criminal and civil liability, for directors of firms that engage in “hardcore” cartels prohibited in terms of the Competition Act. In addition, it sought the ability to fine such persons, and to seek to have them prohibited from acting as directors.

Clauses 11 and 12 of the amending Bill will insert a new offence section into the Competition Act, making it an offence for a director, or other person having or purporting to have, management authority within the company, to cause, or knowingly acquiesce in, the firm conducting a prohibited practice in terms of section 4(1)(b) of the Act.

In addition, proposals currently included within the scope of the Companies Law reform project would, if enacted, empower the Competition Commission or other industry-specific regulators to seek a court order disbarring a person from serving as a director of a firm, if that person was responsible for the firm contravening the Competition Act, or relevant industry-specific legislation. It is the dti position that this power is best introduced globally within a reformed Companies Act, rather than on a piecemeal fashion in other Bills.

2.5 Leniency for whistleblowers

In order to encourage voluntary disclosure of anti-competitive conduct by the involved firms, the Competition Commission seeks a legal foundation for excusing “whistleblower” firms who provide essential information to an investigation. The Competition Act currently does not specifically contemplate such excusing of respondents to a complaint, and may indeed be susceptible to a very restrictive interpretation, suggesting that the Competition Commission has only two alternative courses available to it at the conclusion of an investigation, i.e. to refer the complaint to the Competition Tribunal or to issue a notice of non-referral to the complainant.

Clause 8 of the Bill will introduce a scheme of leniency at the option of the Competition Commission by amending section 50 of the Competition Act to specifically allow the Competition Commission to excuse a respondent to a complaint.

2.6 Other technical amendments addressed in Bill

2.6.1 Amendments to certain definitions

Clause 1 of the amending Bill effects technical amendments to the definitions of “acquiring firm”, “respondent” and “target firm”.

2.6.2 Investigation of illegal merger implementation

Section 13A of the Competition Act prohibits the parties to an intermediate or large merger from implementing the merger unless approved in terms of Chapter 3. Section 59(1)(d) permits the Competition Tribunal to impose an administrative fine for an unlawful implementation of a merger, and section 60 permits the Competition Tribunal to order divestiture of assets in response to an unlawful implementation of a merger.

But nothing in the Act allows the Competition Commission to receive, initiate, investigate or refer to the Competition Tribunal a complaint alleging the unlawful implementation of a merger. This appears to be an oversight, creating a serious gap in the Competition Commission’s enforcement powers.

Clause 7 of the Bill—together with other consequential editorial changes—rectifies this by amending section 49B of the Competition Act.

2.7 Extensions of time for Competition Commission to refer complaints to Tribunal

Section 50(4) and (5) of the Competition Act set out time limits within which the Competition Commission must conclude its investigation of a complaint, and subsection (4) provides for extensions by agreement or application to the Competition Tribunal. The scheme set out in subsection (4) is deficient, in that it allows an application to the Competition Tribunal only if there has first been an extension agreed with the respondent.

Clause 8(c) and (d) of the amending Bill rectifies this problem, and allows for initial or multiple extensions, either by agreement or by application to the Competition Tribunal.

Further amendments addressed in this Bill relate to numbering and cross-reference errors.

3. OTHER DEPARTMENTS AND BODIES CONSULTED

Department of Communications
 Department of Minerals and Energy
 Department of Justice and Constitutional Development
 Department of Transport
 Department of Public Enterprises
 National Treasury
 The Presidency
 Economic Cluster/FOSAD
 Competition Commission and Competition Tribunal
 Independent Communications Authority of South Africa (ICASA)
 National Energy Regulator of South Africa (NERSA)

Food and Allied Workers Union (FAWU)
COSATU Representatives
Business Unity of SA (BUSA)
South African Property Owners Association (SAPOA)
Competition Law Committees of the Law Society of the Northern Provinces.

4. COMMUNICATION IMPLICATIONS

The Bill has been published in the *Gazette* for public comment, and further consultations will be held with other government departments, sector regulators, industry associations, consumer groups, professional associations, trade unions and any other interested persons.

5. FINANCIAL IMPLICATIONS

None.

6. PARLIAMENTARY PROCEDURE

6.1 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.

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

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