CCLE

Centre for Competition Law and Economics

# Competition Amendment Bill (2017): Comments

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# Table of Contents

**1 Introduction** ..... **5**

**2 Clause 2: Horizontal restrictions section 4(1)** ..... **6**

**3 Abuse of Dominance** ..... **7**

3.1 Clause 3: Excessive pricing ..... 7

3.2 Clause 3: Changes to the structure of section 8(c) and 8(d)– general exclusionary acts ..... 9

3.3 Clause 1: Amended definition of an exclusionary act (CAB section 1) ..... 9

3.4 Clause 3: Imposing conditions on sellers (CAB 8(1)(d)(iv)) ..... 10

3.5 Clause 3: Monopsony pricing and buyer power (CAB section 8(1)(d)(vii)) ..... 11

3.6 Clause 3: Predatory pricing (CAB s 8(1)(d)(v)) ..... 12

3.7 Clause 3: Margin Squeeze (CAB 8(d)(vii) ..... 14

3.8 Clause 4: Price discrimination (s 9) ..... 14

**4 Clause 6: Deleting the provisions on complex monopolies and other parts of the CAA (s 10A of the 2009 CAA)** ..... **17**

**5 Mergers** ..... **17**

5.1 Clause 7: Amendment of the general merger provision 12A(1)(b) regarding the consideration of public interest ..... 17

5.2 Amendment of the criteria in section 12A(2) dealing with creeping concentration and structural features ..... 18

5.2.1 Economic context ..... 18

5.2.2 Legal remarks ..... 21

5.3 Clause 7: The proposed amendment to the public interest provisions in section 12A(3) ..... 24

5.4 Clause 8: The proposed provision that concerns mergers by a series of transactions (CAB section 12B) 25

5.5 Clause 9 and 10: Explicitly granting the Commission and Tribunal powers to impose conditions to protect the public interest (section15(1)(b) and16(3)(b)) ..... 27

**6 Market inquiries ..... 29**

6.1 Introduction ..... 29

6.2 Clause 18: Description of a market inquiry in section 43A ..... 29

6.3 Clause 18: Addition of the description of an "adverse effect on competition " in the CAB section 43A(2) ..... 30

6.4 Clause 18: The definition of "features of the market" in section 43A(3)' ..... 31

6.5 Clause 19: The basis upon which market inquiries can be commenced (section 43B)' ..... 31

6.6 Clause 19: The notice to initiate an inquiry section 43B(2)' ..... 32

6.7 Clause 19: Terms of reference (section 43B(4) of CA) ..... 33

6.8 Clause 24: Representations on the terms of reference (currently CAB section 43G(2)) ..... 33

6.9 Clause 19: Section 43B(5) amendment of the terms of reference ..... 34

6.10 Clause 19 and Clause 24: Conducting market inquiries (currently CA section 43B(3), CAB sections 43B(3)(A) and 43G proposed section 43C) ..... 34

6.11 Clause 19: Publication of the report ..... 37

6.12 Clause 20: Matters to be decided in a market inquiry (section 43C in CAB on our proposal 43D) 37

6.13 Clause 21: Broad remedies to address adverse effects on competition (CAB s 43D, on our proposal 43E) ..... 39

6.14 Clause 19 & 22: Completing the market inquiry and publishing and notification of the market inquiry report (Section 43E(1) of the proposal, 43C(1) of the CA and 43F(1) on our proposal) ..... 43

6.15 Clause 23: Appeals against decisions decisions to grant enforcement orders (CAB section 43F on our proposals section 43G) ..... 45

6.16 Clause 27: Consent orders with parties in market inquiries (CAB s 49D) ..... 46

6.17 Clause 30: Extending the powers of the Tribunal for market inquiries CAB Section 58 (also CA Section 58) ... 47

**7 Other procedural and enforcement provisions ... 49**

7.1 Clause 12, 28 & 38: Empowering the Commission to publish a leniency policy (CAB section 43E and 83(2)) ... 49

7.2 Clause 31: Amendment of the provisions regarding administrative penalties CAB and CA section 59 51

7.3 Clause 32: Amendment of the divestiture provision to provide for divestiture in the context of market inquiries (CAB and CA s 60) ... 53

7.4 Clause 33 and 34: Providing for appeals to the Constitutional Court and not the Supreme Court of Appeal (CAB and CA s 62 and 63) ... 55

7.5 Clause 35 (in the memorandum) ... 58

7.6 Clause 35: Amendments to the prescription provision (CAB and CA s 67(1)) ... 59

7.7 Clause 37: Amendments regarding the status of Guidelines s 79 ... 59

**8 Annexure A: Concentration ... 61**

8.1 Long-run concentration levels ... 61

8.2 Empirical evidence concerning concentration ... 61

8.3 Role of government policy ... 63

8.4 Clarifying concepts ... 64

8.5 Conclusion ... 64

**9 Annexure B: Further aspects that require attention ... 65**

# 1 Introduction

The CCLE believes that the Competition Amendment Bill (CAB) is well considered and timely, and that the Bill will contribute to the development of a growing and competitive economy. However, we believe that some improvements can still be made to the Bill. In the comments that follow, we focus on five elements:

1) Provisions that in our view **go too far** and will therefore hamper rather than promote competition.

2) Provisions that appear to be **formulated in a manner that will not achieve the goals** of the amendments and therefore will require some reformulation to achieve this.

3) **Gaps in the reform or flaws in the current competition regime** that require urgent attention if the goals of the reform and competition law goals in general are to be achieved[1].

4) Some aspects regarding the **policy behind the amendments** and the relationship between the Competition Act (CA) and other policy measures (see the priorities p 8 (iv)).

5) Some comments on the discussion of **market concentration** in the Background Note (see Annexure A).

In these comments we will use the published version of Background Note, the Competition Amendment Bill, and the Memorandum of the Objects as published in the Government Gazette GN 1345 in GG 41294 of 1 December 2017. At the beginning of every section we state the relevant page numbers in the Background Note, the Memorandum and the Bill in this order. We also use the following abbreviations:

CAB Competition Amendment Bill

CAA Competition Amendment Act 2009

CAC Competition Appeal Court

CA Competition Act 89 of 1998 in its current form

[1] For this purpose we focus on priorities (i) ensuring efficacy of basic provisions ii) alignment of the Competition Act (CA) with other policies, and iii) efficacy of regulatory authorities.

# 2 Clause 2: Horizontal restrictions section 4(1)[2]

Section 4(1)(b)(ii) is amended to also provide a *per se* prohibition for market allocation in the form of “market shares”. We understand that the addition of the words “market shares” is aimed at addressing the fact that ‘collusive agreements in concentrated markets are achieved and monitored through the allocation of market shares between cartel members’. While the insertion might seem like a minor addition and cause little harm, its wording as well as the justification for inserting it, is difficult to follow.

It would appear that the reason behind this extension is the fear that incumbents in the market will jointly take steps to allocate the market to themselves in a manner that would allow them to exclude others from the market. However, it is difficult to see how the mere allocation of all market shares between existing competitors would achieve this. Further steps will be required and it is these further steps that will have to be addressed. It is suggested that this should be dealt with in other ways:

- First it may be useful to explicitly prohibit **boycott agreements** or agreements between competitors that are meant to exclude competitors. There are good examples of this in Australian legislation and US case law.

- Second, it may be necessary to specifically state that the abuse of dominance provision also will apply to **collective dominance**. Although some commentators propose that collective dominance also form part of SA law there is as yet no certainty on this point.

[2] P. 14 and p 61 par 2.1-2.3 read with p. 28.

# 3 Abuse of Dominance

## 3.1 Clause 3: Excessive pricing[3]

The deletion of the phrase 'to the detriment of consumers' is as an attempt by the legislator to also protect businesses who might be forced to absorb the excessive price when downstream markets are competitive. This is an important shift in focus away from consumer harm to harm suffered by firms and fits into the new focus on small and previously disadvantaged firms (BBBEE). This crystalises the idea that anyone that is negatively affected by an excessively high price is protected under the CA – whether it is a firm buying an input or the final consumer. Howeever, as it stil concerns purchasers and the line between purchasers and consumers is difficult to draw, this is not a radical change of competition law. On this basis we support the change. It is clear that this change will strengthen the ability of the competition authorities to successfully prosecute such abuses although the requirement of harm to consumers in this context was not regarded as a very significant requirement. It has been argued that prices that are excessive will in general harm consumers.

However, we believe the further attempts to strengthen this provision should be more carefully reconsidered. In fact, there is no jurisdiction in the world that we know of, where the excessive pricing provision has received wide application. It is difficult to think how it can be applied outside of egregious cases of exploitative abuses of dominance. It is generally accepted that prices will not be excessive simply because they mean that a firm will make an economic profit or because a lower price would have been charged in a perfectly competitive market. The reason for this, as the economist Schumpeter has rightly pointed out, is that the development of markets and the prices in them must be considered over time. Firms innovate and act as entrepreneurs as it allows them to increase their profits by creating new products or differentiating their products. This is necessary both for economic growth and the welfare of consumers. If firms are not allowed to profit from these activities they will refrain from them. In most jurisdictions excessive pricing will be prohibited where this justification for charging prices that are substantially in excess of the cost of a firm does not apply e.g. where a firm has obtained market power through government intervention. The legislator should therefore realize that this provision is most likely to apply in the cases of state entities who charge unregulated prices.

The presumption in the proposed section 8(2) is both badly formulated and unworkable even if its wording were to be improved.

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[3] P 14 and 61 para 3.2, 3.8 read with p. 29.

When it comes to the formulation, section 8(2) does not make it clear when a price will “prima facie” be an abuse of dominance. The problem with this provision of course is that the charging of an excessive price is itself an abuse of dominance. It bears no relationship to the definition of excessive price in section 1. What will the person alleging contravention have to prove to show a prima facie abuse? The provision could require a special procedure before adjudicatory bodies that would require a first stage where only prima facie evidence would have to be put forward. But if this were so, it would be absurd to allow the respondent to escape liability only by proving reasonableness. A better threshold for a shift in the evidentiary burden/onus will be required.

It is correct that there is a significant problem in terms of asymmetry of information in excessive pricing cases. The affected firm does not have access to detailed accounting data needed to calculate the ‘economic value’ of the good. This data belongs to the dominant firm and is not readily available, even if the firm is a listed entity with high accounting reporting standards. But it is suggested that this problem should be addressed by less invasive measures. Currently, the Commission can use its investigative powers to obtain the necessary data from the dominant firm to analyse whether any complaint has merits. If the implications of the new section 8(2) is that the Commission will do very little analyses (it is not clear what a prima facie case entails) and simply refer the case to the Tribunal for adjudication then this must be an abdication of their role as investigator and this will unnecessarily burden the Tribunal. The Bill expects that the shifting of the evidentiary burden will increase the prospects of successful prosecution. This does not seem to follow logically.

It should be apparent from the earlier analysis of the nature of the excessive pricing provision that the likelihood of causing more harm than good and of having too many false positives, therefore militate strongly against the presumption proposed in section 8(2).

- If this provision is retained, and we underline that we strongly feel that it should not, then:

> 1) a better threshold should be defined, such as a requirement that the Commission must show that prices are significantly higher than economic value (which includes cost of investment and other economic costs);
>
> 2) the nature of the evidentiary burden/onus should be clarified. Perhaps it should be stated that the burden should be on the respondent to show that that the price does not bear any reasonable relation to the economic value of product.

The Competition Appeal Court has already done much to develop criteria according to which excessive pricing should be evaluated. It is hoped that this provision would not be read to give the Commissioner powers to contradict the CAC, especially in the light of the expanded status that the CAB now gives to Guidelines (we comment on this in section 7.7).

## 3.2 Clause 3: Changes to the structure of section 8(c) and 8(d)– general exclusionary acts[4]

The drafters propose to "strengthen" section 8 by deleting section 8(c), which currently deals generally with exclusionary acts, and then to have an expanded list of the type of practices that were previously in 8(d), as a so-called open list of the known, predictable exclusionary acts developed in competition jurisprudence. The amendment will mean that respondents will now in all exclusionary act cases bear the onus of showing that there are technological, efficiency or other pro-competitive gains. It will also remove the opportunity to avoid a fine in the case of a first time offence under current section 8(c) (see in this respect clause 31).

We believe that this new provision may perhaps undermine another benefit which the Commission currently derives from s 8(1)(d). According to the Tribunal in the SAA case[5] a practice stated in section 8(1)(d) will be presumed to be exclusionary while this will not be so for exclusionary acts in terms of 8(1)(c). It is not clear whether this will be so for those abuses listed under (8)(1)(d). Instead of "including" the CAB should state "including the following practices that will be exclusionary". The provision should read:

"8(1)(d) … engage in any exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act, including the following practices that will be exclusionary".

This aspect requires comment in the Explanatory Memorandum. No reference is currently made on it.

## 3.3 Clause 1: Amended definition of an exclusionary act (CAB section 1)[6]

The expansion of the definition of exclusionary act to include "participation" in a market is not at all clear to us. What types of activities that are not otherwise covered would be dealt with in terms of this provision? Participation by those who are not in the market would be covered by the part of the provision that deals with entering a market. The extension must therefore be aimed at incumbents that are prevented from expanding in the market. The term participation seems to be added to cover other restrictions confronting incumbents, perhaps practices that will undermine their ability to compete. If this is so perhaps a better phrase than

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[4] P. 15 read with p. 29.
[5] Competition Commission v South African Airways (Pty) Ltd 18/CR/Mar01 para 99-112.
[6] P. 16 and 61 par 1.1 read with p. 28.

"participate" is required. We wonder whether the uncertainty created by the inclusion of this term will be helpful while nothing will be gained from it.

## 3.4 Clause 3: Imposing conditions on sellers (CAB 8(1)(d)(iv))[7]

The previous s 8(d)(iii) now s 8(1)(d)(iii) primarily deals with tying and bundling arrangements. At its core it covers the situation where a purchaser is required to purchase separate goods or services that are unrelated to the object of a contract with the goods or services that they intend to purchase in terms of a contract, from a particular or designated firm. The provision is then extended to the situation where a purchaser is forced to accept conditions that are unrelated to the object of a contract. It is somewhat difficult to interpret this part of the provision as it does not relate to any well-recognised form of abuse of dominance. In *Sappi Fine Papers (Pty) Ltd v Competition Commission*[8] the Tribunal therefore proposed that this part of the provision concerns only situations where a condition links up two markets. Although the approach of the Tribunal is coloured by a general understanding of section 8(d)(iii) which no longer holds,[9] it is suggested that the conclusion is correct. The last part of section 8(d)(iii) cannot be divorced from preceding parts.

If this is correct then it does not make sense to insert a new section 8(1)(d)(iv) that aims to apply a similar rule for the benefit of sellers. The requirement of unreasonableness will further complicate matters. Although the aim of the amendments is to extend the protection of competition to small and medium firms this would just go **too far beyond the bounds of conventional competition law**. The amendment will probably be of no effect as it will still have to be shown that the condition will have an anti-competitive effect. The new addition would therefore create the false impression that unreasonable conditions would now by themselves be of concern to competition law. This provision perhaps reflects a somewhat over-aggressive attempt to extend the application of competition law provisions in favour of sellers.

If the aim truly is to prevent exploitation of market power that operates in the same manner as the prohibition of excessively low prices then it should not be in this part on exclusionary acts. It perhaps should rather be combined with what is now 8(1)(d)(viii) (which we comment on next).

[7] P. 16 and 62 par 3.5 read with p.29.
[8] 62/CR/Nov01 pars 44–50.
[9] The court believed that would not be necessary to prove anti-competitive effects in s 8(1)(d) cases but this approach was later rejected.

## 3.5 Clause 3: Monopsony pricing and buyer power (CAB section 8(1)(d)(vii))[10]

The CAB now introduces, for the first time explicitly, the concept of a dominant firm using its market power to lower the price of a supplier to 'an excessively low' price. This is now included as a separate abuse under 8(d)(viii), but features also under price discrimination (s 9 (4)). Similar to excessive pricing, the evidentiary burden/onus is on the dominant firm to show that the price was reasonable.

From an economic point of view, this is probably the single biggest concern with the new amendments under abuse of dominance. While section 8(1)(d) does require proof that the anti-competitive effects outweigh any pro-competitive gains, this clause will open the door for numerous cases which are probably on balance pro-competitive. There are three main problems:

a) There is no guidance on when a price is 'excessively low'. Given the difficulties surrounding excessive pricing, it is unrealistic to expect an undefined low price to be successfully prosecuted;
b) The fact that the onus is on the dominant firm to show the price was reasonable opens the door for many frivolous and/ or strategic complaints by competitors, with the extra cost of defense borne by the dominant firm;
c) Economists generally do not see anti-competitive effects flowing from low prices. The aspects that would need to be examined to understand whether prices are excessive low and anti-competitive are complex. The following would be important evidence from an economic point of view:
    a. How does the dominant firm secure better prices from a supplier (i.e. is this as a result of market power?) and are such prices passed on to end-consumers;
    b. What does the downstream market look like and can the dominant firm directly affect competition through e.g. collusion;
    c. Can the dominant firm affect downstream competition indirectly by forcing the supplier to offer worse terms to its competitors?

The main problem here is that the dominant firm may have market power as a buyer vis-à-vis the supplier, but not as a seller. This needs to be established right up front, before the prima facie case is even investigated. It would be preferable to include a requirement that states explicitly that monopsony power cases will only be pursued if there is a dominant firm that buys goods/ services from a (non-dominant) supplier, and also has market power in the downstream selling market. However, we understand that this may not be necessary where the aim is not to protect consumers but intermediate suppliers.

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[10] P. 16 and p. 62 par 3.7 read with p. 30.

Even if it is finally decided that excessively low prices should prohibited some redrafting will be necessary:

- This should not form part of s 8(1)(d) which deals with exclusionary provisions. Like section 8(1)(a) these abuses could also lead to exclusion but perhaps the main issue is that they are exploitative. An abuse therefore should arise whether it leads to exclusion or not. Moreover, it should not be necessary to prove anti-competitive effect as is normally the case with exclusionary acts. Perhaps s 8(1) should be expanded to accommodate both excessively high and low prices.
- The phrase excessively low prices must be defined.

## 3.6 Clause 3: Predatory pricing (CAB s 8(1)(d)(v))[11]

Predatory pricing is notoriously difficult to prove, as the history of SA case law also shows. It is not clear that widening the ambit of cost standards will make it easier to prosecute this abuse.

In the current version of the CA, predatory pricing is not prohibited eo nomine. The Act merely establishes that firms may not price below marginal or average variable cost (this is the so-called "Areeda-Turner Test"[12]. However, the drafters have correctly pointed out that several other more relevant and more expansive and relevant definitions have now been developed in order to distinguish predatory practices from acceptable pricing behaviour. The drafters therefore correctly point out that it would create greater clarity for firms if this provision were to modernised. We agree with this approach but consider that the economic measures should rather be given as instances of predatory pricing and that a more general prohibition of predatory pricing is required. If not the legislator may continually be playing catch-up. Of course other forms of predatory pricing will continue to be covered by the Act, as it covers exclusionary practices in general, but uncertainty may be caused by the current provision and this is exactly what the legislator wants to prevent.

We propose that predatory pricing should be defined in section 1 and that this provision should determine that predatory pricing will be an exclusionary act. However, it may not be easy to define predatory prices. The Canadian description in s 78 is not very helpful. It states that "(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor" will be an abuse of dominance.

The use of the term "include" in the new section 8(1)(v) makes it uncertain to determine exactly what standards will apply here.

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[11] P 15-16 and 62 par 3.3-3.4 read with p. 29.

[12] AKZO Chemie BV v Commission C-62/86 par 71-72. See *Competition Commission v Media 24 Ltd* CR154Oct11 par 78.

The new 8(d)(v) refers to "selling goods or services below their relevant cost benchmark" but the phrase "relevant cost benchmark" is vague and unhelpful. The list of examples of a "relevant cost benchmark" does not really give content to the phrase.

It is not clear why the traditional "marginal cost" standard is not included in this provision.

In the Media24 case[13] the Tribunal decided that pricing below Average Total Cost (ATC) could be exclusionary but mere evidence of below cost pricing could not suffice. Nevertheless, the Tribunal pointed out why it was important to accommodate ATC in some way. "In our view the use of the ATC standard, even where prices are above AVC, is appropriate, particularly in our economy, characterised as it is by high barriers to entry in many markets and the unwillingness of capital markets to sponsor the entry of competitors against dominant incumbent firms. They are the "less financially" secure that Greer contemplates. Moreover, the ATC test is a more reliable standard when dealing with the problems associated with the vertically integrated or multi-product firm, because here the more orthodox measures of cost evaluation, whether marginal cost, AVC or AAC, can so easily be obfuscated or frustrated. In such a context the informational asymmetries between the outsider seeking to indict the firm as a predator and the insiders defending the firm, are such that in most instances the firm is better placed to win the cost classification debate. Not because it is necessarily doctrinally correct, but because it has command over the accounting choices".

The Tribunal found that pricing below ATC would be exclusionary if further factors show that it is. The Tribunal considered whether direct and indirect evidence indicated that the pricing below ATC was "part of a plan for eliminating a competitor".[14] It looked at whether the firm was or would reasonably be able to recoup losses and finally whether an equally efficient competitor would have been able to compete effectively with the pricing behaviour of the firm. The Tribunal correctly pointed out that the EEC test as such would perhaps be too lenient in a country such as South Africa but it could be considered with other factors.

In the formulation of a new, wording some attempt should be made to gain from the learning that has already been built up in the South African case law. We propose that this provision should be reformulated as follows:

"8(d)(iv) Selling goods or services below an appropriate measure for costs if there is evidence that it is likely to exclude competitors or selling goods and services below a relevant cost benchmark"

A relevant cost benchmark should then be defined in section 1 as:

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[13] Par 92, 218.
[14] Taken by the Tribunal from the European Akzo case par 72.

"Marginal cost, average variable cost, average avoidable cost, long-run average incremental cost of a firm or any other standard for determining the costs of a firm that is reasonably similar to any of these cost standards"

## 3.7 Clause 3: Margin Squeeze (CAB 8(d)(vii) [15]

This is a welcome inclusion, although the term is not defined.

Padilla is quoted by the Tribunal in the Senwes case as listing the following requirements for a margin squeeze:

(1) The supplier of the input (or translated into our jurisprudence the dominant firm) is vertically integrated;
(2) The input in question is in some sense essential for downstream competition
(3) The vertically integrated dominant firm's prices would render the activities of an efficient rival uneconomic
(4) There is no objective justification for the dominant firm's pricing arrangements.[16]

It seems that it would greatly add to the meaning/ clarity of the term margin squeeze if these concepts could be included in the definition of the abuse.

## 3.8 Clause 4: Price discrimination (s 9)[17]

Price discrimination is usually seen as benign by economists and while it is clear that policymakers in South Africa will require the South African provision to operate for the protection of small firms it must be pointed out that this will mean that 1) South Africa will depart from many other legal systems 2) The law as applied may in some respects harm the competitive process and especially the interests of consumers and other purchasers. It is therefore suggested that this provision should strike a careful balance and that the CAB

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[15] P.16 and 62 par 3.6 read with p. 29.
[16] See O'Donoghue and Padilla, op. cit. page 310. The authors have derived this test based on a notice of the European Commission on the application of competition rules to access agreements in the telecommunications sector.
[17] P. 17 and 63 par 4.1-4.4 read with p. 20.

would, in its proposed form, go too far, although some of the proposed amendments have much to commend them. Our reasoning is as follows:

Price discrimination was first covered explicitly by the Robinson-Patman Act which was enacted in the United States in 1936. The legislation was inter alia enacted to protect small businesses. It is therefore apparent that the protection of small businesses has always been an important objective for price discrimination. In this sense it is correct that the drafters of the CAB have focused on this provision. But the Federal Trade Commission has in recent years ceased enforcement of this legislation outside of those situations where it would also constitute broader monopolization (abuse of dominance in the US), in terms of the Sherman Act s 2.

In Europe art 102 and its predecessors have specifically covered price discrimination. The provision specifically lists "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage" as a possible example of abuse of dominance. However, the Guidance on the European Enforcement Priorities now specifically determines that price discrimination will be anti-competitive only if it would hamper competition from an equally efficient competitor or a competitor that is as efficient as the discriminating firm. [18]

It, it is therefore clear that many competition authorities have lost their appetite for addressing price discrimination as it seldom harms the competitive process in the broader sense and consumers more specifically. In reality price discrimination may be beneficial to many purchasers including many consumers. It will allow producers to acquire a part of what would otherwise be consumer surplus but could lead to absence of a dead-weight loss as marginal consumers are still able to obtain products.

The proposal to shift the burden to prove that price discrimination will have the effect of preventing or lessening competition definitely is beyond the pale. Price discrimination, even if the provision is aimed at protecting small firms, will only prevent or lessen competition in a relatively small number of cases. Upstream firms will seldom have the incentive to harm competition on other levels of the distribution chain as it will be in their interests that those firms should be efficient. We very strongly recommend that this reverse onus be reconsidered. It was clear from the *Nationwide Poles* CAC judgment[19] that the court believed evidence of anti-competitive effects to be important to the architecture of this provision and it is suggested that there is no need to depart from that, especially if it is considered that the Commission, with all the power, skills and resources that it has at its disposal, will often have to bring these cases.

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[18] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/2 pars 23–27.

[19] *Sasol Oil (Pty) Ltd v Nationwide Poles* CC 49/CAC/Apr05 37-39 rejecting the approach in the Tribunal according to which competitive relevance was regarded as sufficient.

We find it particularly problematic that the addition of the word “and” at the end of the new s 9(2)(a) will mean that it will not be sufficient to rely on any of the other grounds of justification unless it can also be shown that the price discrimination is not likely to prevent or lessen competition. This would appear to be incorrect. These clearly should justify price discrimination even where it would prevent or lessen competition.

Nevertheless we strongly support the new section 9(3) that requires competition authorities to consider the effect on small business. If one were to include price discrimination as a separate abuse, it would make sense within the broad context of the Act to consider the effect on small business. This accords with the views expressed in the Nationwide Poles cases and also clarifies the position considerably.[20]

As harm done to small firms often will be the cause of downstream pressure it also makes sense to insert s 9(4) in light of the policy goals of the CAB.

The inclusion however of price discrimination against suppliers is unadvisable, as explained above.

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[20] *Sasol Oil (Pty) Ltd v Nationwide Poles* CC 49/CAC/Apr05 27, 29-29 and the Tribunal *Nationwide Poles* CC *v Sasol Oil (Pty) Ltd* 2/CR/Dec03 par 81-89.

# 4 Clause 6: Deleting the provisions on complex monopolies and other parts of the CAA (s 10A of the 2009 CAA)

In Clause 6 of the CAB[21], provisions on complex monopolies in the CAA that did not come into effect (Section 10A of the CAA, are deleted. This is commendable. Perhaps there is a need to consider all of the provisions in that Act that have not come into effect and to either bring them into effect or delete them. We can provide the list of these provisions with some views on what their fate should be and can provide it on request.

# 5 Mergers

## 5.1 Clause 7: Amendment of the general merger provision 12A(1)(b) regarding the consideration of public interest[22]

The proposed amendment reflects existing jurisprudence.[23] It will ensure that there is no doubt that public interest has to be considered in every merger case. Nevertheless, the commentary to the CAB is perhaps inaccurate, when it states that the competition and public interest analysis is "of equal status". Public interest will have to be considered in every case and conditions are often imposed in order to ensure that the public interest criteria are met, but public interest has never persuaded an adjudicatory authority to approve a merger which cannot be justified on competition grounds or to reject a merger that is not anti-competitive on the mere ground that it would harm public interest.

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[21] P 20 and 63 par 6 read with 32.
[22] P 18 and 64 pars 7.3 read with p 33.
[23] *Harmony Gold Mining Co/Gold Fields Ltd* 93/LM/Nov04 par 42.

## 5.2 Amendment of the criteria in section 12A(2) dealing with creeping concentration and structural features[24]

The CAB adds to the list in section 12A(2), which sets out criteria that may be considered in determining whether a merger substantially prevents or lessens competition. These amendments must be placed in context. From an economics perspective, any effects-based merger analysis has to consider the structure of the market, which includes previous mergers and increases in concentration. The analysis should also take into consideration the history and structural features of any market. Nevertheless, as these are important features, it might be worth specifically requiring that it be done.

From the perspective of law, the adjudicatory authorities have seldom addressed merger cases with reference to the criteria in 12A(2)[25] and they have, in practice, had limited effect, because they are not particularly well formulated or organised. Therefore, these additions probably will not drastically increase the consideration of the issues that will now be included. However, they could somewhat increase the likelihood that the aspects will be "explicitly considered".[26]

### 5.2.1 Economic context

Even so, we note that these amendments reflect a deeper concern with the impact of of large firms, operating in a multitude of markets in South Africa, on competitive outcomes and dynamism in the economy. Below we reflect on its implications for competition policy and suggest a number of changes to align the amendments with economic theory.

The proposed amendments include two new provisions on "related markets". The rationale provided for the proposed amendments hold that an assessment of the position of a merging party in a market "related" to the market under investigation will assist in addressing creeping concentration. This is inconsistent with the economic definition of concentration: the market structure in a "related" market (for example, as evident in the market share of the merging party in that market) does not feature in the calculation of the HHI (or any other concentration measure) for the market under investigation. Concentration

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[24] P 18 and 64 par 7.1-7.2, 7.4, 7.5 read with p 33.
[25] *African Media Entertainment Ltd v David Lewis* 68/CAC/Mar07 01/12/2008 par 12 where s 12A(2) was called a "guidance" and par 17 where it was stated that these are "pointers" that "aid" the enquiry of competition authorities.
[26] See the Background Note 18.

measures in competition policy are based on a particular market. Nevertheless, one may argue that such a multi-market approach is necessary, given ownership concentration and their potential competition problems.

#### 5.2.1.1 Conglomerate effects

To our minds, the salient competition concern that underlies the proposed amendment relates to conglomerate effects of mergers. Yet conglomerate mergers – like vertical mergers – are often deemed pro-competitive. If a merger allows the combining firms to bundle a variety of products, it will generally increase consumer surplus and variety. In fact, conglomerate mergers may well facilitate exactly the type of innovation that policymakers would like to encourage.

The theory of (harmful) conglomerate effects does not enjoy strong support in economics. In fact, in a summary (albeit dated) of conglomerate effects analysis in the EU, Neven[27] notes that, of the five conglomerate effects raised by the European Commission in previous merger cases, only one concern enjoys some support in economic theory. The concerns that enjoy little support include (i) arguments relating to economies of scale and scope in supplying products in neighbouring markets, (ii) economies of scale for buyers of products from neighbouring markets (i.e. the claim that efficiency hurts consumers), (iii) spillover benefits from strong to weak brands (merged entity can "prop up" weaker brands at the expense of competitors), and (iv) potential competitive effects and substitution away from weaker substitutes. None of these concerns found much support in court or in economic theory. There appears to be some support for a fifth concern, related to contingent sales, where a merged entity may use a "must have" brand to force continued sales or marketing also of its weaker brands in adjacent markets. The theory is not well developed though.

Another potential competition concern that could be underlying this amendment is post-merger foreclosure. For example, if one of the "related" markets is an upstream input market and one of the merging parties is a dominant firm in that market, it is possible that the merger may create the incentive and ability for the merged entity to foreclose its rivals in the relevant market from access to this input. But these are standard competition problems that can be dealt with in the existing framework.

A third potential competition concern driving the amendment could be a concern with the coordinated effects of mergers, especially in light of the emphasis on common board members. Yet a theory of coordinated effects based on "related markets" is far from clear. Coordinated effects result from increased post-merger concentration – the reduction in the number of competitors increases the probability of successfully coordinating, in part due to the larger rents that can be obtained from collusion. It is therefore

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[27] Neven, D.J. 2008. *Analysis of conglomerate effects in EU merger control*. In: Paolo Buccirossi (ed): Handbook of Antitrust Economics. London: MIT Press.

difficult to see how relations between a merging party and other rivals in related markets have any bearing on collusion in this market.

Finally, there is a theory of multi-market concentration – as alluded to in the context provided by lawmakers – which is less concerned with the competitive effects of a merger and more with the extent to which merging parties are already active in the economy at large. Consideration of these issues would from an economics perspective depart from orthodox competition policy completely and it should be very carefully considered.

5.2.1.2 Related effects

The proposed amendments will have to clarify the concept of a "related" market, as used in sections 12A(2)(i) and (j). One possible definition could be that a "related" market is one in which there is no overlap among merging parties, i.e. a market in which only one of the parties is competing. In competition cases, the economic analysis does not investigate all markets, in order to focus on those "relevant" markets in which there is competitive overlap among merging parties and, hence, potential competition concerns. Competition analysis is not blind to factors outside of these relevant markets that may affect the competition analysis. An analysis of conglomerate effects requires an analysis of a range of markets, as conglomerate effects, by definition, take place across, rather than within, markets. Put differently, the potential theories of harm – often involving tying or bundling – necessitate an analysis of a range of markets. But even here, not all markets are analysed: the selection of the appropriate "related" markets is intimately tied to the relevant theory of harm. Without such a theory guiding decisions, it is effectively impossible to conduct a basic analysis or to provide guidance to merging parties about what their "related" markets are. The practical difficulty here is that large firms may well be involved in a very large number of markets.

The economic literature and European competition policy on conglomerate effects can be quite useful in defining "related" markets[28]. In principle, there are three possibilities: conglomerate effects may occur across markets that are complements and markets that offer products that are "weak" substitutes, where "weak" means that the products have failed the SSNIP test for inclusion in the relevant market[29]. The European Commission has further clarified what it considers as complementary or "weak substitute" markets, noting that these are either markets of technical complementarity (where products co-function), markets of

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[28] *Ibid* 17.
[29] "Weak" substitute markets also include, in the extreme, products that are not substitute, which are often referred to as markets "independent in demand". We include the latter in our discussion of "weak substitute" markets.

economic complementarity[30] (as per the standard definition of complements), and markets of commercial complementarity[31] (where products form part of a set of products jointly offered by, for example, retailers).

The critical factor that raises the possibility of conglomerate effects in a merger case is the presence of common buyers: for example, only if buyers are purchasing from all of the complementary markets and if a merger involves the combination of firms each operating only in some of these markets, would bundling of products be attractive to the merged entity.

This would suggest that the proposed amendments have to be altered to reflect (i) the contingent nature of analysing “related” markets (only in the presence of common buyers) and (ii) a definition of “related” that aligns with the definitions adopted by the European Commission. While this may be a task for the competition authorities, the risk of a vague concept, such as “related”, not being defined or, at least, contextualised (by connecting it to a theory of harm that lawmakers have in mind) is that amendment can be used to target large firms simply for having a presence in a large number of markets.

### 5.2.2 Legal remarks

We now proceed to evaluate these provisions from a legal perspective.

#### 5.2.2.1 Suggestions and legal remarks on s 12A(2)(i) and (j)

The new section 12A(2)(i) contains a spelling error. It should read “the extent ~~of~~ to”. Moreover, company law no longer refers to “members” when it refers to shareholders. The reference to members should therefore be replaced. It would also appear as if the proposed provisions can be improved more generally. It does not appear as if the proposed (i) and (j) deal with different issues and it is suggested that they can be combined. Moreover, it is suggested that it is not necessary to refer merely to the extent of the relation but that ultimately it should be about the impact. Extent should be considered in determining impact, but it is perhaps not necessary to make this point explicitly. We also believe that the provision perhaps should be extended to

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[30] Economic complementarity would aligh with an approach in which markets are considered “related” if they are directly vertically related to the relevant market, i.e. markets directly downstream or upstream of the relevant market. An input or wholesale market and a downstream retail market would be “related” in this sense, as they can be seen as complementary. As current merger control adequately deals with such “related” vertical markets and their impact on the relevant market, related markets based on economic complementarity should probably exclude vertical relationships.

[31] Commercial complementarity would align with an approach in which “related” markets are similar product markets in alternative geographic locations in South Africa (where the relevant geographic market is local or regional) or, where the geographic market is national, alternative product markets (perhaps with products sold by the same firms).

other firms in the same markets in which merging parties operate. We therefore propose that inserted provisions should read as follows:

"(i) the relationship that the merging parties have to other firms in the relevant market or markets or related markets, whether through shareholding or other similar interests held by the merging parties, common shareholders or other interest holders in merging parties and other firms or common directorships in the merging parties and other firms".

5.2.2.2 Suggestions and legal remarks on 12A(2)(k)

We are perplexed by the explanation that is given for the addition of the new 12(2)(k). The view expressed in the background note, namely that the addition of 12A(2)(k) will create a duty to disclose merger activity in the last three years, is misguided. Section 12A(2) does not constitute a duty to disclose. It will be clear from the earlier analysis that s 12A(2) does not create duties of disclosure. However, the provision perhaps still makes sense if it is to fulfil a more limited role: to require adjudicatory bodies to consider mergers concluded in the preceding 3 years when a transaction is notified, even if preceding mergers were not notified or notifiable. The limits of this provision should nevertheless be realised:

- As the parties to the merger will have to meet the threshold requirements, it is unlikely that other significant mergers which they conclude will not. So it is unlikely that earlier mergers will be under the radar.
- The provision will not cover transactions that are not mergers, that is where no change of control occurred. These types of transactions will have to be considered in terms of the new 12A(2)(i) and 12A(2)(j) (our proposed 12A(2)(i).
- The notified merger can be rejected on the basis of creep but preceding transactions cannot be undone retrospectively (see s 13(3)).

This will suffice if the aim is to consider creeping market concentration. If the aim is to consider creeping concentration of ownership, there perhaps is a need to state that "any significant transactions by which parties to the merger have increased their interests in firms in the relavant market or relevant markets or related markets within the last 3 years should be considered".

5.2.2.3 Suggestions and legal remarks on other parts of s 12A(2) and final proposal

As mentioned earlier, it should also be pointed out that the list in section 12A(2) was taken mostly from Australian law.[32] It would appear that the list not only requires additions but it perhaps is in need of broader reformulation. We perhaps would propose that the entire list be reformulated as follows:

"(a) the actual and potential level of import competition in the relevant market or markets;

(b) the ease of entry into the relevant market or markets, including tariff and regulatory barriers;

(c) the level and trends of concentration in the relevant market or markets~~, and history of collusion, in the market~~;

(d) the history and likelihood of collusion, in the relevant market or markets

(e) the degree of countervailing power in the relevant market or markets;

(f) dynamic competition and the dynamic characteristics of the relevant market or markets, 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 from the relevant market or markets;~~.~~

(i) the nature and extent of vertical integration in the relevant market or markets;

(j) the extent to which the parties to the merger operate in related markets;

(k)(l) and possibly (m) or the versions proposed above should then follow."

[32] Australian Trade Practices Act 1974, s 50(3), and, to a lesser extent, from the Canadian Competition Act 1985, s 93.

## 5.3 Clause 7: The proposed amendment to the public interest provisions in section 12A(3)[33]

It is commendable that the drafters intend to strengthen the public interest provisions in order to accommodate a wider consideration of the interests of small firms and participation of historically disadvantaged persons. In most situations it is perhaps better to deal with concentration of ownership as a public interest rather than a competition issue, although there may be some overlap. At the same time the limits of public interest in promoting greater participation by historically disadvantaged persons and ownership by such persons should be borne in mind.

The Tribunal has now accepted in *Vodafone Group plc/Venfin Ltd*[34] that it would take an:

"enormously ambitious reading of this provision to contend that it empowers us to require parties to sell the interest, which is the subject of the merger, not to their chosen acquirer but to a person, or class of persons, of our making. We have also previously expressed a deferential view to public interest issues in our interpretation of the Competition Act, where other instruments of regulation deal with issues".

From an economics perspective, this approach is at least partly because of the less rigorous analysis associated with an evaluation of public interest issues: the analysis of the competitive effects of a proposed merger is currently much more sophisticated than the analysis of a proposed merger's impact on a set of public interest provisions. In particular, there is an established analytical process in competition analysis: for both market definition and the assessment of a merger effects, economists draw on a broad set of established quantitative and qualitative tools and sophisticated economic theory. In contrast, the public interest considerations are often qualitative in nature and far less rigorous. More important, merger specificity – i.e. the matching of effects with the particular transaction under consideration – is a central concern for competition analysis, whereas the necessarily broader aims of the public interest provisions may make this link more difficult. Perhaps some difference is inevitable, as public interest provisions are attempts at incorporating industrial and broader economic policy considerations into competition policy. Even so, these differences in rigour imply limits to a reliance on public interest provisions, especially if one seeks to have an economics-based competition policy.

As noted, the differences in rigour, as is recognised in case law, can be traced to the broad nature of the public interest provisions. Whereas the competition analysis is rooted in a market-based analysis, the

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[33] P 18 and p 64 par 7.3 read with p 34

[34] *Vodafone Group plc/Venfin Ltd* 110 & 111/LM/Nov05 pars 15ff. See also the approach in *Anglo American Holdings Ltd/Kumba Resources Ltd* 46/LM/Jun02 pars 167, 170.

public interest assessment has no specific unit of analysis or direct link to the relevant market under investigation. Consequently, we note that the proposed amendments to section 12A(3)(c) and the additional 3(e) – which both relate to small business and, in particular, businesses owned or controlled by historically disadvantaged people – narrows some of the broad statements to a specific market-based criterion. There is now reference to "the ability of … to effectively enter into, participate in and expand within the market" and "the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons in the firms in the market".

In this regard we note that section 12A(3)(c), in particular, is consistent with competition economics, to the extent that it requires a merger assessment to explicitly consider new entry.

It may also be an opportune time to consider changing section 12A(3)(a), (b) and (d) to reflect a market-based or market-linked assessment of all public interest provisions. Given the increased attention given to the employment effects of mergers, it is useful to think about ways of making the employment analysis more rigorous and merger-specific. It would also be an opportune time to remove terms that may create confusion - we note that section 12A(3)(d) refers to "international markets", although this market term is probably not used in the same way as it is used in most of the Act and could be replaced by an alternative term.

As far as the new section 12A(3)(e) is concerned, we note that it, may strengthen the consideration of a greater spread of ownership in merger cases, though we doubt whether it is likely that a merger will be rejected on this basis. The provision will however require firms to give careful consideration to the BBBEE components of mergers and is consistent with government's broader social objectives.

## 5.4 Clause 8: The proposed provision that concerns mergers by a series of transactions (CAB section 12B)[35]

Merger notification allows parties to a merger to implement the merger once approved. Where mergers do not have to be notified, as in the case of most small mergers, the protection that is given by the termination of the waiting period gives the necessary certainty that allows firms to proceed with the implementation of a merger. The cost and uncertainty that will be brought about by willy-nilly attempts of the competition authorities to undo implemented transactions will be very harmful to the economy. A fine balance therefore has to be struck in a provision such as this one and it has to be very carefully formulated to ensure that its

[35] P 18 and p 64 par 8.1-8.2 read with p 24.

boundaries are clearly understood. It currently falls short of these two standards. Some of the uncertainties created by this provision will be briefly highlighted.

- There is a strong view in the South African competition jurisprudence that a chain of transactions that are concluded to establish a merger will all be treated as one broader merger transaction. These constituent transactions will have to be notified and approved before any one of the discrete transactions are implemented. The relevant adjudicatory body will consider all the constituent transactions together in determining whether the merger should be approved or not. It is not clear how Section 12B will relate to the existing law.[36] It is not clear from the proposed Section 12B(1) whether some or all of the existing learning will be applicable here. It is not clear whether transactions that are concluded over a period longer than 3 years could still be part of a chain. It is also not certain whether the provision "result in" will reflect the competition jurisprudence or whether it will include any transaction concluded within three years of the conclusion of the transaction in the chain that will effectively mean that the series will constitute a merger.
- There are clear conflicts between Section 12B(1) and 12B(2). Section 12B(1) makes it apparent that the provision applies to two or more transactions that result in a merger. However, 12B(2)(b)(ii) determines that a transaction that strengthens control (i.e. a transaction that is concluded after the merger), would have to be included here. Although 12B(1) clearly applies to transactions leading up to a merger transaction, 12B(2) applies only to such transactions where they constitute control in terms of 12(2)(g) (see 12B(2)(b)(iii)).
- The difficulties mentioned under the first point of the previous heading are further promoted by Section 12B(4) which makes it clear that strengthening of a merger will not be covered if it takes place in accordance with Section 12(2)(a)-12(2)(f). It will further be difficult to deal with transactions that fall within 12(2)(a)-12(2)(f) if they can also be covered by 12(2)(g) (as will normally be the case).
- Reliance on Section 12(2) is problematic as mergers may also be established in other ways. These are the mere bright line provisions. They do not constitute a numerus clausus. The bifurcated transaction in the Edgars case mentioned above would not be covered by this provision.
- It is not immediately apparent why the power to treat the transaction as one is given to the Commission and the Commission alone. Perhaps it could be argued that all notifiable mergers have to be notified to the Commission, but it would appear that provision is intended to apply beyond the notification phase.

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[36] *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 43/CAC/Nov04 27 January 2005 23–25 where the court considered the legal principle that considers form over substance and the intention of the parties. See also *Commission v Edgars Consolidated Stores Ltd* 95/FN/Dec02 pars 9, 13–19, 42–43, 66 where the Commission protested against an "artificial bifurcation" of a transaction.

- It may be difficult to determine how the three-year period mentioned in Section 12B should be calculated. There is no reason why all the transactions should be treated as occurring on the date on which the last one occurs.

It will be difficult to apply this provision and little will be gained from it. It is proposed that the aims of this provision can be achieved in a much simpler way. It would seem to us that the legislator wants to insure that transactions in a chain that constitutes a merger should not be implemented, unless constituent transactions are considered together. For this purpose a deeming provision would suffice. We propose that a provision can simply be added to section 12. This provision Section 12(3) could then determine: "Where an acquiring firm obtains control as defined in this provision in a target firm or over its assets, all transactions by which the acquiring firm has directly or indirectly acquired shares in, other interests in or assets of the target firm, that are concluded in the 3 years preceding the last transaction culminating in the change of control, will be regarded as one indivisible transaction to establish control, unless the parties to the merger can prove that any of those transactions were not concluded with the intention to obtain control over the target firm". Perhaps the provision can be more elegantly drafted but this should be its gist.

If our proposal is accepted, any implementation of any of the preceding transactions will be gun-jumping and all aspects of the entire series of transactions will have to be considered.[37]

## 5.5 Clause 9 and 10: Explicitly granting the Commission and Tribunal powers to impose conditions to protect the public interest (section15(1)(b) and16(3)(b))[38]

The proposed amendments and addition to Section 15(1)(b) and 16(3)(b) should be reconsidered. These two provisions state that the Commission, in the first, and the Tribunal, in the second, may "make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) and (c)".

The Background Note states that:

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[37] Compare where a merger was not notified, Netcare Hospital Group (Pty) Ltd/Community Hospital Group (Pty) Ltd 68/LM/Aug06 5/11/2007 pars 9ff.

[38] P 19 and p 64-65 read with 30-31.

“These amendments aim to reflect and consolidate the jurisprudence developed by the Competition Appeal Court and Tribunal recognising the breadth and scope of conditions that can be imposed to creatively address the public interest impact of mergers”.

This seems to suggest that the aim of these amendments is merely to confirm the power of the Tribunal to impose conditions to protect public interest. If this is the purpose of these provisions, then they are in the wrong part of the Act. These provisions should then be added to Section 13(5)(b), 14(1)(b) and 16(2), or it should, at least, be related to those provisions.

The Memorandum states that:

“Section 15 [and s 16] regulates the Competition Commission’s powers to revoke its approval of an intermediate merger. Revoking approval of a merger is in many cases a drastic remedy and may in certain circumstances be inappropriate or impractical. This amendment provides that the Competition Commission may make an appropriate order regarding any condition relating to the merger, including those relating to employment, small businesses and firms owned or controlled by historically disadvantaged persons”.

This explanation of course differs substantially from the one in the Background Note. The memorandum implies that this provision was inserted to allow for the granting of conditions to protect public interest, although the wording of the proposed provisions would not make it possible to apply them properly in these circumstances. Moreover, the reference in both these provisions, to only two elements of Section 12A(3), makes it clear that the explanation in the Background Note, that these provisions merely confirms the approach of the courts, is not correctly represented here. Given the explanation in the Memorandum, there is also no reason why reference is made to only two parts of Section 12A(3).

It is therefore proposed that these proposals should be abandoned or substantially clarified.

# 6 Market inquiries

## 6.1 Introduction[39]

We strongly support the general role envisaged for market inquiries. This is the most appropriate tool for addressing structural problems in markets. The alternative proposal, namely to set thresholds for market concentration in different markets, is unworkable for the reasons stated in the Background Note (see page 12).

Although the Background Notes and Memorandum do not explicitly refer to other legal systems, they are correct to state that inquiries have been effectively used in other jurisdictions, notably in the United Kingdom (UK), where market investigations have become an important tool for promoting competition.[40] The South African provision is, quite closely, based on its counterpart in the UK.

## 6.2 Clause 18: Description of a market inquiry in section 43A[41]

The definition of market inquiry is sound, but should perhaps be extended to inquiries that apply to more than one market or to a particular sector. It is important that the initiation of these processes should not be hampered by challenges regarding market definition. Many of the inquiries that have been conducted in South Africa have not focused on one particular market. The UK provision from which much of our Chapter 4A is borrowed, has been so extended.[42]

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[39] P 19 and p 66-67 pars 18.1-18.5.
[40] See the Enterprise Act 2002 as amended Part 4 which comprises of ss 131-183.
[41] P 20 and p 67 par 18.6.1 read with p 42.
[42] Section 131(2A) and the concept of cross-market reference. Although the concept cross-market in the UK appears to be unnecessarily narrow.

## 6.3 Clause 18: Addition of the description of an “adverse effect on competition “ in the CAB section 43A(2)[43]

The phrase “adverse effects on competition” is designed to create a lower threshold than the phrase that is used in the CA, which is “substantially prevents or lessens competition” (see p 20 of the Background Note). Nevertheless, it is doubtful whether this standard will be significantly lower. The definition makes it clear that there will only be an “adverse effect on competition” where features of the market “prevents restricts or distorts competition”. The phrase “prevents restricts and distorts” competition, is simply the European and UK (whence this phrase comes for purposes of this Part) equivalent of the South African phrase “prevents or lessens” competition. The “adverse effects on competition” phrase is merely relevant as it determines that this chapter is concerned with the extent to which the “features of the market” will “prevent restrict or distort” competition. When it comes to the threshold, the only significant difference between this and other parts of the Act will be the absence of the word “substantial”. If the drafters really intend to lower the threshold further, they will have to use a weaker term than “prevent, lessen or distort”.

We strongly believe that this threshold should not be lowered further. Chapter 4A allows the Commission to take drastic steps to intervene in the economy and they should be triggered only once a decent threshold is met. Although we do not feel particularly strongly about this, we would prefer the wording “prevent or lessen” to “prevents restricts or distorts”, simply because it fits better with the South African jurisprudence and legislation.

This provision should perhaps be reformulated into a more conventional definition. In this sense it should look more like Section 43A. Nevertheless, we have not made a proposal in this regard.

Again, the definition should perhaps be amended to provide for the possibility that an inquiry may concern “market or markets”.

We therefore propose that the provision should read “An adverse effect on competition in a market is established if any feature, or combination of features, of a market for goods or services prevents, or lessens~~restricts or distorts~~ competition in that market”.

It also is confusing that this term “adverse effect on competition” is not consistently used in Chapter 4A and this will create considerable confusion. The reason for this oversight concerns the manner in which these provisions were copied from the UK. There the term “adverse effect on competition is only added to

[43] P 20 and 68 par 18.8.2 read with p 42.

later parts of the section on “market investigations”, the UK equivalent of market inquiries.[44] We suggest that, from a drafting perspective, it would make more sense to remove the phrase “prevents restricts or distorts competition” in chapter 4A, for which it has been defined in Section 43A with “adverse effects on competition”.

## 6.4 Clause 18: The definition of “features of the market” in section 43A(3)[45,46]

First we propose that this provision should be restated in the form of a definition. The definition appears to be acceptable, with the following exceptions:

- It is not quite clear what “other privileges” in section 43A(a)(3)(a)(iv) means. Would this refer to state privileges or privileges in general? If it concerns state given privileges then perhaps another term should be used. If not then the term is very wide. Would affirmative action or the benefits of an apartheid education for a white entrepreneur fall into this category?
- Should concentration in 43A(3)(b) not refer to “market concentration”?
- Section 43A(3)(e) has been copied from the UK, but it is not clear in the context of the South African law. It should perhaps rather read “conduct relating to the market which is the subject of the inquiry of any customers of firms who supply that market or acquire good or services from that market”.

## 6.5 Clause 19: The basis upon which market inquiries can be commenced (section 43B)[47,48]

We propose minor changes to Section 43B(1)(a). From a drafting perspective, the CAB should make use of its own definitions to avoid confusion. Furthermore the CAB should perhaps distinguish between initiating and conducting of a market inquiry. A market inquiry should commence with a formal publication in the Government Gazette, but it should be conducted through investigations, hearings and a report:

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[44] Enterprise Act 2002 s 134(2).
[45] This provision is an expanded version of the Enterprises Act 2002 s 131(2).
[46] P 19 and 67 pars 18.6.1-18.6.3 read with p 42-43
[47] This provision is quite similar to the UK Enterprises Act s 131(1).
[48] P 19 and 67 par 18.7.1 read with p 44

“43B(1)(a) The Competition Commission, acting within its functions set out in section 21 (1), ~~,~~ may ~~conduct~~ initiate a market inquiry at any time, subject to subsections (2) to (4)—

(i) if it has reason to believe that there is an adverse effect on competition ~~any feature or combination of features of a market for any goods or services prevents, distorts or restricts competition~~ within that market or those markets that will be the subject of the inquiry; or

(ii) to achieve the purposes of this Act.”

Furthermore, it is not obvious what “during a specified period”, in Section 43B(1)(b), means. If it is meant to refer to the date within which the inquiry should commence then it should be reformulated to “within a specified period”. If it refers to the duration of the inquiry, then it should rather be covered by Section 43B(4). Here the distinction should perhaps again be drawn between initiating and conducting an inquiry. We therefore propose that the provision should read:

“43B(1)(b) The Minister, after consultation with the Competition Commission and after consideration of the factors in subparagraphs (i) and (ii), may require the Competition Commission to initiate~~conduct~~ a market inquiry contemplated in paragraph (a) during a specified period”.

This provision means that the Minister only has to consider whether the requirements of s 43B(1)(i) or 43B(1)(ii) are met. He or she only has to consider them. This drastically widens the power to initiate inquiries. A narrower more objective standard would be preferable.

## 6.6 Clause 19: The notice to initiate an inquiry section 43B(2)[49,50]

As noted earlier, we propose that the inquiry should be initiated by means of the publication of its terms. This will require minor amendments to clarify the distinction between conducting and initiating an inquiry. The current provision should be changed to Section 43B(2)(a):

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

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[49] 67 par 18.7.2 p 44

[50] See the Enterprise Act s 133.

A further provision s 43B(2)(a) should then be added and it should state that:

"The Competition Commission may only commence conducting the market inquiry 20 business days after it has been initiated".

It would make sense to determine more precisely what activities cannot be conducted during these 20 days.

## 6.7 Clause 19: Terms of reference (section 43B(4) of CA)[51]

Section 43B(4) provides that the terms of reference must include the time within which the inquiry will have to be completed. The drafters are correct when they state that time limits for market inquiries are desirable. Nevertheless, we have the following comments:

- Is 18 months not perhaps too short? Section 137 in the UK allows for 2 years?
- We agree strongly that it should be possible to impose shorter periods in the terms of reference. In that sense the South African Act is an improvement on its UK counterpart.
- It is not determined when the 18 month period will commence. We would propose that the starting date should be the date of initiation of the inquiry (in the sense that we have described above).
- We wonder whether extension of the 18 month period should not be decided by the Tribunal and whether an ultimate restriction should not be imposed.
- The list of matters that should be in the terms of reference in the UK is considerably longer than in South Africa, but it would appear that the South African requirements are sufficient.

## 6.8 Clause 24: Representations on the terms of reference (currently CAB section 43G(2))

We propose that this provision does not belong with the rest of CAB s 43G (on our proposal 43C(3)). It directly concerns terms of reference and should therefore be dealt with under 43B. It therefore should be added here:

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[51] P 20 and 67 read with p 45

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

We are also concerned that no minimum standards or requirements for notice are set out here. We therefore think that this provision will need refinement.

## 6.9 Clause 19: Section 43B(5) amendment of the terms of reference[52]

This provision is not addressed in the CAB, but it may be necessary to restrict amendments of the terms of reference. However, we have not proposed specific changes.

Where an inquiry was initiated because it was requested by the Minister, it may be necessary for the Minister to consent to amendment.[53] This provision should accordingly read:

"43B(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, provided that the Minister must consent to amendments where a market inquiry follows upon a request by the Minister in terms of section 43B(1)(b)".

## 6.10 Clause 19 and Clause 24: Conducting market inquiries (currently CA section 43B(3), CAB sections 43B(3)(A) and 43G proposed section 43C)[54]

The provisions in the proposals to chapter 4A do not always follow a logical sequence. We propose that Section 43B should deal only with all aspects related to the initiation of a market inquiry and that other aspects should be covered in different sections. That will require a renumbering of the provisions which we will explain. All aspects regarding the conduct of market inquiries should in our view be in s 43C which should bear the heading "Conducting a market inquiry".

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[52] P 45.
[53] Cf the Enterprise Act 2002, s 135 on the extent to which amendments of different kinds of amendments may be made.
[54] P 20 and p 67-68, 69 pars 18.7.2-18.7.4, 18.12) read with p 44-45, 49

This provision should, firstly, contain as section 43C(1) what is currently s 43B(3) (under both the CA and CAB). It currently reads:

“43C(1) 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”.

The exact role of s 49A in market inquiries should be more carefully considered. As we understand it, it cannot be used in the hearings themselves as s 54 will apply in these circumstances. We would think that this provision would be used to extract evidence for investigations outside of hearings.

Next the proposed s 43B(3A) should be added here as s 43C(2). However, there is currently a conflict between this proposed provision and the current CA s 43B(3)(a) (our proposed s 43C(1)(a). The drafters should consider deleting one of the two provisions. It would seem to us that the general provisions regarding confidentiality could be made applicable here. But we do not strongly favour this. Most importantly one of the two should go.

It should more broadly be considered whether the current s 43B(3)(d) is adequate to deal with hearings: when and how they should be held. It is probably envisaged that all inquiries will culminate in hearings? If so this should be specifically stated and all the provisions on hearings should be consolidated as 43C(3)ff. The following issues must be covered here:

- There is reference here to the presiding member but it is not clear what that means. This must be clarified.
- There must be a power to make rules for the conduct of hearings and perhaps other aspects of proceedings, especially when it comes to who may participate and when. Perhaps this can be added to s 21(4) (but see also the statutory provisions below).

What is currently section 43G of the CAB should then be added to this part. Any person can "participate" in the broadest sense by making written submissions to the inquiry (see Clause 19 CAB s 43B(2). But what is regulated here is participation in inquiry hearings. The provision should therefore make it clear that it concerns participation in *hearings* (see p 21 and p 69 18.12 where the constitutional significance of this provision is discussed). Moreover, it is not clear why other Ministers would only be allowed to participate on request of the Minister. We think that this qualification could be scrapped. The provision as a whole should read:

"43C([depending on what other provisions are excepted here]) In accordance with the procedures adopted by the inquiry, the following persons may participate in a market inquiry hearings—

(a) the Competition Commission;

(b) the Minister;

(c) ~~at the request of the Minister, a~~Any Minister responsible for the sector that includes or is materially affected by the market that is the subject of the inquiry;

(d) firms in the market or markets that is the subject of the inquiry;

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

(f) any other person—

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

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

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

The provision regarding inputs about the terms of reference currently CAB s 43G(2) does not appear to belong with this provision and it should be added to the part that deals with terms of reference (see above the proposed 43B).

## 6.11 Clause 19: Publication of the report

This provision should be with all other provisions on publication of the inquiry report (see below).

## 6.12 Clause 20: Matters to be decided in a market inquiry (section 43C in CAB on our proposal 43D)[55]

From a drafting perspective s 43C(1) (in our proposals s 43D(1)) should merely be amended to reflect the defined terms for chapter 4A:

"In a market inquiry, the Competition Commission must decide whether<u> there is any adverse effect on competition in </u>~~any feature, or combination of features, of~~ each relevant market for ~~any~~ goods or services ~~prevents, restricts or distorts competition within that market~~.".

If these changes are not made the threshold of adverse effects on competition which is at the core of the newly conceived CAB would not apply to the evaluation of markets in market inquiries.

We welcome s 43C(2) (that should, on our proposal, be 43D(2)).

Section 43C(3) (our proposed s 43D(3)) currently assumes that the Competition Commission will have to take steps in terms of s 43D in every inquiry. Although the Background Note initially at p 20 takes the view that the Commission is "empowered" to take steps, p 21 seems to make it clear that this is intentional (see also p 68 par 18.8.1 where it is stated that this will impose a discipline on the inquiry although it is difficult to see how this will occur through the imposed duty and 18.8.2 where it is stated that an "obligation" to grant a remedy is created here, 18.8.3 states that it requires the Commission to take steps). However, this does not appear to be sensible. CAB s 43D (on our proposal 43E gives the Commission an extraordinarily wide power to intervene in markets but it must be exercised with care. It is conceivable that the Commission could find that a particular market suffers from certain structural flaws but that they cannot be corrected without causing greater harm than the benefits that would be achieved (see the discussion at p 12 of the background not where these drafters give the best counter against their own proposal that the Commission should be forced to grant a remedy). Finally and perhaps most importantly, the mere fact that there are adverse effects on competition will not necessarily mean that the jurisdictional requirements of s 43D (as numbered in the CAB will be met).

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[55] P 20-21 and 68 paras 18.8.1-18.8.3 read with p 46

Clearly the UK equivalent provision is less strict. It states that it must be determined:

“(a) whether action should be taken by it under section 138 for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;

(b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and

(c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented”.[56]

Furthermore, the CAB s 43C(3)(a) (on our proposal 43D(3)) does not properly accommodate all the other possible steps that are open to the Commission that are set out in current s 43E(3) (previously CA s 43C(3)). We therefore propose the following amendments.

The proposed CAB s 43C(3) should be replaced. The new s 43C(3) (on our proposals s 43D(3)) should combine the spirit of the UK equivalent with the needs of the South African one. The previous list of steps that the Commission could use (CAB 43E(3) previously CA s 43C(3), must be combined with the new proposals in the CAB. This provision should determine

“43D(3) If the Competition Commission decides that there is an adverse effect on competition, it must determine whether and if so what action should be taken~~ in terms of s 43D~~. The actions that can be taken includes:

(a) initiating~~e~~ a complaint and entering into a consent order with any respondent, in accordance with section 49D, with or without conducting any further investigation;

(b) initiatinge a complaint against any firm for further investigation, in accordance with Part C of Chapter 5;

(c) initiating~~e~~ and referring 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~~

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[56] Enterprise Act s 134(4).

(d) making non-binding recommendations to a~~ny Minister, regulatory authority or affected~~ firm to take action to remedy, mitigate or prevent the adverse effect on competition;

(e) making non-binding recommendations for new or amended policy, legislation or regulations to any Minister or regulatory authority;

(f) Agreeing with firms in the market to take such steps as would be required to reasonably and practicably address an adverse effect on competition and having it made a consent order in terms of s 49D;

(g) taking action in terms of section 43D [on our proposal 43E] by means of an enforcement order or recommendation for divestiture in terms of s 60;

The proposal for (d) and (e) is built on s 43E(1) (as it is numbered in the CAB, it used to be s 43C(1) of the Competition Act), 43C(3)(b), 43C(3)(c) (as they are numbered in the CAB) and section 43E(3)(d) (as it was numbered in the CAB this was s 43C(3)(d) of the CA). (see on recommendations 68 18.10)

The proposed (f) is added to allow for consent orders. They would be better than enforcement orders in terms of s 43D (43E on our proposal) as they would at least create some buy-in.

We have no concerns with s 43C(4) which should on our proposals be 43D(4).

## 6.13 Clause 21: Broad remedies to address adverse effects on competition (CAB s 43D, on our proposal 43E)[57]

It is of course necessary to grant the competition authorities the power to take steps to address adverse effects on competition that go beyond the existing remedies to address prohibited conduct and mergers. However, careful steps should be taken to ensure that the power to grant remedies should remain within legitimate bounds. We believe that the current proposed remedy goes very far beyond what would be reasonable and permissible:

- It would create uncertainty for investors. They would have no clear guideline by which they could determine whether their investment in an industry or market is safe and protected by the law. The provision crosses the line between a rule of law and rule by discretion.

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[57] P 20, 21 and 68 par 18.9 read with 47

- Many of the remedies that could be necessary to address adverse effects in terms of s 43D (on our proposal 43E) could be regarded as unconstitutional because they would constitute unreasonable and indeterminate deprivations of property. A property deprivation can take place long before there is an order for divestiture.
- The provision could undermine the basic regulatory scheme of competition law that has carefully and effectively developed over almost 20 years. If the competition authorities wanted to prevent prohibited conduct, why would they go through the complex and rigorous process of a complaint reference if they could simply apply the wider powers that they have in terms of an inquiry? We can think only of one and that is that they will not be able to have administrative penalties imposed through an inquiry but most other remedies would become irrelevant.
- As will become apparent from the analysis of UK law, the powers to grant the new remedy is not sufficiently specific, does not specifically state what and how the new enforcement remedy will work and rests on an incorrect understanding of the role of the Commission and Competition Tribunal in South African competition law.

On the face of it, the proposed South African provision shows similarities with its UK counterpart. But this is only superficially true and the equivalent UK provisions actually show that the this part of the CAB is just too widely formulated. A careful analysis of the relationship of the South African and UK approach is necessary. The CAB s 43D(1) and s 138 of the UK Enterprise Act are similar in the sense that they both determine that the competition authority *must* or *shall* "in relation to each adverse effect on competition, take such action … as it considers to be reasonable and practicable … to remedy, mitigate or prevent the adverse effect on competition concerned". Yet the UK Enterprises Act limits and gives content to this power in various provisions.

\- Section 138 is given content by ss 159 and 161.

> \- Section 159 allows for undertakings to be made to address adverse effects on competition instead of granting unilateral enforcement orders. If a resolution to problems can be reached by means of an agreement then it would clearly be better than issuing orders against participants in the market. The CAB provides for consent orders to be extended to these situations (currently section 49E(3)(a)). This would provide further protection in the sense that consent orders have to be confirmed by the Tribunal. But perhaps the link between these provisions should be clarified.
>
> \- Section 161 places fundamentally important limitation on section 138 of the UK Enterprises Act.
>
> > \- It firstly states that the Competition and Markets Authority (CMA) which is the equivalent of the South African Competition Commission, "may, in accordance with section 138, make an order under this section". This means that the CMA will not be obliged to make use of s 161

read with 161. Currently the CAB would force the SA Competition Commission to make use of its enforcement remedy in terms of s 143D. This notion has already been criticised above.

- The CMA cannot grant any order. It may only grant one of the orders provided for in Schedule 8 or "such supplementary, consequential or incidental provision as the person making it considers appropriate".

- Moreover, section 161 makes it clear that the action taken in terms of s 138 (the equivalent of s 43D) is not the act that is binding but that an order in terms of s 161 can be made to give effect to s 138. It allows the Competition and Markets Authority, which is the equivalent of the Competition Commission in the UK, to grant binding orders to address adverse effects.

- Section 164 further gives content to what the UK Enterprises Act calls these "enforcement orders". They will be similar to enforcement orders that the CMA may more generally make in terms of the Enterprises Act and will have to comply with most of the rules that apply to those orders. This highlights a further aspect that has to be carefully taken into account here. In the UK, as in European competition law generally, competition authorities themselves have the power to grant remedies. These decisions are then subject to broad reviews by courts. In South Africa, outside the area of intermediate and small mergers, the body that gives final decisions on enforcement remedies is the Competition Tribunal (The point made on p 20 and para 18.3-18.4 where the view is expressed that giving the Commission this power is simply the same as in the merger regime is therefore incorrect. In fact the power of the Commission to grant final orders is rather limited. It may only do so in the context of small and intermediate mergers. This argument accordingly is unconvincing). Accordingly, there is a real need to amend the provision in the CAB to give more direct powers to determine or confirm these remedies to the Competition Tribunal.

- Section 165 in the UK provides for notice to all affected parties to ensure that they have an opportunity to make inputs before an order becomes final (these requirements are set out in schedule 10).

- Section 166-167 in the UK ensures that there will be proper publication and record-keeping of orders. Perhaps these provisions are unnecessarily elaborate but some aspects may also be relevant for South Africa.

We therefore propose that this part of the CAB requires considerable reformulation. This part of the CAB will have negative consequences for investment, will lead to endless litigation about its content and constitutionality and will drive a cart and horses through the basic regulatory scheme of the CA. The following proposals are made:

- The type of order currently mentioned in s 43D should be called an enforcement order.

- The Commission should be forced to determine whether any remedies are appropriate but should not be forced to give enforcement orders (see on the duty to make use of these powers p 20, 21 and 68 18.9).
- Enforcement orders should be the remedy of last resort and if other measures in the CA can be used they should be preferred.
- A clear distinction should be drawn between enforcement orders and other remedies such as recommendations to other authorities. In particular divestiture orders should be separated out from enforcement orders. A divestiture order is a special kind of order that is based on a recommendation (see the manner in which it is currently set out).
- A clearer relationship between consent orders and enforcement orders should be established.
- Enforcement orders should be more clearly distinguished from recommendations.
- The types of consent orders that should be granted should be more clearly circumscribed.
- Clearer procedural mechanisms for the granting of enforcement orders should be established. In particular a greater role should be given to the Competition Tribunal.

We tentatively propose the following:

43E. ~~Duty to remedy adverse effects on competition~~Enforcement orders and divestiture recommendations

"(1) Subject to the provisions of any law or government policy, and if no other remedy mentioned in s 43D(3)(a)-43D(3)(e) would reasonably address the adverse effect on competition and especially if no agreement to address it in terms of s 43D(3)(f) can be reached the Competition Commission may ~~must~~, in relation to that adverse effect on competition, ~~take the action that it considers to be~~ grant an enforcement order if it would reasonably and practicably ~~in order to~~ remedy, mitigate or prevent the adverse effect on competition.

(2) The action taken in terms of subsection (1) may not include an enforcement order to sell any shares, interests or assets of a firm.

(3) Subject to the provisions of any law or government policy, and if no other remedy mentioned in s 43D(3)(a)-43D(3)(f) would reasonably address the adverse effect on competition and especially if no agreement to address it in terms of s 43D(3)(f) can be reached the Competition Commission may, in relation to that adverse effect on competition, recommend [apply is perhaps a better word] to the Tribunal that it orders a firm to sell any shares interests or assets in terms of section 60(2)(c) if the Commission believes that it would reasonably and practicably remedy, mitigate or prevent the adverse effect on competition.

(~~3~~4) The order~~decision~~ of the Competition Commission in terms of subsection (1) and recommendation in accordance with subsection (3) must be consistent with the decisions of its report unless there has been a

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

One aspect that we have not clarified is whether contracts or provisions in contracts can be declared inoperable in terms of compliance orders. We tentatively believe that they should. We have not specifically dealt with the issue in our proposed provision, but the matter should be carefully considered.

The consequences of a failure to comply with binding remedies in this provision still has to be considered. It is proposed that a breach of an order in terms of this provision should be treated in the same way as a prohibited practice. It should lead to administrative fines, injunctions etc. Moreover, it should be possible to claim damages for harm done by breaching these provisions. This should still be addressed.

## 6.14 Clause 19 & 22: Completing the market inquiry and publishing and notification of the market inquiry report (Section 43E(1) of the proposal, 43C(1) of the CA and 43F(1) on our proposal)

We have no major concerns with the basic gist of the proposed s 43E(1) (on our version 43F(1). However, we propose that all the provisions regarding completion of market inquiries, notice and publication should be set out here. We also believe that the relevant provisions could, from a drafting perspective, be set out more clearly.

This provision should commence with what is CAB 43B(6). In the CAB this provision states:

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

We propose that there are two issues inherent in this provision, which must be separated. First, there is the requirement that the market inquiry must be completed within the time envisaged in earlier provisions. Second there are parts that concern the publication with the report. We believe these two parts should be separated:

"~~Subject to subsections (4) and (5), the [~~43F(1). The Competition Commission must complete a market inquiry ~~by publishing a report contemplated in [section 43C] sections 43D and 43E,~~ within the time set out in the terms of reference referred to[contemplated] in section 49B(2)~~ubsection~~ ~~(2)~~ as provided for in section 49B(4) and 49B(5)".

It should then secondly be provided that a market inquiry should be completed by publishing the market inquiry report. An attempt is currently made to address these issues in the CAB (s 43B(6)) as well as in CAB s 43E(1) (section 43C(1) of the CA). Section 43E(1) states:

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

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

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

It has already been stated previously that the part of this provision that concerns recommendations to the Minister should be incorporated elsewhere (see the new proposed 43D) above). The proposal to delete the reference to "or without" which suggests that such recommendations will always have to be made is also unrealistic. It does not even accommodate the possibility that a report concludes that no negative effect on competition is found.

Moreover, this provision is peculiar in that it suggests that the publication of the report proceeds after completion of the market inquiry while it is clear from the proposed s 43B(6) that it is the publication of the report that terminates the inquiry. However, the parts regarding publication in the Gazette and notification to the Minister must be combined with s 43C(6). We therefore propose the following wording:

"43F(2). The Competition Commission must complete a market inquiry by publishing a report in the Gazette and submitting the report to the Minister."

The part of CAB s 43E(2) (previously s 43C(2)) should then be added as s 43F(3):

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

Moreover, it is suggested that there is a greater need for setting out what should form part of the report. The current CAB s 43E(1)(a) and s 43E(1)(b) is entirely inadequate. One aspect that should be carefully considered is whether remedies must or at least should be proposed in the report. But other aspects should also be covered, the report should set out all findings on whether there is an adverse effect on competition. This should be carefully considered for s 43F(3).[58]

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[58] Compare the UK Enterprises Act s 136.

The CAB s 43E(1) currently determines (see CA s 43C(1)) as part of a broader provision, that recommendations to the Minister must be attached to the report provided to him. We propose a wider provision which states that “The report or a summary of the report and non-binding recommendations made in terms of 43D(3)(d) and 43D(3)(e) must be submitted to every person to whom such a recommendation is made”.

## 6.15 Clause 23: Appeals against decisions decisions to grant enforcement orders (CAB section 43F on our proposals section 43G)[59]

At page 21-22 of the Background Note, it is stated that a party under our constitutional democracy is allowed to challenge the outcome of a market inquiry. However, it is clear from CAB 43F (on our proposal 43G) that the CAB merely aims to provide an appeal for decisions regarding enforcement orders in terms of CAB 43D (on our proposal 43E). It is further stated, in the Background Note, that CAB 43G is aimed at providing for an appeal to the Tribunal on the record to prevent reconsideration and replication of the market inquiry before the Tribunal (p 21-22, 18.11). These two observations again illustrate the dangers of CAB 43D (on our proposal 43E). Drastic remedies can be imposed on parties without giving them the benefit of a careful process such as complaint proceedings. Moreover, the provision allows for a wide range of persons to appeal the enforcement orders made in terms of the market inquiry but this is perhaps good considering the impact that these orders could have. It is therefore concluded that, the provision for the most part appears to be acceptable. We only propose small changes. The provision (CAB s 43F(1)) should now read:

“43G(1) Any person referred to in section ~~43G(1)~~ [in our proposal this is now in s 43B] who is aggrieved by an enforcement order issued by~~the determination of~~ the Competition Commission in terms of section ~~43D~~ [on our proposal this is 43G(1)] may, within the prescribed period, appeal against that determination to the Competition Tribunal in accordance with the Rules of the Competition Tribunal.

(2) In determining an appeal in terms of subsection (1), the Competition Tribunal may—

(a) confirm the enforcement order~~determination~~ of the Competition Commission;

(b) amend or set aside the enforcement order~~determination~~, in whole or in part with any order that could have been made by the Commission in terms of section 43E(1); or

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[59] P 21 and 68-69 18.11

(c) make any further determination or order that is appropriate in the circumstances.

(3) If the Competition Tribunal sets aside the enforcement orderdecision of the Competition Commission, in whole or in part, it may remit the matter, or part of the matter, to the Competition Commission for further inquiry in terms of this Chapter.

(4) Any remittal to the Competition Commission in terms of subsection (3) must be completed within six months from the date of the order of the Competition Tribunal."

The revision in s 43G(2)(b) is intended to clarify the types of orders that can be given by the Tribunal on appeal and it should replace the amendments proposed in clause 30 (see below)

Nevertheless there are difficulties with CAB 43F(5) [on our proposal 43G(5). It establishes that:

"Any person aggrieved by a determination or order of the Competition Tribunal in terms of subsection (2) may appeal against that determination or order to the Competition Appeal Court."

We have the following comments about this provision:

There is no apparent reason why this provision is more widely formulated than the provisions regarding appeal. This provision must be reconsidered. Perhaps it should be possible for any person mentioned in terms of CAB s 43F(1) (on our proposal 43G(1)) to participate or oppose an appeal to the Tribunal and then any person who participated in an appeal to the Tribunal should also be allowed to proceed to take the matter further to the Competition Appeal Court.

Although we have not added it to our draft provision, there is a need to determine the standard that the Tribunal and CAC should use here. Perhaps that standard should be transposed from the proposed s 43E(1). The standard perhaps should be "whether the remedy will be reasonable and practicable in order to remedy mitigate or prevent the adverse effect on the market".

## 6.16 Clause 27: Consent orders with parties in market inquiries (CAB s 49D)[60]

Section 49D should be brought into line with the scheme proposed earlier.

[60] P 21 and p 69 par 20 read with 53

"49D If, during, on or after the completion of the investigation of a complaint or a market inquiry, the Competition Commission and the respondent, or any person that has reached an agreemt with the Commission in accordance with section 43D(3)(a) or 43D(3)(f) 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)."

Some amendment of this provision may also be necessary if our proposal on consent orders set out below is accepted.

## 6.17 Clause 30: Extending the powers of the Tribunal for market inquiries CAB Section 58 (also CA Section 58)[61]

The Background Note states that this amendment is proposed to allow the Tribunal to grant any of the orders that it would normally be able to grant in prohibited practice proceedings, in appeals from enforcement orders in market inquiries made in terms of CAB Section 49D (on our version Section 49E). The problem is that the minor amendment of Section 58(a)'s introductory part does not work down into the more specific provisions. These provisions make it quite clear that these remedies with meant to apply to prohibited practices. We place all the reference to prohibited practices in italics to prove the point.

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

(i) interdicting any *prohibited practice*;

(ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a *prohibited practice*;

(iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;

(iv) ordering divestiture, subject to section 60;

(v) declaring conduct of a firm to be a *prohibited practice* in terms of this Act, for purposes of section 65;

[61] P 21 and p 70 par 23 read with p 54 and p 55

(vi) declaring the whole or any part of an agreement to be void;

(vii) ordering access to an essential facility on terms reasonably required;"

Many of these provisions relate specifically to prohibited practices or even to specific prohibited practices. The incompatibility problem cannot be solved by simple amendments.

Moreover, we believe that some of the remedies should not simply be available in appeals on enforcement orders in market inquiries. Should it really be possible for the Tribunal to order divestiture, or impose administrative penalties in terms of this provision? This provision does not accord with the structure that we have set out above (CAB s 43D (on our version s 43E)). Divestiture should be a remedy of last resort and recommendations or references for divestiture should be separated from enforcement orders.

We propose that the solution lies in reformulating CAB s 43F(2)(b) (on our proposal 43G(2)(b); see the discussion of clause 23). It should simply allow the Tribunal to make the same orders as the Commission.

Although the other proposals for amendment to s 58(c)(i) in this clause are perhaps not necessary, we believe that they will serve to clarify the legal position.

# 7 Other procedural and enforcement provisions

## 7.1 Clause 12, 28 & 38: Empowering the Commission to publish a leniency policy (CAB section 43E and 83(2))[62]

The CAB intends to allow the Commission to set out a leniency policy. This is done by means of two amendments:

21(1)(g) —

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

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

“49E Leniency

(1) The Competition Commission must develop, and publish in the Gazette, a policy on leniency, including the types of leniency that may be granted, criteria for granting leniency, the procedures to apply for leniency and the possible conditions that may be attached to a decision to grant leniency.

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

The only aspects in these amendments that require attention are:

- The reference to a grant of leniency in terms of s 43E. This provision does not allow for any grants of leniency and it is therefore proposed that it should be scrapped.
- The link between this provision and the new s 73A is not clear. That provision will be considered below.

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[62] P 24, p 70 21 p 71 31 incorrectly referred to as clause 31 read with p 53-54 and 59

However, we are of the view that the amendments will not be enough to address difficulties with consent orders. The view is taken at p 24 of the Background Note that this provision merely brings the provision into line with the case law but we believe that a much more comprehensive statutory provision will be required to resolve the difficult issues that arise here.

According to the case law the current leniency policy allows the Commission to decide not to refer a particular firm to the Tribunal.[63] However, this creates a number of problems:

- If a person has not been referred that means that section 67(2) does not apply. This provision states that “A complaint may not be referred to the Competition Tribunal against any firm that 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”. There is no completed proceedings before the Tribunal. A new complaint therefore can be brought against the firm. The Commission itself will probably be functus officio but other parties will still be able to commence proceedings in accordance with s 49B(2).
- A party who intends to claim damages will not be able to bring such a claim unless a firm is referred to the Tribunal and a decision is made against the particular firm.[64]
- It is finally still not clear whether the Commission is allowed to settle matters, which is what it does here, without making use of the mechanisms for consent orders set out in s 49D.

We therefore propose that one of four solutions should be applied:

- The provisions of the CAA in s 8 should be applied. If this is done however we believe a more effective approach should be followed to damages claims. However, we consider that this certification process still does not provide adequate protection for damages claimants. Section 8(e) which inserts a new s 50(6) should be improved;
- The Act should provide that firms that have received leniency should still be referred to the Tribunal and that the Tribunal should still make findings against them but that administrative fines may not be imposed on them. The provisions regarding the powers of the Tribunal should be amended to provide for this.
- Leniency certifications should be given the status of Tribunal decisions and details of the contraventions for which leniency is given should set out the nature and extent of contraventions for which leniency is given.

[63] Agri Wire v Competition Commission [2012] ZASCA 134 sien ook [2011] ZAGPPHC 117.
[64] Premier Foods v Manoim NO (20147/2014) [2015] ZASCA 159 (4 November 2015).

- Alternatively it should be provided in the Act that leniency agreements should be approved as consent orders but that the Tribunal can only refuse if the requirements of the leniency policy are not met.

There are also difficulties with the leniency provision in s 73A, which provides for criminal liability in the context of cartels. In short, this provision provides for the criminal liability of a person who has caused a firm to engage in a cartel or who has knowingly acquiesced in a firm engaging in such conduct (CA s 73A(1)). Persons can be prosecuted only if the Tribunal or CAC has made a finding that the firm has been involved in a cartel (CA s 73A(3). The provision then, finally, states that the Commission may not request or seek a prosecution against a person if the Commission has certified that a person is deserving of leniency (CA s 73A(4)). The phrase "deserving of leniency" was defined in the 2009 Amendment Act but this provision has not come into effect.

These leniency provisions should be reconsidered in the light of the solution that is ultimately chosen for dealing with leniency. It is worthwhile pointing out that the provision will be irrelevant on the current approach to leniency applications in terms of which the Tribunal simply does not refer a firm which has received leniency and if it is decided that the Act should provide that mere leniency certifications will suffice. Both these solutions do not lead to findings against a firm that is required in terms of s 73A(3). It is also worth indicating that the current leniency policy and the Act does not contain any provisions that provides for the granting of leniency to persons who are not firms. The proposed CAB s 49E is however wide enough to deal with leniency to persons although the relationship between the two types of leniency perhaps will require further legislation.

We have no qualms with the interim measure proposed as CAB s 83(2), but perhaps some time constraint should be placed on this provision.

"83(2) Until a leniency policy referred to in section 49E is published in the Gazette or for two years whichever comes first, the leniency policy published in Government Gazette No. 31064 (GN 628 of 23 May 2008) and amended in Government Gazette No. 35139 (GN 212 of 16 March 2012) will remain in effect."

## 7.2 Clause 31: Amendment of the provisions regarding administrative penalties CAB and CA section 59[65]

Currently the CA attempts to distinguish between serious and less serious contraventions. In the case of serious and clear contraventions administrative fines can be imposed even on a first contravention (CA s

[65] P 16-17 and p 70 par 24 read with 55-56

59(1)(a)). In the case of less serious contraventions a so-called yellow card applies. Fines could not be imposed on first contraventions but only where the firm committed a similar contravention, a second time (CA s 59(1)(b)).

The CAB proposes that all provisions that provide for this distinction should be amended or deleted to allow for fines to be imposed in all prohibited practice cases. It is proposed that s 59(1)(a) should be amended to allow for the imposition of fines "for a prohibited practice in terms of section 4(1), 5 (1) and (2), 8 (1) or 9 (1)" where it previously referred only to "section 4(1)(b), 5(2) or 8(a), (b) or (d)". It is further proposed that s 59(1)(b) which provided that fines could not be imposed for practices in terms of "4(1)(a), 5(1), 8(c) or 9(1)" should be deleted.

This change is justified on the following basis at 16-17:

"Given the greater certainty that has now been developed since its promulgation, it is appropriate to withdraw the "yellow card" at this time. There is now far greater awareness of the Act's prohibitions of anti-competitive conduct and the serious consequences of non-compliance with its provisions, removing the need for these provisions."

However this justification for amendment mischaracterises the reasons for the bifurcation of prohibited practices in s 59(1). Awareness plays only a very small role here. Some contraventions are simply less serious while it may in some cases be difficult to distinguish pro-competitive and anti-competitive conduct. Vertical agreements are, for instance, often pro-competitive and the risk of false positive are particularly large. But horizontal agreements that are not per se prohibited in terms of s 4(1)(b) may also frequently have positive effects for competition. It may be very difficult for consumers to determine whether they are on the right or wrong side of the line. The argument of the Tribunal is only convincing as a justification for a proposal that the category of prohibited practices that should be protected even on a first contravention should be enlarged. We tentatively agree that all abuses of dominance listed in s 8 should now be subject to fines. Here the learning has sufficiently progressed to allow for fines in cases of exclusionary practices that are not specifically listed in s 8. However, we propose that price discrimination which is often benevolent, horizontal practices that contravene s 4(1)(a), vertical practices except for price maintenance in s 5(2) should not be visited with fines on first contravention. Even if the drafters concluded that fines should be imposed on first contravention, section 58 should perhaps be amended to determine that fines for the last mentioned types of contraventions should only be imposed if the contravention is "serious and deliberate". It seems insufficient that "gravity" would otherwise only be considered as one of several factors that could determine the amount of the fine.

We strongly agree with the further amendments to the fining provisions. Section 59(3)(d) of the CA only requires market circumstances to be taken into account but it is now extended. In determining the quantum of fines "the market circumstances in which the contravention took place, <u>including whether, and to</u>

what extent, the contravention had an impact upon small businesses and firms owned or controlled by historically disadvantaged persons". We believe that it will frequently be better to consider these types of concerns in a provision such as this rather than in substantive provisions.

The extension that is proposed in CAB in the newly proposed s 59(3A), namely that fines can be imposed in single economic entities contradict the South African case law that with reference to the current s 4(5), which concerns single economic entities[66] but accords with the approach in many other legal systems such as Europe. We therefore support this amendment. There may however be some doubt whether this is the correct way to extending liability. Perhaps the European approach should be considered more carefully.[67]

We also suggested earlier that the remedies that can be imposed for breach of compliance orders should be considered here. This provision should be amended to provide for it.

## 7.3 Clause 32: Amendment of the divestiture provision to provide for divestiture in the context of market inquiries (CAB and CA s 60)[68]

As previously mentioned in the analysis of clause 21 in the discussion of market inquiries, the proposals on divestiture are not properly thought through. Those problems are carried over into this provision. To start with there is a serious drafting error here. It is proposed in the CAB that a provision should be added to section 60(2) stating that:

"60(2)(c) after a market inquiry conducted in terms of Chapter 4A, the Competition Commission finds that there is an adverse effect on competition in the relevant market and makes a recommendation to the Competition Tribunal that such an order is appropriate." The rest of the provision currently states that:

"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

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[66] Loungefoam (Pty) Ltd v Competition Commission 102/CAC/Jun 10 par 65.

[67] See Case C-97/08 P Akzo Nobel and Others v Commission and the test that was applied here: does the firm have the ability to exercise decisive influence over the conduct of the subsidiary, and did it in fact exercise such influence during the period of infringement.

[68] P 21 and p 70-71 par 25 read with 56.

(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."

Hence the proposed addition would not makes sense as the introduction in s 60(2) refers to "orders under s 58" while the pre-existing parts of s 60(2) are linked up by use of the connector "and". Moreover, divestiture in terms of recommendations in market inquiries should at least be subject to same protections as contraventions of s 8 mentioned in s 60(2)(a). We therefore propose a more comprehensive amendment of s 60(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

(i) the order is in addition to or in lieu of making an order under section 58; and

(ii) the prohibited practice cannot adequately be remedied in terms of another provision of this Act or it is substantially a repeat by that firm of conduct previously found by the Tribunal to be a prohibited practice.

b) after a market inquiry conducted in terms of Chapter 4A, the Competition Commission has made a recommendation in accordance with 43E(3) and the Tribunal finds that:

(i) it would reasonably and practicably remedy, mitigate or prevent the adverse effect on competition; and

(ii) if no other remedy mentioned in s 43D(3)(a)-43D(3)(f) would reasonably address the adverse effect on competition."

The other proposal for amendment to s 60(4) is unproblematic.

## 7.4 Clause 33 and 34: Providing for appeals to the Constitutional Court and not the Supreme Court of Appeal (CAB and CA s 62 and 63)[69]

The CAB in this part envisages replacement of the provisions in s 62 and s 63 that allow for appeals from the Competition Appeal Court to the Supreme Court or Constitutional Court. In those cases where appeals are possible it now only allows for appeals to the Constitutional Court and the provisions that allowed for appeals to the Supreme Court of Appeal are deleted. The background note states that "The amendments bring the Competition Act in line with amendments to the Constitution" (p 71). However, we disagree strongly that these amendments are necessary to bring the CA into line with the Constitution.

This requires a brief description of the developments that have taken place in this area of Competition law. In brief section 62(1) read with 62(3)(a) sets out matters that are within the exclusive jurisdiction of the Tribunal and CAC. In these situations the Act specifically determines that no appeal beyond the CAC is possible. Initially the Supreme Court of Appeal in *American Natural Soda Ash Corporation v Commission* 554/03 [2005] ZASCA 43 (13 May 2005), 2005 6 SA 158 (SCA) read section 62 in the light of the Constitution and read this provision to mean that such appeals were possible in some cases. This was because the CAC has a status of a High Court (s 36(1)(a)) and the Constitution in s 168(3) allowed for appeals from all High Courts to the Supreme Court. Nevertheless, the Constitution itself has now been amended and the initial position has been restored. The Constitution Seventeenth Amendment a 168(3)(a) now provides "The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament". In cases that fall within s 62(1) no appeal from the CAC to the SCA is possible. However, the CAB amendments clearly are not meant to deal with this situation as it does not purport to amend s 62(1) and 62(3)(a).

The proposed amendment covers section s 62(4), 63(2) and 63(2). They concern decisions by the CAC that do not fall within s 62(1) but under s 62(2). In these cases s 62(3) read with 62(4) currently allows for appeals to either the Supreme Court of Appeal or Constitutional court. Section 63 states how these appeals will take place. The CAB in this context removes references to the Supreme Court of Appeal and therefore will make appeals in these situations to the Supreme Court of Appeal impossible.

"62(4) An appeal from a decision of the Competition Appeal Court in respect of a matter within its jurisdiction in terms of subsection (2) lies to the ~~Supreme Court of Appeal or~~ Constitutional Court, subject to section 63 and ~~their~~ its respective rules."

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[69] P 25 and p 71 par 26 read with 56-57

“63(2) Subject to the Constitution and despite any other law, an appeal in terms of section 62(4) may be brought, ~~to the Supreme Court of Appeal or if it concerns a constitutional matter,~~ to the Constitutional Court~~,only~~ —

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

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

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

Next, the CAB, although it is not quite clear there are drafting problems, determines that s 63(4) should be deleted:

~~“63(4) If the Competition Appeal Court, when refusing leave to appeal, made an order as to costs against the applicant, the Supreme Court of Appeal or the Constitutional Court may vary that order on granting leave to appeal.”~~

The CAB also clearly provides that s 63(7) and 63(8) should be deleted:

~~“63(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 under this Act”.~~

~~63(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”.~~

There is absolutely no amendment of the Constitution that allows only for appeals to the Constitutional Court. There is in fact no doubt that the Constitutional Court has been prepared to defer to the Supreme Court of Appeal on civil issues that arose in competition cases. In recent times the Supreme Court of Appeal has played a constructive role in developing competition law jurisprudence. If the CAC is treated like a High Court then appeals, where they are allowed, should operate in the same way as for ordinary High Courts. In fact section 168(3)(a) excludes the appeal jurisdiction “competition matters to such extent as may be determined by an Act of Parliament”. This presumes that if an appeal jurisdiction still exists, it should at least also be to the Supreme Court of Appeal. Section 167(3)(b)(ii) widens the jurisdiction of the Constitutional Court to non-constitutional matters “if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court”. However, this provision again does not mean that appeals should not be made to the Supreme Court of Appeal. Finally, it will become apparent that Supreme Court of Appeal unlike the Constitutional Court will hear

appeals on leave granted by the CAC. This allows for the CAC to determine that some case should be appealed. The CAC should not be deprived of this power.

There are also further issues that are covered by these amendments in the CAB. Even if the appeals to the Supreme Court are allowed it would seem that s 63(7) is out of date. It should be deleted as proposed.

The CAB removes any references here to the requirement that leave to appeal from the CAC must first be sought from the CAC and that it can only thereafter be requested directly from a higher court (CAB ss 63(2), 63(4). It only provides for leave to appeal granted by the Constitutional Court (CAB s 63(2)(b)). We have limited expertise in this area but at least the following should be stated:

- If appeals to the Supreme Court of appeal remains possible as is proposed here then it makes sense at least to allow for leave to be granted by the CAC. The Superior Courts Act of 2013 states in s 16(1)(c) that "an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal". It could be considered whether this should be a requisite for obtaining leave to appeal from the Supreme Court of Appeal. Again the Superior Courts Act of 2013 should be considered. This provision apparently would allow for rules that would first require leave to be requested from the CAC, as is currently the position as well as a system where leave may be sought from either of the two. If appeals to the Supreme Court of Appeal and the rules on leave are maintained it would make sense to retain s 63(8). We therefore also argue that the proposal to delete it should be reversed.

- In the case of appeals to the Constitutional Court the general approach to appeals to Constitutional matters should in turn be considered. The Constitutional Court has the power to grant leave for appeals of Constitutional matters and special leave in the case of non-constitutional matters. It is clear from r 19 of the Constitutional Court rules[70] that this leave will have to be granted irrespective of whether leave was granted in the court from which the appeal comes. It would therefore in this situation make sense to dispose of any requirement to require parties to apply for leave. Although there could still be some sense for allowing or even requiring applications for leave in the CAC when it comes to appeals in cases that concern constitutional issues, it makes no sense in non-constitutional ones. There is a too high hurdle that will at all events have to crossed in the Constitutional Court.

It is finally proposed in the CAB that the part of s 63(2) which allows appeals on constitutional issues only to the Constitutional Court be removed. The provision previously allowed appeals on constitutional

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[70] See the interim reading that will apply in terms of the practice direction in terms of rule 32(2) replacing existing rule 19 that was issued by the Chief justice but see also the amended s 167(3)(b)(ii) of the Constitution.

matters to the Constitutional Court only. However, this is not the position in other High Courts. Even constitutional issues, outside of declarations that legislation is void can be appealed to the Supreme Court of Appeal. This restriction is therefore unnecessary and its removal is correct. Although the Act does not specifically provide for it, the opposite is of course also true. There is no reason to limit appeals of non-constitutional matters to the Supreme Court of Appeal as s 167(3)(b)(ii) could be used in these circumstances.

In summary we advise strongly against the proposed exclusion of appeals to the Supreme Court of Appeal. The Supreme Court of Appeal should in most cases still be the first port of call in s 62(2) appeals. Section 62(4) should be retained in its current form. Only the parts on leave in Constitutional matters and the restriction thatconstitutional appeals must be made to the Constitutional Court only should be removed from s 63(2). It should now read:

"63(2) An appeal in terms of section 62(4) may be brought to:

(a) the Supreme Court of Appeal with leave of the Competition Appeal Court or if the Competition Appeal Court refuses leave, with leave of the Supreme Court of Appeal; or

(b) the Constitutional Court with leave or special leave as may be required, from the Constitutional Court".

Section 63(4) should be brought into line with these provisions. It should state:

"63(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."

Section 63(7) should be deleted as proposed.

Section 63(8) should be retained in its current form.

## 7.5 Clause 35 (in the memorandum)[71]

This point in the memorandum and background is clearly wrong and can simply be ignored. There is no statutory provision on this.

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[71] P 25 and p 71 par 27

## 7.6 Clause 35: Amendments to the prescription provision (CAB and CA s 67(1))[72]

The proposed amendment does not appear to do much to clarify CA s 67(1): “67(1) A complaint in respect of a prohibited practice that ceased more than three years before the complaint was initiated may not be ~~initiated more than three years after the practice has ceased~~ referred to the Competition Tribunal.” What is perhaps more important is that the prescription provision should be extended to apply not only to initiations but also to situations where complaint proceedings are commenced in other ways, such as where a complaint is submitted in terms of s 49B. It is also not clear why this provision determines that reference to the Tribunal is no longer possible although prescription is determined with reference with the commencement of complaint proceedings. It would finally seem that this provision would not apply outside of complaint proceedings and it must be considered whether this is correct. Should it for instance apply to references by a court (s 65(2)) or applications to make declarations that the Act has been contravened by private parties (s 58(1)(a)(v))?

## 7.7 Clause 37: Amendments regarding the status of Guidelines s 79[73]

The proposal that Guidelines issued by the Commission must be taken into account is somewhat vague. It does not quite address concerns that firms may have about the status of Guidelines. However, as very few decisions on whether the CA has been contravened rests with the Commission, Guidelines would be of limited significance if the adjudicatory bodies were simply allowed to ignore it. In Europe, Guidelines issued by the European Commission do not have to be elevated to this status, as the Commission is the main decision-maker in many contravention cases.[74] We therefore support this provision. We suggest that it will be applied in the following manner: Where a matter is determined in the Guidelines the Tribunal or CAC will have to consider it. They can reject it but they would have to justify the departure.

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[72] P 24 and p 71 par 28 wrongly referred to as clause 36 read with 57
[73] P15 and p71 par 30 wrongly referred to as clause 38 read with p 58
[74] The position in the US is different but there are fewer guidelines in that jurisdiction and it is not possible for private parties to use the mechanisms of public enforcement.

# 8 Annexure A: Concentration

The Background Note contains a separate section dealing with economic concentration in the South African economy. This section correctly reflects the fact that while concentrated markets can stifle competition, large firms might also be more efficient due to scale economies in certain sectors, especially those characterised by high fixed costs. This is the reason cited for the rejection of the idea of a separate standalone statute that would have the explicit aim (and measures) to de-concentrate markets. This is a welcome approach, as a one size fits all prohibition on concentrated markets would be inappropriate.

The chosen path was to introduce many amendments that are jointly aimed at addressing concerns about concentrated markets. In this document, we have provided detailedcomments on these specific amendments in more detail. Even so, we are concerned that the empirical basis for the notion of increasing economic concentration in South Africa is not well established. This Annexure sets out our high-level views on this critical matter.

## 8.1 Long-run concentration levels

Concentration measures cannot be the sole basis for measuring the efficacy of competition policy. Long-run concentration levels tend to fluctuate for reasons other than ineffective competition policy. The recent rise in concentration in the US and other advanced economies are, at least in part, due to the rise of large technology companies. In fact, a large number of new (and highly concentrated) markets have arisen, which did not exist a decade ago. A primary feature of many of these markets is that they are characterized by network externalities, which will in due course result in only a few players. Of course, competition policy should be dynamic and evolve to address new competition problems. Even so, it is quite likely that concentration levels in the South African economy, ten years from now, will be similar to what they are today. Apart from the fact that concentration does not imply lack of competition, such an outcome would not suggest that competition authorities have failed.

## 8.2 Empirical evidence concerning concentration

More important, the concentration results reported in the Background Note offers an insufficient empirical basis for arguing that something is amiss in managing concentration in the South African economy. The only evidence provided on high or increasing concentration levels is the market shares and Herfindahl-Hirschmann Indices (HHI) in Table 1 (p 10) of the Background Note. In this regard, we note the following.

Firstly, the Background Note (p 10) states that:

"Research conducted by the Commission supports a widely-held view that markets in South Africa remain highly-concentrated, some twenty-three years after the end of apartheid"

However, the market share and HHI data shown in Table 1 have no dates and one presumes that these present a snapshot in time. The data is described as covering the period 2009 to 2016, but one would assume that the 2,150 mergers analysed all took place in different years. Econometrically, it is not possible to infer trends from a pooled set of data. The correct approach would be to measure concentration over time, for the same markets. Based on the data provided in Table 1, there is not enough evidence to suggest that concentration has increased. The results as reported lack a time dimension that would allow comparison of the average concentration level in merger cases of 2000, say, with those of 2016. This is difficult with this dataset – as one would have to compare the same market in 2016 with the market in 2000. Increases in concentration would have to be pervasive across all sectors in order to conclude that overall concentration levels are increasing. Generally, a far more comprehensive evaluation of concentration and structural conditions in South African markets, by a panel of experts, is required. If in fact, concentration has decreased (from high levels prior to 1999), then the Competition Act might well have been effective in changing the structure of the economy. We accept that there is a 'widely-held' popular view that concentration remains high in the SA economy – although we also note that there is often confusion between market concentration and ownership concentration. However, this does not negate the need for sound academic research to establish the proper facts.

We also note that there is not enough research on concentration trends over time, and that data restrictions make such research difficult. However, we point out that, based on the published research available, it is not clear that the notion of increased concentration is indeed correct. Several older and more recent publications in leading economic journals have considered this issue. We do not cover the spectrum here, but we note that research by Fourie and Smit (1993) reported upward trends in relative concentration at the time[75]. This was disputed by another leading academic at the time, Leach, who found reductions in overall concentration levels[76]. More recent research by Fedderke and Szalontai (2009)[77] and Fedderke and Naumann (2011)[78] also considered trends in concentration levels. Their main findings were that concentration persisted up to 1996, whereafter it dramatically decreased for all sectors. The decline was

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[75] Fourie, F.C.v.N. & Smith, A. 1993. Concentration, Tariff Protection and Industrial Performance in South Africa. South African Journal of Economics, 61(3):116-133.

[76] Leach, D.F. 1992. Absolute Vs Relative Concentration in Manufacturing Industry: 1972-1985. South African Journal of Economics, 60(4):386-399.

[77] Fedderke, J., & Szalontai, G. 2009. Industry concentration in South African manufacturing industry: Trends and consequences, 1972–96. Economic Modelling, 26:241-250.

[78]

specifically between 1996 and 2001, and was consistent across concentration measures. The authors note that changes in methodology might have contributed to the decline, but they nevertheless conclude that concentration in SA economy has decreased between 1996 and 2001. As this decline would coincide with the implementation of the Competition Act from 1999, this is valuable information which should be further analysed. We would therefore recommend that more research be undertaken in this regard.

Secondly, while 2,150 merger reports may appear to represent a large sample, one does not know how this data is distributed among the sectors reported in Table 1. Concentration is simply a term used to describe the dispersion of market shares between the total number of firms in a market. But in order to measure concentration correctly, one needs market share data for all firms in a sector. It is not clear that the merger filings would have contained accurate data on all firms, as the CC is often mainly concerned with the market position and market shares of the merging firms. Certainly, some of the "average market shares" reported in Table 1 (defined as the 'average market share for a dominant firm in a defined product market'), seem very high.

It might also be the case that relevant markets were defined differently in different mergers (as they should be), but that market shares were then aggregated across different relative markets to derive aggregate sector market shares. Some significant sectors, e.g. banking, chemical industries, construction, etc are not listed. While there are not very good official data sources on concentration in SA, one can consider e.g. the four-firm concentration ration (CR4) between 1982 and 2005 from publications by Statistics SA. According to these official statistics, the CR4 has decreased between 1982 and 2005 in the following sectors: plastic products, glass and glass products, rubber products, etc. This does not mean that overall concentration has decreased, but nevertheless one might want to consider structural changes at sectoral level when dealing with abuse of dominance or mergers.

## 8.3 Role of government policy

We therefore find that the results reported from the study by the Competition Commission of a large number of past merger cases might be an important contributor to the evidence, but remain incomplete. At least in some of the sectors mentioned, government regulation plays a key role in determining entry and, hence, concentration. In communications technologies, for example, licences have a significant impact on the structure of these markets (and related markets). The same is true of financial services, energy and mining. In these markets, government policy often actively limits entry. Competition policy amendments are not likely to effect significant structural change.

## 8.4 Clarifying concepts

There is much reference in the Background Note to “creeping concentration” as well as a confusion of ownership and market concentration (refer to Section 4.2 of this document). These concepts have to be clarified and studied empirically.

Concentration measures have a specific relationship to the relevant market. For example, the HHI relates to the sum of squared market shares. However, the measures proposed will not address concentration in this sense. Preventing mergers on the basis of the position of firms in other markets will not decrease concentration in a given market. Of course, the proposed measures may address structural issues, related to the fact that selected firms hold positions in multiple markets. But that is quite distinct from addressing concentration. It is therefore important to clarify concentration definitions and their relation to competition policy.

Furthermore, some of the proposed changes to the merger provisions relate to so-called creeping mergers. It is neither clear how many past merger cases in South Africa can be seen as “creeping” nor the extent to which “creeping” mergers can be seen as a determinant of high concentration. Again, this requires a more thorough assessment.

## 8.5 Conclusion

While we agree therefore that concentrated markets could be a concern to lawmakers, the levels and, more important, the trends in concentration in the SA economy need to be studied in much more detail and more rigorously before embarking on extensive amendments aimed at dealing with purported increases. It remains critical that lawmakers refer to such research and to existing published literature. Currently, that literature indicates, at best, different trends in different industries.

# 9 Annexure B: Further aspects that require attention

We have identified a number of other issues in the Competition Act, which we strongly believe should be addressed. We list them here very briefly:

- The CA must be better aligned with other legislation. The proposal to amend Section 3, that was made in the CAA of 2009, has not come into effect and the issue should again be considered.
- The presumption in Section 4(2) to 4(4) is in several respects unworkable and it should be strengthened. It could be useful in markets where firms are inter-connected, but not in its current form.
- The provision on single economic entities in Section 4(5) should be extended to other areas, such as mergers.
- The per se prohibition of minimum resale price maintenance is out of step with current economic and legal views (s 5(2)). These provisions are often pro-competitive and will often protect entry and new incumbents in a market.
- The Act does not make it clear when complaint proceedings must be used. This should be clarified.
- The precise context within which and the question whether consent orders in terms of s 49D have to be concluded have to be clarified.
- The Commission is the main enforcer of competition law but it may be deprived of its role where courts make references of competition law to the Tribunal. It should be determined that the Commission should be given an opportunity to prosecute a complaint where a reference constitutes conduct that should be so addressed.
- It should be more precisely determined when parties will be able to apply for declarations that the Act has been contravened, so they can bring damages claims (see s 58(1)(v))
- Gun jumping in mergers should also become practices for which complaint procedures and all aspects of these proceedings should be made applicable (although this may happen in practice, it is not properly accommodated in the Act). It should, for instance, also be possible to claim damages where harm is done because of gun jumping.
- The double jeopardy rule in s 67 and its relationship with market inquiries perhaps still requires clarification.