LAW SOCIETY OF SOUTH AFRICA

SUBMISSIONS TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON ECONOMIC DEVELOPMENT ON THE COMPETITION AMENDMENT BILL DATED 5 JULY 2018, IN RELATION TO AMENDMENTS TO THE COMPETITION ACT NO. 89 OF 1998

Introduction

1. On 11 July 2018, the Minister of Economic Development tabled the Competition Amendment Bill 2018 ("**Amendment Bill**") in Parliament, which proposed new and revised amendments to the Competition Act, 89 of 1998 ("**Principal Act**").

2. Over the past nineteen years, members of the constituent entities of the Law Society of South Africa ("**LSSA**") who practise in the area of competition law have experienced the Principal Act in operation and have observed first-hand the extent of its successes and also its shortcomings.

3. The LSSA is a national non-statutory body which represents the attorneys' profession in South Africa by bringing together in a single entity its six constituent members, the Black Lawyers Association, the National Association of Democratic Lawyers and the Law Societies of the Northern Provinces, the Cape, the Free State and KwaZulu-Natal. The LSSA speaks nationally on behalf of the attorneys' profession. Its specialist committees, of which the Competition Law Committee is one, consists of practising attorneys who are experts in their field of practice.

4. The LSSA believes that the effective and efficient enforcement of the Principal Act is crucial in achieving a free and fair economy in South Africa, to the benefit of its people. If amendments to the Principal Act can address its shortcomings, this should lead to improved competitiveness in markets and enhanced benefits for South African consumers. We therefore trust that Portfolio Committee will find our submissions useful, and we would welcome the opportunity to debate them during the Committee's public hearings on 28 and 29 August 2018. A formal request to make oral submissions accompany these written submissions.

5. The LSSA commends the manner in which a number of shortcomings in the Draft Competition Amendment Bill, which was published for comment on 1 December 2017, have been addressed.

6. However, a number of serious concerns with the Amendment Bill remain. Certain provisions of the Amendment Bill may have the unintended result of softening competition between firms or chilling pro-competitive investment. Moreover, if the ideals of the Amendment Bill cannot be met by a Competition Commission and Competition Tribunal ("**the Competition Authorities**") which are, by their own

admission, under-resourced, this will do severe damage to the well-earned reputations of those institutions.

7. Further, the lack of clarity in some of the proposed amendments may result in inconsistencies in application by the Competition Authorities. Fairness is comprised of both objective and subjective elements. Any inconsistency in the interpretation and application of legislation that is, effectively, the "gateway" to the South African economy could result in perceived unfairness, which may in turn discourage potential investors.

8. The comments of the LSSA set out below aim to (1) clarify aspects of the Amendment Bill that risk creating uncertainty, and (2) mitigate the negative impact on investment and competitiveness that may result from particular provisions, whilst preserving what the LSSA understands to be the underlying objectives of the Amendment Bill, namely to address market concentration and unequal ownership patterns in the South African economy. These submissions are presented with the goal of ensuring that the provisions of the Amendment Bill are as clear as possible to allow for greater certainty for market participants and for the Competition Authorities.

9. We would also welcome engagements on potential amendments that are not currently included in the Amendment Bill, but that may nonetheless be important for improving the efficacy of the Principal Act.

Protocol for the LSSA's comments

10. The LSSA has established a number of working groups to study the Amendment Bill and prepared submissions on the most critical provisions. The LSSA's submissions and comments have been grouped accordingly, into the following <u>three</u> sections:

    10.1 Part 1 - Prohibited Practices;

    10.2 Part 2 - Merger Control, and

    10.3 Part 3 - Market Inquiries.

11. In each section, we repeat the provisions of the Amendment Bill, with the LSSA's proposed amendments in coloured mark up or "track changes" format, followed by a short motivation in respect of each proposal.

PART 1: PROHIBITED PRACTICES

Amendments relating to Chapter 2 of the Principal Act and related sections

Introductory remarks

12. The comments set out below relate to the prohibited practices sections of the Amendment Bill.

13. At the outset, we wish to record the LSSA's support for provisions that seek to recognize the importance of small and medium sized businesses in the economy, as well as firms owned or controlled by historically disadvantaged individuals. Certain amendments are effective in clarifying the fact that these factors (ie., concentration and ownership spread) merit consideration when interpreting and administering the Act. However, significant concerns remain in respect of the provisions set out below relating to prohibited practices.

Amendments to section 1 of the Principal Act

14. Definition of "average avoidable cost"

    14.1 It is proposed that the definition in the Amendment Bill be amended as follows:

    'average avoidable cost' *means the sum of all costs, including variable costs and ~~product specific~~ fixed costs specific to the goods or services concerned, that could have been avoided over the short term if the firm had not produced an identified amount of additional output, divided by that identified amount of additional output;*

15. Motivation

    15.1 The amendments are required to render the definition as an average. In addition, reference to costs avoidable over the short term is important as over time, all costs conceivably become avoidable, and it would be irrational and inefficient to prohibit firms from pricing below long-term cost measures.

15.2 Given that section 8(d)(iv) of the Principal Act refers to "goods or services" it is **recommended** that the definition is broadened to use the same terminology.

15.3 It is **recommended** that the term "good" be substituted for "product" wherever it occurs in the Amendment Bill as "good" is the term used in the Principal Act.

16. Definition of "average variable cost"

16.1 It is proposed that the definition in the Amendment Bill be amended as follows:

'average variable cost' *means the sum of all the costs that vary with an identified quantity of a particular ~~product~~ good or service, divided by the total produced quantity of that good or service;*

17. Motivation

17.1 Given that section 8(d)(iv) of the Principal Act refers to "goods or services" it is **recommended** that the definition use the same terminology.

17.2 It is **recommended** that the term "good" be substituted for "product" wherever it occurs in the Amendment Bill as "good" is the term used in the Principal Act.

18. Definition of "participate"

18.1 It is proposed that the definition in the Amendment Bill be amended as follows:

'participate' *refers to the ability of or opportunity for efficient firms to sustain themselves in the market, and ''participation'' has a corresponding meaning;*

19. Motivation

Absent the qualification that the firms concerned should be efficient, there is a clear risk of the term being used to protect inefficient firms to the detriment of effective competition and consumers.

Amendments to section 8 of the Principal Act

20. General comments

20.1 The LSSA supports the Amendment Bill's objective to more effectively regulate excessive concentration and recognises that the concentrated nature of many sectors of the economy is a legitimate concern. However, the LSSA cautions that measures should not be introduced that could have the unintended consequence of, in practice, outlawing conduct that could be pro-competitive, merely because of perceived risk of enforcement. Certain perceived inefficiencies in the economy might therefore be better addressed through overarching and coordinated industrial policy rather than mere competition law enforcement. Moreover, the Amendment Bill caters adequately for assessment and regulation of the identified issues in less blunt manner through, for instance, market inquiries.

20.2 Certain of the proposed amendments contained in the Amendment Bill appear to be predicated on the view that large firms' participation in a market creates inherent risks and hence the need to create presumptions and a shift of the evidentiary burden in order to better police conduct. However, the Principal Act creates a presumption of dominance based purely on market shares, rather than any assessment of market power or, more correctly, any assessment of evidence indicating the likelihood of the abuse of that market power. For instance, in regard to EU competition law, which is the inspiration for much of the Principal Act, the assessment of dominance is distinct from the mere calculation of market shares, and even dominance, once established, does not raise concerns on its own, and certainly does not raise any onus shift on dominant firms. Antagonism towards concentration in itself may force firms to adopt overly broad internal compliance measures, which in turn creates a risk of effectively proscribing broad classes of conduct (by any firm with more than 35% market share) that may include a good deal of normal, procompetitive,

efficiency enhancing conduct. The evident danger is that firms might be inhibited from competing robustly, or (in the case of the proposed provisions to outlaw buyer power) seeking to lower input costs. The provisions would catch a very large number of firms and could substantially increase the risk of false positives when firms seek to identify potential anticompetitive conduct, with chilling effects on competition in the long-term. If firms do not have the incentives to compete, and win market share from one another, or innovate to create new markets (in which they might enjoy a share of more than 35%), then the fundamental dynamic that drives competitive efficiency, productivity improvements and broad based economic development will be weakened.

20.3 It is submitted that some of the proposed amendments may have the opposite of the intended effect. The requirements in some of the proposed amendments regarding a dominant firm's obligation to ensure that its conduct does not inhibit "participation" does not take into consideration the fact that the dominant firm may be a competitor of the small and medium firms or firms owned or controlled by historically disadvantaged persons ("**HDP-owned businesses**"). There are risks inherent in requiring a dominant firm therefore to cooperate with and assist its competitors or to obtain detailed information from its competitors in relation to their ability to participate in the market in order to discharge the proposed evidentiary burden imposed on the dominant firm.

20.4 It is also submitted that the removal of the "yellow card" offence will, post amendment as contemplated in the Amendment Bill, render section 8(c) of the Principal Act of sufficient import to cover conduct that the Amendment Bill now unnecessarily seeks to codify in the proposed amendments to section 8(1)(d)(vi) and (vii). It is submitted that the apparent preoccupation with codification risks retreating to a "rules based" enforcement paradigm at the expense of a more efficient, effects-based point of departure. The latter approach, which is increasingly the standard approach globally and reflects decades of scholarship on the best ways to promote economic efficiency, allows for more flexible enforcement over time, as policy and circumstances develop, while the former can create a straightjacket for regulation that should be eschewed, and will result in substantial, unintended inefficiencies.

20.5 The proposals below should be taken with the above concerns in mind.

Proposed amendment to section 8(1)(c) of the Principal Act

20.6 Section 8(c) of the Principal is not proposed to be amended in the Amendment Bill (save for deletion of a comma) and currently reads as follows:

8. *(1) It is prohibited for a dominant firm to —*

…

*(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive**[,]** gain;*

20.7 It is **recommended** that the provision in the Amendment Bill be amended as follows:

*(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive**[,]** gain, save that if the exclusionary act affects a small or medium business or a firm controlled or owned by a historically disadvantaged person, the dominant firm concerned must show that the anti-competitive effect of that act is outweighed by its technological, efficiency or other pro-competitive**[,]** gain;*

21. Motivation

As indicated, the removal of the "yellow card" for section 8(c) contraventions renders this section a more powerful tool for enforcement, and obviates the need for a more rules-based approach at section 8(d). In line with the Amendment Bill's efforts to elevate the support of small, medium and HDP-owned businesses, the additional wording creates a stronger enforcement paradigm for conduct affecting such entities along the lines of section 8(d). As indicated below, this will also justify the deletion of some of the problematic additions to section 8, as such

conduct can fall under the rubric of section 8(c) without any signal that the conduct is somehow "softer" in nature.

Proposed amendments to section 8(1)(d)(ii) of the Principal Act

21.1 It is **recommended** that the provision in the Amendment Bill be amended as follows:

8. *(1) It is prohibited for a dominant firm to—*

…

*(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive**[,]** gains which outweigh the anti-competitive effect of its act—*

(i) …

*(ii) refusing to supply scarce **[goods]** goods or services to a competitor ~~or customer~~ when supplying those **[goods]** goods or services is economically feasible;*

22. Motivation

22.1 The reference merely to "customer" is problematic as the failure to supply a party may mean that that party cannot technically be regarded as a customer of the dominant firm. Furthermore, if the goods and services in question are scarce, the requirement should be limited to conduct aimed at foreclosing competitions rather than any decision to efficiently utilise resources. Broadening the rule to effectively outlaw any refusal to deal could lead to a multiplicity of potential actions. In any event, complaints about a mere refusal to deal with a customer can be brought under the revised section 8(c), which is no longer a "yellow card" offence under the Amendment Bill.

Proposed new sections 8(1)(d)(vi), 8(1)(d)(vii), 8(2) and 8(4) of the Principal Act

It is **recommended** that these proposed new sections of the Principal Act, as proposed in the Amendment Bill, be deleted.

23. Motivation

23.1 The proposed **Section 8(1)(d)(vi)**, which proscribes margin squeeze, is merely a codification of well-established case law and should not require its own nomenclature in the Amendment Bill (consequentially, the definition of margin squeeze in section 1 should also be deleted). It is adequately captured under section 8(1)(c), which is no longer a yellow card offence under the Amendment Bill. It is also submitted that the notion of margin squeeze relates more to an analytical framework for an exclusionary theory of harm (i.e., a number of factors need to be present, on a case by case basis) and does not easily align with a legislative definition based on conduct. Although vertical integration is the common thread, margin squeeze could (for example) be seen as a form of predatory abuse (low downstream pricing) or constructive refusal to supply (high upstream pricing by a dominant firm) and each allegation would involve different assertions about the market and conduct. Insofar as margin squeeze is itself something of a portmanteau, it is appropriate that it continue to be dealt with under the (now strengthened, and which the LSSA recommends be further strengthened) terms of section 8(c) of the Principal Act.

23.2 The proposed **Section 8(1)(d)(vii)** reflects the Amendment Bill's continued concern with buyer power, such that the exertion of buyer (monopsony) power is therefore treated as being as detrimental to competition as supplier (monopoly) power. Such an approach is simply not supported by the existing body of economic research, nor international best practice, and is likely to have detrimental effects on the ability and incentive of larger firms to continue to seek out efficiencies, in the form of lower input costs that would otherwise have directly benefitted their customers and ultimately consumers.

23.3 Moreover, it is well accepted that buyer power can be beneficial to consumers. It is a well-founded presumption in competition economics and competition law that buyers that obtain reductions in variable costs will typically pass on at least a portion of these cost reductions to their own customers (irrespective of the competitive conditions that they face in their own downstream markets). Accordingly, to the extent that the buying power of firms is enhanced, this can be expected to lead to such firms reducing prices to their own customers.

23.4 Whilst the LSSA accepts that buyer power can, under particular circumstances, result in competitive harm, it is not appropriate to presume so, even if the buyer/s in question is/are dominant purchasers. Indeed, buyer power is more often likely to result in lower pricing and other benefits in the supply chain (through incentivising suppliers to be more competitive), while supplier power is far more likely to have negative consequences.

23.5 This proposed provision in the Amendment Bill places a large firm at risk simply for attempting to negotiate competitive terms. It will in principle be open to any supplier to allege an abuse of dominance each time that a large firm seeks to negotiate price (or declines to contract, or switches supply to a cheaper source) which not only chills commercial negotiation and contractual freedom but could lead to an unjustified multiplicity of complaints – which is important to consider in light of the Competition Authorities' resources to deal with an even greater volume of complaints.

23.6 By the same token, over-protecting suppliers from the rigours of competition is not an effective way to build a robust and globally competitive marketplace, and will harm the prospects for economic development and broad-based growth.

23.7 It is difficult to see how guidelines which are contemplated in the proposed new section 8(4) might meaningfully assist to provide certainty in this regard. By way of example, if the Commission were to provide guidelines with reference to cost benchmarks of upstream suppliers, it is highly improbable that a dominant purchaser would be expected to know its upstream suppliers' costs. The amendment, as formulated in the Amendment Bill is clearly unworkable for any dominant firm. It is simply

not possible for a dominant firm to reverse engineer what prices would impede the ability of it suppliers "to participate effectively". Clearly such a provision is open for abuse (or misapplication) by suppliers, first to claim that they are "not dominant", and second to claim an inflated price level that is necessary "to participate effectively".

23.8 Rather than create an unworkable, and unintentionally harmful rules-based presumption against buyer power, it is preferable to have any residual buyer power concerns addressed under the strengthened provisions of section 8(c) of the Principal Act, where precedent can be established to better capture the circumstances where such conduct should be regulated – for instance, an appropriate test should logically develop an analogous test to that which has been developed by the case law in to excessive pricing cases, such that low purchase prices might be prohibited if they bear no reasonable relation to the purchase prices that would have prevailed under long term competitive equilibrium (and be lower than those prices). This is not adequately reflected in the proposed Amendment Bill. The LSSA also notes that structural circumstances that evidence anti-competitive buyer power might also be better addressed through market inquiries and merger control.

23.9 The proposed **section 8(2)**, which seeks to introduce a shift of the evidentiary burden in the event of a "*prima facie*" case of excessive pricing (or "prices that would impede the ability of suppliers to participate effectively"), raises a number of concerns:

- It is unclear how a case based on such a mechanism will be run in practice. For instance, at what point in the process will the Competition Tribunal be able to determine that a *prima facie* case has been met, and that the procedure should change to accommodate a shift in the evidentiary burden? It is submitted that the existing provisions of the Principal Act relating to interim relief are better suited to dealing with *prima facie* arguments in a way that balances the rights of respondents with the need for effective enforcement.

- Moreover, it is not clear what would constitute a "*prima facie* case". In general, introducing presumptions to facilitate prosecution might be acceptable only where the relevant provision provides an unequivocal

description of straightforward conduct that triggers the presumption (in circumstances where the nature of conduct itself is relatively unambiguous). This allows one to form a clear, forward looking view of whether certain conduct is likely to trigger a prosecution. Pricing in a market is not susceptible to this sort of presumption.

- Indeed, a broadly acknowledged difficulty in cases of potential excessive pricing is that in all but those markets that conform to the paradigm of perfect competition, firms are able to earn positive mark-ups over their own costs, even if competition operates effectively in such markets. This makes it extremely difficult to identify whether prices are truly excessive or simply reflect those that would be expected to arise under conditions of effective competitive oligopoly, even after a very significant amount of analysis. Given this problem, it is extremely difficult to envisage how establishing a *prima facie* case could ever constitute more than a completely subjective judgment.

- This will likely make it extremely difficult for market participants to assess their conduct and risk in advance of setting a price. It is also not clear (and potentially can never be clear) how a respondent might prove that a price is "reasonable".

- The proposed shifting of the evidentiary burden is likely to chill risk-taking and investment by firms, including foreign direct investment, which is a key driver of economic development and broad-based growth. Equally importantly, for an onus to remain with a regulator imbued with investigatory powers makes sense from a legal and process perspective. For respondents to bear the onus would be patently unfair, where they do not have the same investigatory powers to gather and compel data and information to defend themselves.

23.10 The proposed **section 8(4)** implies guidelines might be issued to "fill in the gaps" left by the proposed section 8(2). However, this elevates Commission-derived guidelines to the status of legislation; and it is potentially unconstitutional for the enforcer to devise the terms under which it would benefit from a reverse onus. See also the comments below on constitutionality and the proposed amendments to section 79.

Proposed new section 8(3) of the Principal Act

23.11 The LSSA **recommends** that the proposed provision be amended as follows:

(3) Any person determining whether a price is an excessive price must consider whether such price bears no reasonable relation to, and is [significantly and persistently] higher than ~~compare that price to~~ a competitive price determined by taking into account all relevant factors;

24. Motivation

24.1 The LSSA welcomes the additional guidance on excessive pricing (although notes that this could be incorporated in guidelines rather than legislation). However, there is appreciable concern that the list of factors, although not a *numerus clausus*, excludes some key and obvious factors to consider, such as a consideration of replacement costs, other economic costs and demand factors. The definition of excessive pricing in the Principal Act, which the Amendment Bill proposes to remove, as developed by case law, has already set out clearer parameters of how an excessive pricing analysis must be undertaken. A mere price comparison may be indicative, but cannot be dispositive, and although the clause provides for "all relevant factors" to be taken into account, a narrow interpretation based on the *eiusdem generis* rule of interpretation risks a responsible economic assessment being excluded. In particular, obvious problems arise due to:

- the absence of a "reasonableness" criterion (that is currently contained in the definition of excessive pricing in the Principal Act that the Amendment Bill proposes to delete);

- the failure to explicitly reflect the ultimate benchmark for excessive pricing that has been established in case law (namely prices under long term competitive equilibrium);

- the absence of a requirement that alleged excessive prices be "significantly and persistently above" the appropriate comparator competitive price.

24.2 Without a clearer definition and ultimate benchmark (prices under long term competitive equilibrium), the other indices are not sufficiently logically linked to an ultimate test.

<u>Submissions on constitutionality of section 8, as proposed to be amended in the Amendment Bill</u>

25. The proposed revisions to section 8, as contained in the Amendment Bill, raise an issue of separation of powers and is arguably unconstitutional as it is currently drafted. Section 8, as proposed to be amended in the Amendment Bill, provides in relevant part that:

(3) Any person determining whether a price is an excessive price must compare that price to a competitive price determined by taking into account all relevant factors, which may include –

…

(f) any guidelines published by the Competition Commission in terms of section 79 regarding the calculation and determination of an excessive price.

26. In addition, section 8, as proposed to be amended in the Amendment Bill, provides in relevant part:

(1) It is prohibited for a dominant firm to –

…

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act—

…

(vii) requiring a supplier which is not a dominant firm, particularly a small and medium business or a firm controlled or owned by a historically disadvantaged person, to sell its products to the

dominant firm at a price which impedes the ability of the supplier to participate effectively.

…

(4) The Competition Commission must publish guidelines in terms of section 79 setting out the relevant factors and benchmarks for determining whether the practice set out in subsection (1)(d)(vii) impedes the ability of a firm which is not a dominant firm, particularly a small and medium business or a firm owned or controlled by a historically disadvantaged person, to participate effectively."

27. The proposed new section 8(3)(f) elevates the Competition Commission's guidelines ("**Commission's Guidelines**") to a factor that may be taken into account in determining whether a price is an excessive price. This has the effect of delegating law-making powers to the Competition Commission, thereby encroaching on the separation of powers between the legislature and an organ of state.

28. Thus, although the new section 79(4) proposed under the Amendment Bill will provide that the guidelines are not binding, the wording of the proposed new section 8(3) will, in fact, render the guidelines binding on firms as the guidelines become a factor that may be given weight in any proceedings relating to a contravention of section 8(3).

29. The result of this provision is that the Commission's Guidelines will, in fact, be an integral part of the government regulation of the conduct of dominant firms.

30. The delegation of law-making powers is not permissible and may render the provision unconstitutional. We therefore **recommend** that the proposed new subsection 8(3)(f) be excised from the Amendment Act.

31. Similarly, the proposed new section 8(4) read with section 8(1)(d)(vii) raises concerns regarding separation of powers, as the Commission is empowered to publish the "relevant factors and benchmarks" for determining whether section 8(d)(1)(vii) is contravened.

32. The result of this provision, as with section 8(3), is that the Commission's Guidelines will, in fact, be an integral part of the governmental regulation of the conduct of dominant firms.

33. This encroachment into the separation of powers is particularly concerning because the Commission is not a neutral body but is responsible for the enforcement and prosecution of contraventions of the Principal Act.

34. In this regard, it is instructive to have regard to the recent Constitutional Court judgement of *Marshall and others NNO v Commissioner for the South African Revenue Service* [2018] (7) BCLR 830 (CC), and in particular the cautionary dicta at paragraph 10 –

> *"Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided.*"

35. Any notion that guidelines should themselves have probative value flies in the face of the principle above.

36. The power conferred on the Competition Commission to make guidelines which set out the "factors" and "benchmarks" to be applied in determining a contravention is a broad discretionary power, which ought to lie with the legislature or be developed by the judiciary. In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8, the Constitutional Court held –

> *"[47] . . . if broad discretionary powers contain no express constraints, those who are affected by the exercise of the board discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision."*

37. Although the Court in *Dawood* accepted that there may be instances where a broad discretion is permissible, for example, where the factors relevant to exercising the discretion are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance, the discretion to make guidelines containing the "factors" or "benchmarks" relevant to delineating a contravention of an Act cannot be broad. The power to set "factors" and "benchmarks" goes beyond the manner of implementation, and encroaches on the decision of what constitutes a contravention of the Act.

38. Thus, while the LSSA does not oppose the Competition Commission having the power to issue guidelines, that power cannot extend to determining the "factors" and "benchmarks" that will be relevant to determining prohibited conduct, as this lacks constraint and effectively amounts to exercising a law-making function.

39. We therefore **recommend** that the wording of section 8(4) be amended in line with the new wording for section 4(6) and 5(4), namely –

> *"The Competition Commission must publish guidelines in terms of section 79 regarding application of this section".*

<u>Proposed amendments to Section 9 of the Principal Act</u>

40. It is **recommended** that the proposed new section 9(3) be amended as follows –

> *<u>(3) Without derogating from subsection (2) w</u>hen determining whether the dominant firm's action is prohibited price discrimination, the dominant firm must show that its action does not impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to participate ~~effectively~~.*

41. It is **recommended** that the proposed new section 9(4) be deleted.

42. <u>Motivation</u>

    42.1 It seems appropriate that the provisions of section 9(2) remain absolute defences and it is difficult to square that with the provisions of **section 9(3)**. The proposal clarifies the primacy of 9(2).

42.2 The introduction of the word "effectively" in **section 9(3)** serves to modify the defined term "participate" in a manner which is not clear. It is submitted that the test established under the definition of "participate" in section 1 of the Principal Act (as amended by the Amendment Bill and if the **recommended** proposal of the LSSA above is adopted) is sufficiently clear and the introduction of the word "effectively" introduces a potential for debate and litigation that threatens the efficacy of the provision.

42.3 The proposed new **section 9(4)** purports to regulate discrimination in the case of purchase prices. However, unlike sales by a dominant firm, which is "one to many", purchases by such firms are "many to one" and thus far more difficult for a purchaser to self-regulate. As a point of departure, and as discussed in some detail above, conduct that potentially lowers input pricing should not be treated as the corollary of higher selling prices and the proposed amendment is likely to have unintended consequences for price inflation as it strongly disincentives robust negotiation on price.

The proposed amendments to section 10 of the Principal Act

43. The proposed new sub-section (2A)

It is **recommended** that the proposed provision should be amended as follows:

(2A) Unless the Competition Commission and the applicant agree otherwise, the Competition Commission must grant or refuse to grant the exemption referred to in subsection (2) within ~~one year~~ six months of the receipt of the application or within such period as may be prescribed in terms of section 78.

44. Motivation

It is submitted that a period of one year is excessive. Generally speaking, applications for exemption are driven by pressing commercial or economic circumstances and there is therefore need for a swifter resolution of applications.

45. The proposed amended sub-section (3)(b)(ii)

It is **recommended** that the proposed provision should be amended as follows:

(ii) promotion of the [ability of] effective entry into, participation in ~~and~~ or expansion within a market by small [business,] and medium businesses, or firms controlled or owned by historically disadvantaged persons [, to become competitive];

46. Motivation

Presumably the legislative intention is for either criteria to be met, not both. It is recommended that this should be made clear by the use of the word "or" instead of "and".

The proposed new section 59(3A)(a) of the Principal Act

47. This proposed provision should be amended as follows:

(3A) In determining the extent of the administrative penalty to be imposed, the Competition Tribunal may –

(a) increase the administrative penalty referred to in subsections (2) and (2A) to include the turnover of any firm or firms that control the respondent, where the controlling firm ~~or firms knew or should reasonably have known that~~ is shown to have directed the conduct of the respondent ~~was~~ engaging in the prohibited conduct; and

(b) on notice to the controlling firm or firms, order that the controlling firm or firms be jointly and severally liable for the payment of the administrative penalty imposed.

48. Motivation

The notion that mere knowledge or imputed knowledge of the conduct of a subsidiary or controlled entity is insufficient to found liability and offends against the notion of separate corporate identity and amounts to statutory piercing of the corporate veil. The proposal also places an undue burden on holding companies

irrespective of the nature of its relationship with or proximity to, a subsidiary. In line with international practice, a controlling company ought to be liable only where it can be shown to have actively directed that the separate entity conduct itself in contravention of the law.

Proposed amendments to section 79 of the Principal Act

49. The LSSA **recommends** that the proposed amendments to section 79 should be reconsidered.

50. Motivation

50.1 The LSSA fully supports the issue of guidelines as a useful indication of the Commission's likely approach to enforcement. However, the process for issuing guidelines is far less stringent than the promulgation of legislation and to elevate guidelines to the status of legislation, which is the likely effect of the proposed amendments to section 79 strays into executive overreach. The notion that a regulator could create its own paradigm for prosecution is potentially problematic for the rule of law, and may undermine the separation of powers. Simply put, the Commission cannot be allowed to determine what is illegal in order to enforce it.

50.2 When legislation is promulgated, those potentially affected thereby should be able to determine with reasonable certainty what constitutes an offence. Leaving it to the Commission to "fill in the gaps" through an uncertain process (guidelines can be held back, amended, suspended etc) introduces legislative uncertainty where guidelines are purportedly part of the basis for a prosecution. This is especially so as the existence of guidelines will also be a factor that the Tribunal must consider when determining administrative penalties.

50.3 The proposed amendments delete reference to the non-binding nature of guidelines and remove the current discretion on the part of the Commission, Tribunal and Competition Appeal Court in their interpretation of the Principal Act. The proposed section 79 (4) states that a guideline is not binding but this is contradicted by the peremptory requirement in the proposed section that the guideline must be taken into account by any person interpreting or applying the Act.

50.4 It is submitted that more clarity be given as to the status of guidelines - which should be to provide an indication of the Commission's likely approach on enforcement, but should not be a basis for the interpretation or application of the Principal Act or fetter the discretion of the Tribunal or Competition Appeal Court.

PART 2: MERGER CONTROL

Amendments relating to Chapter 3 of the Principal Act and related sections

Introductory remarks

51. The comments set out below relate to the merger control sections of the Amendment Bill.

52. The Amendment Bill proposes the most substantial amendments to the Principal Act in nearly 20 years, and the LSSA believes that these amendments should be seen, in part, as an opportunity to encourage investment (both foreign and local) through amendments that encourage merger activity that is particularly likely to result in pro-competitive outcomes, including those that are expected to benefit small firms and industries. Specifically, a merger control regime that expedites the assessment process, reduces associated costs and increases certainty in relation to this category of mergers will ultimately result in greater levels of economic growth and innovation.

<u>Proposed amendments to section 12A of the Principal Act</u>

53. The LSSA **recommends** that the proposed provision in the Amendment Bill be amended as follows:

9 Section 12A of the Principal Act is hereby amended by –

"(a) by the substitution of subsection (1) for the following –

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

*(a)**]** If it appears that the merger is likely to substantially prevent or lessen competition, then determine –*

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

(b) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3) ***[;or***

(b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)]*.";*

(b) by the insertion after subsection (1) of the following subsection:

"(1A) Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).";

(c) by the substitution of paragraphs (g) and (h) in subsection (2) for the following and the insertion of the following paragraphs in subsection (2) after paragraph (h) –

*"(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; [****and****]*

*(h) whether the merger will result in the removal of an effective competitor****[.]****;";*

(d) by the addition in subsection (2) after paragraph (h) of the following paragraphs:

"(i) the extent of ownership by a party to the merger in another firm or other firms in the relevant ~~related~~ market~~s~~*;*

(j) the extent to which a party to the merger is related to another firm or other firms in the relevant ~~related~~ market~~s~~*, including through common members or directors; and*

(k) any other mergers engaged in by a party to a merger for such period as may be stipulated by the Competition Commission.";

(e) by the substitution in subsection (3) for paragraphs (c) and (d) of the following paragraphs, respectively:

"(c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to ***[become competitive]*** *effectively enter into, participate in and expand within the market;* ***[and]***

(d) the ability of national industries to compete in international markets[.]; and"; and

(f) by the addition in subsection (3) after paragraph (d) of the following paragraph:

"(e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.".

54. LSSA's proposed amendments to section 9(f) of the Amendment Bill

"(c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to [become competitive] ~~effectively enter into, participate in and expand within the market~~;

"(e) the spread of ownership ~~promotion of a greater spread of ownership~~, in particular the ~~to increase the~~ levels of

ownership by historically disadvantaged persons and employees ~~workers~~ in firms in the market."

55. Motivation

55.1 The LSSA has concerns regarding sections 9(d), 9(e) and (f) of the Amendment Bill. We deal with each of these in turn below.

Section 9(d)(i) and (j) – related markets

55.2 The term "related markets" remains undefined in the Amendment Bill. As such, the proposed amendment appears overly broad for the purposes of the assessment of any conventional common ownership cross-directorship theories of harm, since it includes provision for the assessment of cross-shareholdings between firms in "related markets", rather than in the same market. As a result, the amendment would likely increase the time, cost, and uncertainty associated with merger control.

55.3 We would therefore suggest that the reference to related markets be substituted for "the relevant market" in the Amendment Bill: i.e. the Commission's investigation should be confined to markets which are the same as those under investigation i.e. where a horizontal or vertical overlap between the parties exists.

Section 9(e) – notion of "participation"

55.4 The notion of facilitating "participation" is a new concept and one that applies more broadly than mergers in the Amendment Bill, and which raises concerns.

55.5 The LSSA is fully appreciative of the need to encourage a broader spread of participation, but it is submitted that demonstrating when participation will constitute "effective participation" will be extremely difficult. In this instance, it is unclear how it would be possible for the Commission to isolate and assess the effect of a merger on historically disadvantaged persons ("**HDPs**"). For example, no indication has been given as to what standard might be utilised by the Commission in determining whether a

firm is participating effectively in a market as opposed to merely participating.

55.6 Furthermore, whilst the term has been defined as "*… ability of or opportunity for firms to sustain themselves in the market…*", it appears that what is being contemplated is that the merger control regime would be used to subsidise firms that might not be equally efficient as their rivals; that is potentially confer advantages upon such firms that they would ordinarily not be entitled to, which would not promote more effective competition in a relevant market.

55.7 Given the equal weighting of public interest and competition factors, the proposed amendment would allow all small suppliers, customers or competitors – including those which might not even be meaningfully established in a market – to complain that any merger might hinder their ability to sustain themselves. This may well place a severe investigative burden on the Commission as well as a cost burden on merging parties which may be forced to offer items such as increased payment to suppliers or using suppliers which might not be able to meet the needs of the merged entity; discounts to smaller customers purchasing lesser volumes; and – in the case of competitors – might even facilitate cartel conduct if a firm is encouraged to co-operate with a smaller competitor going forward. Moreover, the emphasis on participation encourages outcomes which focus on short-term profitability rather than sustainable growth which emanates from the ability to become competitive.

55.8 In the circumstances, it is respectfully suggested that the status quo be maintained: a merger should be judged by whether it impairs competitive dynamics in the market by impairing or promoting the ability of small and medium sized businesses and HDP-owned businesses to become or remain competitive rather than conferring non-merger specific advantages on those firms which they ordinarily would not be entitled to.

55.9 To this end, the Commission and the Tribunal should be encouraged to focus on the competitiveness of such firms within a merger-specific context.

Section 9(e) – notion of "greater spread of ownership"

55.10 The LSSA believes that the goal of creating a greater spread of ownership by HDPs is a commendable one. As is the notion of allowing greater scope for small and medium businesses to play a greater role in the economy.

55.11 The proposed wording of section 9(e) may not achieve its aims in the most appropriate way and may present interpretative challenges within a merger control context.

55.12 The LSSA respectfully submits that amendments are required in order to achieve this goal and provide clarity on its application without unforeseen negative consequences.

55.13 The LSSA submits that it would be more pragmatic for the competition authorities to assess "*the spread of ownership*", as opposed to the "*promotion of a greater spread of ownership*". There is a risk that this amendment might undermine (or at least weaken) the key principle of merger specificity, by potentially placing a positive obligation on the merging parties to "promote a greater spread of ownership" rather than requiring that the merger has no negative impact on the spread of ownership. By placing a positive requirement on mergers, and hence abandoning the key principle of merger-specificity, the proposed amendment undermines the objective of merger control and consequently increases uncertainty. Once merger specificity is lost, and there is a positive obligation on a merger, then there is simply no benchmark against which to measure whether or not a merger sufficiently enhances a public interest objective, such as the spread of ownership. This increase in uncertainty is likely to significantly harm investment incentives. Furthermore, the proposed amendment could lead to a much more interventionist process and could undermine the Commission's role as an independent arbitrator of commercial activity.

55.14 Moreover, uncertainty in decision making is likely to disproportionately harm smaller firms, and accordingly such an amendment might actually have a retrogressive effect. While larger firms may be better able to deal with and accept the costs associated with uncertainty, such as accepting

unanticipated, but costly conditions that are applied to mergers, smaller firms might be less able to deal with these burdens. It is notable that, as a result, the amendment may discourage large firms from investing in smaller, more risky firms where the benefits from such an investment may already be uncertain and the possibility of unanticipated costly conditions would serve only to strengthen this uncertainty.

55.15 Quite separately, further negative consequences may be as follows:

- The hampering of the freedom of HDPs to contract with parties of their choosing (e.g. non-HDPs such as foreign investors), and to sell their interests in firms as and when they see fit – which would restrict their freedom to trade and invest as they deem appropriate;

- The interests held by HDPs may be rendered illiquid, alternatively existing HDP shareholders may also be forced to sell their interests to other HDP shareholders at a lower price than non-HDP shareholders could offer.

55.16 The LSSA submits that further clarity is also required on the application of the provision. Consideration should be given to what standards will be applied in deciding which mergers should be approved and on what basis will HDPs be precluded from selling their shares to non-HDPs, e.g. is it the case that a specific percentage of shares must be transferred etc.? Given the potential consequences mentioned above, it is important that greater clarity is provided regarding the practical application of the clause.

55.17 In relation to assessing the levels of ownership of *"workers in firms"* further clarity is required on what will constitute *"a broad-base of workers"* and how this assessment will be carried out. Furthermore, the provision raises key questions, namely what categories of workers will be assessed and at which level of a particular market, whether the provision will only apply to historically disadvantaged workers, and whether the merging parties will have to demonstrate whether such an increase in ownership is feasible in every transaction. In addition, given that the definition of the term *"workers"* is the same as the term *"employees",* as defined in the Labour Relations Act, 1995, the LSSA believes that, for the sake of consistency, it would be preferable to use the term "employee".

55.18 By way of summary, in circumstances where HDPs are realising their investment, they should not necessarily be precluded from doing so. Whether the transaction has an effect on HDP ownership should be one factor to be considered; however, regard must be had to Competition Tribunal decisions such as *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (66/LM/Oct01), at paragraphs 36 to 58 generally, and specifically at paragraph 49, which states "*[t]he Commission may protest that it has no wish to prevent the transaction. However, it must be recognized that the imposition of a condition on the purchaser will come with a price and Thebe, precisely the firm owned and controlled by historically disadvantaged persons, will pay that price. We would however go further and insist that even if Tepco had been a company in perfect health, the Commission should be extremely careful when, in the name of supporting historically disadvantaged investors, it intervenes in a commercial decision by such as investor.*"

Proposed amendments to sections 15 and 16 of the Principal Act

56. The LSSA **recommends** that the proposed provision in the Amendment Bill be amended as set out below. As the proposed sections 10 and 11 of the Amendment Bill contemplate amendments to sections 15 and 16 of the Principal Act that essentially grant the same powers of revocation to the Commission and the Tribunal respectively, we deal with both amendments together below. For the sake of avoiding prolixity, we do not repeat the similar proposed amendment which we believe should be inserted in section 16 of the Principal Act (which relate to Tribunal merger decisions) in the same manner as we propose it should be done with respect to section 15 (which relate to Commission merger decisions):

"***15. Revocation of merger approval <u>and enforcement of merger conditions</u>.***

(1) The Competition Commission may <u>–</u>

<u>(a)</u> revoke its own decision to approve or conditionally approve a small or intermediate merger if –

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

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

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

(b) *in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) and section12A(3)(c) -*

(i) *based on the factors listed in 15(1)(a)(i) – (ii);*

(ii) *if any condition imposed relating or a merger or a condition imposed is no longer practical or no longer serves its purpose; or*

(iii) *at the request of a party to the merger.*

57. Motivation

57.1 As previously submitted by the LSSA, these amendments, as drafted, may extend indefinitely the life of competition authorities' jurisdiction over conditions after issuing final decisions. The circumstances under which a revocation or amendment of conditions is permissible must be made clear.

57.2 The LSSA submits that the Commission or the Tribunal (as the case may be) are *functus officio* once merger approval has been granted until one of the circumstances in section 15(1) are triggered.

57.3 Neither the Commission nor the Tribunal should be empowered to alter conditions without something specific giving rise to this alteration. For example, should the conditions originally imposed become untenable or impractical or are breached, it would be appropriate to amend such conditions, likewise if parties have been deceitful in obtaining approval. These circumstances are already catered for in the Principal Act. To

reiterate, the Commission and Tribunal should not be able to deviate from an agreed condition where there is no justification to do so. To provide the Commission and Tribunal with the powers suggested by the Amendment Bill would undermine commercial and legal certainty.

57.4 Moreover, in the case of conditions becoming unreasonable or untenable, it is suggested that the position set out in the Tribunal decision of *Amec Foster Wheeler SA (Pty) Ltd and The Competition Commission* (VAR252Mar16)[1] should be codified into and extended in the Principal Act: the parties should be permitted to approach the Commission (in the case of small or intermediate mergers) or the Tribunal (in the case of larger merges) to vary conditions. This should be the case even where conditions imposed do not expressly allow for this.

57.5 Critically, these proposed amendments are likely to significantly increase uncertainty associated with merger control, since the proposed amendments appear to undermine the finality of conditions imposed by the competition authorities. Merging parties are unlikely to be willing to agree to conditions for the approval of a merger if such mergers may be subject to being unilaterally changed after the fact. Moreover, the proposed amendments introduce significant additional asymmetry into an already asymmetrical legal process. While the Competition Authorities already have the power to impose conditions for the approval of a merger, the proposed amendments would now allow the same authorities to make further decisions regarding such conditions.

<u>Proposed amendments to section 17 of the Principal Act</u>

58. The LSSA recommends that the proposed amended section should be amended as follows:

> *"17 (1) Within 20 business days after notice of a decision by the Competition Tribunal in terms of section 16,*
>
> *(i) an appeal from that decision may be made to the Competition Appeal Court, subject to its rules, by –*

[1] At para 13.

(a) any party to the merger; ~~[or]~~ or

~~*(b) the Competition Commission;*~~

~~*(c) the Minister on matters raised in terms of section 12A(3), where the Minister participated in the Competition Commission's or Competition Tribunal's proceedings in terms of section 18 or on application for leave to appeal to the Competition Appeal Court; or*~~

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

(ii) a review application of that decision may be made to the Competition Appeal Court, subject to its rules, by:

(a) any party to the merger;

(b) the Competition Commission;

(c) the Minister; or

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

59. Motivation

59.1 The LSSA notes that the right of appeal in relation to the Minister has been limited in the Amendment Bill. Despite this welcome development, however, the LSSA's primary concern with the proposed amendment remains.

59.2 Allowing appeals by the Commission and/or the Minister may lead to a lack of commercial certainty for merging parties – i.e. they could be caught up in litigation long after a merger is commercially viable or a long-stop date expires. This may, in essence, result in a constructive prohibition and a disincentive to invest – especially in high-profile large mergers which already take significant time to be approved.

59.3 Furthermore, the LSSA is concerned that retaining the Minister's right to appear may unintentionally undermine the independence of the Commission and the Tribunal, as the Minister could conceivably appeal and therefore potentially override any decision which does not necessarily coincide with the Executive's objectives (even if the Minister's right of appeal are limited to public interest grounds).

59.4 Similarly, allowing the Commission an unfettered right to appeal could result in the constructive prohibition of a merger due to a delay in acquiring the necessary regulatory approvals.

59.5 The LSSA suggests that, rather than granting the Commission and/or the Minister the right of appeal to the Competition Appeal Court ("**CAC**"), a right of review should be granted. This allows decisions that were unreasonable or irrational to be reviewed by the CAC.

59.6 If the section, as proposed to be amended in the Amendment Bill is maintained, the only feasible discipline could be the inclusion of cost orders for unsuccessful appeals by the Commission and/or the Minister.

59.7 In the alternative, the LSSA submits that the Commission's right of appeal should, in the very least, not be entirely unfettered. It is therefore suggested that the Commission should be entitled to appeal only in circumstances where leave to appeal has been granted by the CAC.

59.8 To emphasise these points, we highlight that the International Competition Network has set out three pillars to guide the development and implementation of successful merger control:

- **Timing**: It is important that the merger control regime is designed to allow mergers to be assessed as quickly as possible, so as to minimise the disruption to the underlying competition for corporate control as far as possible. This concern over timing does not arise simply from firms' preference for quicker procedures, but more importantly that the merger control process leaves parties open to unexpected timing delays – in particular if there is uncertainty about the tests that they face;

- **Costs**: The overall cost of the merger control process, both in terms of direct (i.e. merger filing fees) and indirect costs (including time and effort spent preparing and defending the merger) should be kept to a minimum so as not to unduly discourage potential pro-competitive mergers. In particular these costs might fall disproportionately on smaller firms, which have less managerial capacity and smaller financial reserves – especially in the context of an appeal. The merger control regime should, therefore, aim to minimise these costs so as to encourage investment and economic growth; and

- **Certainty**: Above all, predictability should form the cornerstone of any merger-control regime. Mergers should be objectively analysed in terms of established methods of enquiry and which are appropriate to the analysis. This yields reasonable predictability of outcomes for parties in an otherwise risky transaction, a quality increasingly required in today's fast-paced commercial market realities, where bidders for desired assets may face stiff competition from other potential buyers vying for the same target.

Proposed insertion of section 18A of the Amendment Bill

60. General comments on section 18A

Section 18A requires further public engagement

60.1 The LSSA recognises the need for the Government to proactively engage in the national security issues surrounding acquisitions by foreign firms, as is the case in other jurisdictions. However, the LSSA submits that far more thought and extensive public engagement is required before section 18A is

enacted. Currently, no background or guidance as to Government's policy has been provided.

60.2 As it stands, there is too much uncertainty regarding what constitutes national security interests and how the provision will be implemented. Therefore, the need to address security issues will be far better fulfilled at a later stage, and in a subsequent amendment to the Principal Act (or separate legislation), when Government has had time to adequately and comprehensively outline its approach to national security, as well as consider the implications of such a provision together with relevant stakeholders.

60.3 As a general comment, the LSSA is concerned that the additional notification process contemplated in terms of section 18A could significantly increase the cost of merger activity by foreign firms in South Africa, which could have the unintended consequence of disincentivising foreign investment which investment is vital for the growth of the South African economy.

Definition of national security interests

60.4 The term "national security interests" has not been defined in the Amendment Bill, but the considerations set out in subsection (4) are extremely broad and could conceivably impact the majority of mergers. In this regard, the specific factors to be taken into account in determining the list of national security interests should each expressly relate to national security. Furthermore, subsections (4)(c); (d); (f); and (h) are particularly broad and appear to go beyond what could conceivably be national security interests. The LSSA suggests that these subsections be deleted. Subsection (4)(b) should also be deleted unless the nature of such "sensitive" technology and know-how can be more clearly articulated to address what would affect national security interests..

60.5 While the LSSA is not necessarily equipped to provide a suggested definition, it submits that a clear definition is critical. Without a definition, it is impossible to anticipate which acquisitions may trigger section 18A, which uncertainty could have a hugely detrimental effect on foreign investment into South Africa. It is for this reason that further thought

should be given to this notion by allowing for more adequate notice and comment procedures before a section such as this one is incorporated into the Principal Act.

Materiality threshold

60.6 The LSSA submits that a "materiality threshold" needs to be inserted into section 18A. As noted above, section 18A is broad and could conceivably impact the Amendment Billmajority of mergers. As such, section 18A would be far more palatable if an objective threshold had to be met before section 18A would be triggered i.e. when a merger would "relate" to the list of national security interests.

Composition of the Committee

60.7 Section 18A of the Amendment Bill proposes that the President constitute a committee "*comprised of cabinet ministers and other public officials."* The LSSA proposes that further clarity should be provided regarding which representatives will be appointed to the Committee and whether the Committee will be permanent or constituted on an *ad hoc* basis when transactions trigger a section 18A notification.

Definition of foreign acquiring firm

60.8 As currently drafted, the definition of "foreign acquiring firm" is too broad, and currently encompasses every firm domiciled in South Africa which may have a foreign parent company e.g. a Mauritian holding company for tax purposes. This cannot be the true intention of the provision, and clarity needs to be provided such that a truly South African firm does not fall within the scope of section 18A merely because its parent company or manager is domiciled outside of South Africa. In this regard, it is suggested that the "or" in the definition of foreign acquiring firm be deleted in favour of an "and".

60.9 Furthermore, the LSSA submits that it is unclear what is meant by the use of the term, "*whose place of effective management is outside the Republic*". It would be useful if section 1(d) was redrafted in order to

clarify exactly which firms would be considered to be "foreign acquiring firms."

Notification of small mergers

60.10 The LSSA notes that there is a contradiction in the wording of section 18A:

- Section 18A(6) stipulates that a foreign acquiring firm which is required to notify the Commission in terms of section 13A(1) of the Principal Act must notify the Committee prior to the firm's notification to the Commission (i.e. in the case of a transaction which meets the thresholds for either an intermediate or large merger).

- Section 18A(11) states that if the Minister prohibits a merger in terms of section 18A, the Commission is not entitled to make a decision in terms of, *inter alia*, section 13(5)(b) of the Principal Act, which enables the Commission to approve (whether conditionally or unconditionally) a small merger which was notified to the Commission.[2]

60.11 The LSSA submits that clarity needs to be provided regarding if, and when, parties to a small merger need to notify the Committee of a transaction. Specifically:

- Is a foreign acquiring firm, which is also a party to a small merger, required to notify the Committee in every instance (which interpretation would be contrary to the wording in section 18A(6) of the Principal Act)?

- Is a notification to the Committee required only in circumstances where the Commission requires the notification of a small merger in terms of section 13(3) of the Principal Act, or where the parties have notified a small merger to the Commission voluntarily?

60.12 The LSSA submits that the intention of the Amendment Bill should not be to capture in its ambit all acquisitions by a foreign acquiring firm

[2] In terms of section 13(3) of the Principal Act, the Commission may require a small merger to be notified within 6 months of it being implemented.

regardless of the size of the parties to the merger. Limiting notifications to circumstances where: (i) certain financial thresholds are met, or (ii) where the Commission has a requested that a notification be made makes sense, particularly given that a small merger is unlikely to have a significant impact on national security interests. It would also be in the interest of the Committee to limit the number of notifications that it receives, in order to prevent a situation where a large backlog is created due to the number of notifications received.

Consequences for failure to notify

60.13 The LSSA submits that the Amendment Bill needs to be amended such that the consequences for failure to notify the Committee is clearly set out; if the sanctions are the same as the failure to notify a notifiable merger, this needs to be made clear.

Review or appeal process

60.14 Currently, section 18A does not provide an avenue for merging parties to participate in the Committee's proceedings or for the Committee to consult with or seek input from the merging parties. Further, no avenue for the merging parties to appeal, or take on review, a decision by the Committee is provided for. It is submitted that a process for aggrieved parties to challenge decisions by the Committee needs to be included, so as to provide a "check" on the decisions made by the Committee.

Guidelines

60.15 The LSSA strongly recommends that, before application of section 18A, a comprehensive set of guidelines are published by the Government detailing exactly how the Committee will interpret and implement section 18A in the interest of maintaining legal and commercial certainty. Such guidelines should include:

- certain carve-outs, for example in respect of investments made by private equity firms and similar investment firms, or acquisitions of minority but joint-controlling stakes, which investments would have little or no impact on national security;

- the standard which will be used by the Committee in making its determination in terms of section 18A; and

- identification of sectors which will be considered by the Executive as "sensitive sectors".

61. LSSA's proposed amendments to the proposed new section 18A(1) of the Principal Act, as proposed to be inserted in the Amendment Bill

"**Intervention in merger proceedings by a foreign acquiring firm"**

"(1) The President must constitute a Committee which must be responsible for considering in terms of this section whether the implementation of a merger involving a foreign acquiring firm and a South African target firm, being a firm which carries out its business in South Africa, may have an adverse effect on the national security interests of the Republic".

62. Motivation

The LSSA submits that the primary target firm insofar as section 18A is concerned is also unclear, as the Amendment Bill does not include any requirement that the target firm be either partially or fully South African owned. The unintended result of this is that a section 18A process may apply to acquisitions of firms which are already foreign-owned, or even conceivably, to foreign-to-foreign transactions where the target firm derives revenue in South Africa, but has no local presence. Given that transactions of this nature (i.e. involving target firms that do not control significant infrastructure in South Africa) are highly unlikely to raise national security concerns, the intention of the Amendment Bill cannot reasonably be interpreted to include foreign-to-foreign transactions within the scope of section 18A.

63. LSSA's proposed amendments to the proposed new section 18A(7) of the Principal Act, as proposed to be inserted in of the Amendment Bill

(7) Within 60 days of receipt by the Committee referred to in subsection (1) of a notice in terms of subsection (6), or by a single further period not exceeding 30-days ~~*or such further period which the President may agree*~~

~~to~~, on good cause shown, the Committee must consider and decide on whether the merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic identified by the President in terms of subsection (3)~~.~~, with this 60-day period running concurrently with the periods set out in section 14 and section 14A of the Act.

64. Motivation

64.1 The LSSA submits that clarity should be provided to ensure that the process contemplated by the proposed new section 18A does create a separate notification process in addition to the notification to the Commission. It should be made clear that these two assessments will run in parallel. This addition will prevent the undue regulatory delay that will occur if the merging parties require approval from both the competition authorities and the Committee, and such assessments take place consecutively. Merging parties should be free to proceed to make a notification to both the Commission and the Committee concurrently, at the risk of incurring the costs of a competition notification to the former if approval is not forthcoming from the latter.

64.2 In addition, the LSSA submits that a parallel process would also be beneficial to the Committee, which would be in a position to consult with the Commission. However, it is emphasised that these two processes should nonetheless run independently from one another i.e. the Commission should be entitled to complete its assessment without a decision having been rendered by the Committee and *vice versa*.

64.3 Following on from this, the LSSA is concerned with the inclusion of the phrase "*or such further period which the President may agree to".* A 60 day period is already an extensive period for transactions which are more often than not time-sensitive. The LSSA submits that the 60-day period allocated to the Committee should not be subject to an open-ended extension period i.e. if an extension is required, it should be for a set finite period, for example and additional 30-day period. Again, the LSSA submits that this would be an important step in ensuring that merging parties are able to obtain all necessary regulatory approvals within a reasonable amount of time. Failure to ensure this could easily have the

effect of deterring investors who have a set timeframe in which a transaction may be implemented.

PART 3: MARKET INQUIRIES

Amendments relating to Chapter 4A of the Principal Act and related sections

Introductory remarks

65. The comments set out below relate to the market inquiry sections of the Amendment Bill.

66. The LSSA understands and supports the market inquiry process and recognises that it is a powerful tool to achieve the stated policy aims of effective competition, and broad based economic growth. The LSSA is pleased to note that it had previously raised concerns regarding the lower threshold in relation to market inquires, but these concerns appear to have been mitigated by way of the amendments introduced in section 43D. However, the LSSA considers it vital that the market inquiry process is successfully and efficiently implemented, and does not become a costly exercise that is open to abuse, especially in the current economic climate.

67. This submission will deal with a number of concerns regarding the sections in relation to market inquiries in the Amendment Bill, but our main concerns relate to the efficacy and efficiency of the process, to avoid it becoming too costly to both business and the regulators, and thus becoming a cumbersome and ineffective policy tool.

68. The LSSA reiterates its previous comments that businesses have expressed concerns that the process is very expensive and resource intensive. For many private businesses these costs, which can run to tens or even hundreds of millions of Rand, over a two to five year time period, represent a direct reduction in their profitability, and therefore a direct and substantial reduction in taxable income, and thereby revenue for the Treasury. The Competition Commission will similarly need to expend considerable amounts of money and resources on the process, and it is therefore essential that the best possible outcomes are achieved, while controlling the costs and disruption to normal, efficient business operations.

69. The LSSA is concerned that both the Commission and the Minister are being given extensive powers, and considers it essential that there are appropriate checks and balances in place, bearing in mind that the current incumbents in office will be

replaced in due course, and the system must be able to stand, whoever holds office. The LSSA is of the view that the Tribunal should have powers of appeal and not just review.

70. For example, in terms of section 43B, the Minister may require the Commission to conduct a market inquiry. The LSSA is concerned that too much executive involvement could result in a loss of efficiency and objectivity in the process. It is essential that careful thought be given to this process, and that the "trigger process" is independently overseen. It would be undesirable if the Commission were required to facilitate fifteen market inquiries at the same time, for example, as this could result in a situation that is not only expensive for all parties, would mean that the Commission resources were spread too thin, and would most likely devalue the outcome of each market inquiry. Accordingly, the LSSA proposes that the executive who have oversight over the Minister should ensure that the Minister and the Commission are held accountable for their actions, not only in relation to the "trigger" of a market inquiry but for the entire process of the market inquiry and any resulting remedies imposed on parties to a market inquiry.

71. The LSSA also notes that the proposals of the Amendment Bill indicate that interaction with other regulatory authorities is limited to a requirement in section 43B(2A) that the Commission "notify and consult" them. The LSSA is concerned that this could create duplications, which could result in an increase in costs and resources for parties to a market inquiry as well as for regulators. Such duplication would also have a deleterious effect on the capacity of regulators. Furthermore, if regulators fail to coordinate their activities, this could lead to conflicting recommendations, which would raise concerns regarding the predictability and/or certainty of the processes involved. The LSSA accordingly submits that it is not sufficient for the Commission to merely *"notify and consult"* with other regulators.

72. The LSSA further submits that, in line with the European Commission practice, competition enforcement and regulatory authorities should be viewed as complementary instruments: they must work together to achieve markets that give rise to effective competition. "*For competition and regulation to play their essential, and complementary, roles in making markets work for consumers, there needs to be close cooperation between regulators and competition law enforcers*"[3].

[3] Joaquín Almunia, Vice-President of the European Commission, "Competition v Regulation: where do the roles of sector specific and competition regulators begin and end?, 23 March 2010

73. In addition, to minimise the burden on companies, the LSSA submits that parties to a market inquiry should only be required to submit pre-existing information, and they should not be required to create documents, data or information *de novo* or investigate aspects of their business or the market which the parties had not previously considered. Such *de novo* exercises are extremely time-consuming and expensive for businesses and any such requests could not only slow down the market inquiry process, but also divert scarce business resources from their primary goal, which is to engage in effective competition, thereby promoting economic development and job creation.

74. The LSSA considers it essential that the capacity, resource and leadership of the market inquiries is appropriate, and suitably skilled. The LSSA would recommend that the panel include external members, and that the framework to be followed should be in line with that adopted by the Competition and Markets Authority in its Enterprise and Regulatory Reform Act, 2013, where the panel members are selected for their "*experience, ability and diversity of skills in competition economics, law, finance and industry*".

75. The LSSA has concerns with the inclusion in the Amendment Bill of the power of the Commission to enter into consent orders with parties pursuant to a market inquiry. This is dealt with further below.

76. The LSSA notes that the procedures to be followed at the market inquiry are to be decided on by the Commission in terms of section 43C(1)(b). The LSSA submits that any procedures to be followed at the market inquiries should be decided prior to the commencement of the market inquiry, and should be published in the Government Gazette in order to provide clarity and a clear framework for the conduct of the market inquiry. The LSSA submits that this wording be deleted from section 43C(1)(b) and rather be included under section 43B to ensure that when the Commission publishes a notice in the Gazette in relation to a market inquiry, that it sets out the terms of reference for the market inquiry, invites members of the public to provide written representations to the market inquiry and sets out the procedures to be followed at a market inquiry. Given the limited amount of time available to the Commission in respect of market inquiries, it would be useful for the public to understand how the Commission will be spending the 18 month period. This will ensure that market inquiries become a focused and efficient policy tool.

77. In terms of section 43(B)(4)(a), the Commission must complete its market inquiry within a period of 18 months. The Commission may apply to the Minister to extend this 18 month period for a reasonable period. A "reasonable period" has replaced the original wording of the Amendment Bill which allowed the Commission a period of six months. The LSSA submits that a "reasonable period" is too vague and allows for too much flexibility to allow the Commission to start and conduct inquiries that are insufficiently focussed, and can dramatically expand in scope and scale, without a clear target to investigate. The LSSA notes that the CMA process for market inquiries has a defined initial period followed by a single defined extension period. As such, the LSSA submits that the strict extension period of six months be reinstated, so that there is a strict time limitation and market inquiries are conducted as quickly and as effectively as possible, in order to save time, costs and capacity, and to return business resources to their primary goal, which is to engage in effective competition, thereby promoting economic development and job creation.

78. The LSSA appreciates that the Commission has been granted remedial powers in terms of section 43D. However, the LSSA has concerns regarding the Commission's ability to make determination in relation to pricing and other competitive variables. The Commission is not a pricing regulator or an adjudicative body, any such decision which could have long term ramifications for parties. The LSSA submits that, in a similar manner to the Commission's recommendations to the Tribunal in relation to divestments, the Commission must (only) make recommendations to the Tribunal in relation to pricing, i.e. the Commission should not have final determinative power in this regard.

79. In relation to section 44 of the Principal Act, as proposed to be amended in the Amendment Bill, the Minister is now permitted access to confidential information submitted by parties during the market inquiry process. Although section 45(3)(a) of the Principal Act limits the Minister's use of the confidential information to matters relating to the Act, there are concerns regarding the reasonableness of this section, as proposed to be amended.

80. Accordingly the LSSA recommends the following changes to section 43B and 43F of the Principal Act, as proposed to be amended by the Amendment Bill.

Proposed amendments to section 43B of the Principal Act

23. Section 43B of the principal Act is hereby amended —

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

"Initiating and conducting market inquiries";

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

"(1)(a) The Competition Commission, acting within its functions set out in section 21(1), [and on its own initiative, or in response to a request from the Minister,] may conduct a market inquiry at any time, subject to subsections (2) to [(4)] (7) —

(i) if it has reason to believe that any feature or combination of features of a market for any goods or services [prevents] impedes, distorts or restricts competition within that market; or

(ii) to achieve the purposes of this Act.

(b) The Minister may,

(i) if after consultation with the Competition Commission and after consideration of the factors in paragraph (a)(i) and (ii), and

(ii) if the Minister has reason to believe that any feature or combination of features of a market for any goods or services impedes, distorts or restricts competition within that market,

require the Competition Commission to conduct a market inquiry contemplated in paragraph (a) during a specified period.";

(c) by the substitution for subsection (2) of the following subsection:

"(2) The Competition Commission must, at least 20 business days before the commencement of a market inquiry, publish a notice in the Gazette announcing the establishment of the market inquiry, setting out the terms of reference for the market inquiry, the procedures to be followed at the market inquiry and inviting members of the public to provide [information] written representations to the market inquiry.";

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

"(2A) Before publishing the notice referred to in subsection (2), the Competition Commission must notify and consult with the relevant regulatory authority if the intended market inquiry will investigate a sector over which the regulatory authority has jurisdiction in terms of any public regulation, provided that, in the event that the relevant regulatory authority is conducting, or has in the last three (3) years conducted, an investigation into the relevant sector, the Competition Commission will take all reasonable steps to coordinate with such regulatory authority in order to avoid any duplication.

(2B) The Competition Commission must appoint a Deputy Commissioner referred to in section 23(2)(b) to chair a market inquiry and may appoint one or more additional suitably qualified, independent persons with relevant experience and expertise in competition economics, law, finance and in the market being inquired into to the panel that conducts the market inquiry;

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

"(cA) Sections 49A(1), 52(2), 52(2A), 52(3), 55 and 56, read with the changes required by the context, apply to the conduct of a market inquiry, but for the purposes of this section, a reference in any of those sections to the Competition Tribunal, Chairperson of the Competition Tribunal or to a person "presiding at a hearing" must be regarded as referring to the Competition Commission.";

(f) by the insertion after subsection (3) of the following subsection:

"(3A) For purposes of this Chapter—

(a) the Competition Commission may, within 20 business days of receipt of information claimed as confidential in terms of section 44(1), determine whether or not the information is confidential information;

(b) if the Competition Commission determines that the information is confidential, it may, within five business days, make an appropriate determination concerning access to that information by any person;

(c) before making the decision in paragraph (a) or (b), the Competition Commission must give the party claiming the information to be confidential, notice of its intention to make its determination and consider the representations, if any, made to it by that person; (d) any person aggrieved by the determination of the Competition Commission in terms of subsections (1) or (2) may within 10 business days of the determination, appeal against the determination to the Competition Tribunal.";

(g) by the substitution for subsection (4) of the following subsection:

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

(b) The Competition Commission may apply to the Minister to extend for a ~~reasonable~~ period of six months, the completion of a market inquiry beyond the period referred to in paragraph (a)'; and

(h) by the substitution for subsection (6) of the following subsection:

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

81. Motivation

81.1 Section 43B(1)(b) has been amended for clarity to ensure that the Minister must have a reasonable belief that there are features of a market that impede, distort or restrict competition within that market, as a check and balance to the Minister's wide powers, to ensure that the Minister's decision to initiate a market inquiry is based on just and reasonable grounds.

81.2 Section 43B(2) has been amended, given the limited time periods allowed for market inquiries, to ensure that there is clarity in relation to the procedures to be followed at a market inquiry when the Commission publishes its notice in relation to the commencement of a market inquiry. The LSSA has therefore deleted the wording from section 43C(1)(b) and instead included it under section 43B.

81.3 Section 43B(2A) has been amended in an attempt to ensure that there is sufficient coordination between regulators in order to avoid duplication and to ensure that firms are not unnecessarily imposed upon by regulators.

81.4 Section 43B(2A) has been amended to reflect that panel members should be suitably qualified, independent persons with expertise in the market being inquired into, in order to ensure effective and efficient market inquiries and to avoid the potential for abuse of the market inquiries system.

81.5 Section 43B(4)(a) has been amended in line with section 43B(2).

81.6 Section 43B(4)(b) has been amended to set a specific time period for the conduct of the market inquiry.

<u>Proposed amendments to section 43C of of the Principal Act</u>

"Matters to be decided at market inquiry"

43C. (1) In a market inquiry, the Competition Commission must decide —

(a) whether any feature, including structure and levels of concentration, of each relevant market for any goods or services impedes, restricts or distorts competition within that market; and

~~*(b) on the procedures to be followed at the market inquiry.*~~

(2) In making its decision in terms of subsection (1)(a), the Competition Commission must have regard to the impact of the adverse effect on competition on small and medium businesses, or firms controlled or owned by historically disadvantaged persons.

(3) If the Competition Commission decides that there is an adverse effect on competition, it must determine —

(a) the action that must be taken in terms of section 43D;

(b) whether it must make recommendations to any Minister, regulatory authority or affected firm to take action to remedy, mitigate or prevent the adverse effect on competition;

(c) if any action must be taken in terms of paragraph (b), the action that must be taken in respect of what must be remedied, mitigated or prevented.

(4) In determining the matters in subsection (3), the Competition Commission must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable.

82. Motivation

Section 43C(1)(b) has been deleted as we have proposed that this section be inserted into section 43B(2). This section relates to matters to be decided at a market inquiry; however, the procedure to be followed at a market inquiry should be determined before the market inquiry commences in order to ensure that the market inquiry process is run an effective and efficient manner in the limited time period allowed.

Proposed amendments to section 43D of the Amendment Bill

Duty to remedy adverse effects on competition

43D(1) Subject to the provisions of any law, the Competition Commission may, in relation to each adverse effect on competition, take action to remedy, mitigate or prevent the adverse effect on competition.

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

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

(4) Any action in terms of subsection (1) must be reasonable and practicable, taking into account relevant factors, including—

(a) the nature and extent of the adverse effect on competition;

(b) the nature and extent of the remedial action;

(c) the relation between the adverse effect on competition and the remedial action;

(d) the likely effect of the remedial action on competition in the market that is the subject of the market inquiry and any related markets;

(e) the availability of less restrictive means to remedy, mitigate or prevent the adverse effect on competition; and

(f) any other relevant factor arising from any information obtained by the Competition Commission during the market inquiry.

83. Motivation

Section 43D(2) should be amended to allow the Tribunal to consider any recommendations made by the Commission in relation to pricing remedies as a result of a market inquiry. The Commission is not a pricing regulator or an adjudicative body and any remedies in relation to pricing could have a substantially negative ramification on firms in the market.

Proposed amendments to section 43E as indicated below

Outcome of market enquiry

43E(1) Upon completing a market inquiry, the Competition Commission must publish a report of the inquiry in the Gazette, and must submit the report to the Minister with recommendations, which may include, but are not limited to—

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

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

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

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

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

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

(c) initiate and refer a complaint directly to the Competition Tribunal without further investigation;

(d) take any other action within its powers in terms of this Act recommended in the report of the market inquiry; or

(e) take no further action.

(4) Before the completion of the market inquiry, the Competition Commission must take appropriate steps to communicate, and where necessary on a confidential basis, to any person who is materially affected by any provisional finding, decision, remedial action or recommendation of the market inquiry in terms of this section and call for comments from them.

(5) The Competition Commission must have regard to any further information or submissions received in terms of subsection (4) when deciding the action or making the recommendation in terms of section 43D(1) and (2).

84. Motivation

The LSSA is concerned from a legality perspective that one outcome of a market enquiry may be for the Commission to undertake consent orders. If the proposed section is retained there is the risk that a firm may plead guilty to a practice that has not been fully ventilated by way of an investigation, referral and hearing before the Tribunal. There is the potential for the Commission to run investigations through a market enquiry, which would otherwise have been dealt with in terms of the Commission's cartel or abuse of dominance investigation powers, and as such would circumvent the Commission's need to use its enforcement powers. It also

creates an environment where parties could settle in order in relation to a market inquiry to avoid being investigated by the Commission, which could result in the matter not being properly investigated to the detriment of consumers.

<u>Proposed amendments to section 43F as indicated below</u>

Appeals against decisions made under this Chapter

43F(1) The Minister, or any person referred to in section 43G(1) who is materially and adversely affected by the determination of the Competition Commission in terms of section 43D, may, within the prescribed period, appeal against that determination to the Competition Tribunal in accordance with the Rules of the Competition Tribunal.

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

(a) confirm the determination of the Competition Commission;

(b) amend or set aside the determination, in whole or in part; or

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

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

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

(5) The Competition Tribunal may, on good cause shown, extend the period referred to in subsection (4) for one further period of six months.

(6) Any person referred to in subsection (1) who is aggrieved by a determination or order of the Competition Tribunal in terms of subsection (2) may appeal against that determination or order to the Competition Appeal Court.

(7) In determining an appeal in terms of subsection (1), the Competition Tribunal must be bound to the report of the inquiry published in the Gazette by the Competition Commission in terms of section 43E(1).

85. Motivation

Section 43F has been amended to include Section 43F(7), in order to ensure efficiency and clarity when parties approach the Tribunal following a recommendation made by the Commission. By binding the Commission to its published report and not allowing any additional evidence to be led by either party, any hearings before the Tribunal will be limited in duration and the parties to the hearing will be able to resolve any concerns on an expedited basis.