



**MTN'S SUBMISSION TO THE PORTFOLIO COMMITTEE ON
ECONOMIC DEVELOPMENT REGARDING THE COMPETITION
AMENDMENT BILL 2018, AS PUBLISHED IN GOVERNMENT
GAZETTE NO 41756 DATED 05 JULY 2018 (NOTICE NO. 41756
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1. Introduction

- 1.1 Mobile Telephone Networks Proprietary Limited ("**MTN**") would like to thank the Portfolio Committee on Economic Development ("the **Committee**") for the opportunity to comment on the Competition Amendment Bill ("the **Bill**") published in the Government Gazette under Notice No. 41756.
- 1.2 MTN believes that the Bill has far reaching implications for the South African economy in general from a competition law perspective and views the proposed amendments as an important milestone for effective regulation of competition in South Africa.
- 1.3 The Bill aims to give further effect to the objectives of the Competition Act 89 of 1998 ("the **Act**") through addressing structural challenges in the South African economy in respect of concentration and the racially skewed spread of ownership of firms in the economy.
- 1.4 The Bill proposes amendments to the Act aimed at enhancing the policy and institutional framework, as well as the procedural mechanisms for the administration of the Act. These measures are designed to improve policy coherence, as well as to promote institutional and procedural efficiency.
- 1.5 MTN would like to propose a further strengthening of the Bill in the proposed provisions relating to the abuse of dominance.
- 1.6 MTN believes that the proposed amendments relating to Sections 8 and 9 of the Bill, i.e. excessive pricing and price discrimination, create legal uncertainty. MTN suggests that improvements to the wording in the Bill should be made to provide legal certainty.
- 1.7 The changes proposed in Section 43C of the Bill relating to the market inquiry regime are welcomed, however MTN proposes that a reasonable and objective jurisdictional threshold should be present before such market inquiries are triggered.
- 1.8 MTN cautions the role of the Minister in relation to the Minister's dual ability to initiate market inquiries, as well as the Minister's ability to appeal/review the Competition Commission's findings in the outcomes of a market inquiry process. MTN believes that the Competition Commission, as a Regulator,

should be independent in the discharge of its duties and there should be a clear line between the Minister and the Regulator.

2. MTN Specific Comments

Excessive Pricing by Dominant Firms Prohibited

- 2.1 MTN notes that the Competition Commission has been tasked with the publication of Guidelines on excessive pricing in terms of Section 8(3)(f). MTN welcomes the establishment of such Guidelines from the Competition Commission as it will provide the clarity in terms of what will be deemed as acceptable pricing practice expected from firms in a market.
- 2.5 MTN submits that while developing the Guidelines on excessive pricing, it should be noted that firms operating in competitive markets routinely price products and services with similar costs at different levels to different customers (for example, the pricing of movie tickets to regular adults, children and seniors provides) or even to the same customer (e.g. volume discounts unrelated to cost savings). The reason is that efficient pricing by firms in competitive markets requires reference not only to supply side factors such as costs, but also to demand side factors such as demand elasticities.
- 2.6 MTN also submits that it is common for firms in the ICT industry to bundle components in various ways to encourage customers to buy the bundle, including setting prices for some components that do not reflect the costs of providing those components on a stand-alone basis. Movie theatres, for example, commonly price popcorn and drinks well above the costs of popcorn and drinks. However, it would be wrong to regard this as excessive pricing, as movie theatres typically operate in a competitive industry, without analysing the impact this does to a customer.
- 2.7 There is a risk that false positives are likely to arise if a component of a package is viewed in isolation from the rest of the package. Another example is in the airline industry where some airlines sell tickets cheaply but charge high prices for baggage handling and other services. These extra services are not sold as a standalone, but in combination with a ticket purchase. Therefore, there is an important relationship between various

component prices in the bundle. The question from the proposed Section 8(a) perspective needs to be whether the overall price for the movie-going experience or to get an airline passenger from A to B (i.e. the ticket plus the extras) is excessive with respect to the overall cost of all the components of the service.

2.8 It is crucial from a competition law perspective, to firstly assess whether the market appears to be competitive and functioning well for consumers. When a market appears to be effectively competitive there is little likelihood of excessive prices as competition drives firms to price the bundles that they supply close to the costs of those bundles.

2.9 In today's market where services are sold not in their individual components but in bundles, it is crucial to understand the commercial implications of pricing structures and what may appear excessive on its own is likely to be efficient and consumer welfare enhancing in the sense of generating a greater volume of services consumed overall. Hence the importance of including the qualification that an excessive price be *detrimental to consumers* to avoid "False positives".

Price Discrimination by Dominant Firms Prohibited

2.10 Section 9 of the Bill seeks to delete the legislative qualification in the Act that price discrimination is prohibited if it is likely to have an effect of *substantially preventing or lessening competition*. MTN submits that this provision should not be deleted as the deletion would create false positives. Moreover, price discrimination is allowed world-over as a standard practice if it is not anti-competitive or substantially lessens competition.

2.11 MTN submits that the deletion of this qualification (i.e. price discrimination is prohibited if it is likely to have an effect of *substantially preventing or lessening competition*), lowers the threshold test which is accepted as benchmark world-over in analysing a firm's behaviour when it discriminates in pricing. The effect of the deletion could open the flood gates to unscrupulous assessment of a firm's behaviour when the firm differentiates its pricing due to the nature of how firms compete in the market, which in many instances is justifiable based on factors and market dynamics.

Consideration of Mergers

- 2.12 Section 12B of the Bill proposes that when deciding whether a merger can be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effects that the merger will have on the ability of small firms or firms controlled or owned by historically disadvantaged persons to effectively enter into, participate and expand within the market.
- 2.13 MTN supports the use of competition law to promote the broader public interest in merger analysis in an emerging economy such as South Africa. However, MTN submits that generally the primary purpose of competition law is to maintain and promote competition. Therefore, there should be a careful balance between the promotion of broader public interest issues and the promotion of competition in the market.

Market Inquiries Regime

- 2.14 MTN submits that the Competition Commission intervention into the conduct of business should be based on a legitimate and objectively justifiable reason.
- 2.15 Section 43A (2) of the Bill proposes that an adverse effect on competition is established if any feature, or combination of features, of a market for goods or services impedes/restricts or distorts competition in that market. The proposed amendment lowers competition law standards in that it does away with the "substantial lessening of competition" ("SLC") criteria which is an internationally accepted standard for assessing competition dynamics in the market.
- 2.16 The removal of the SLC test has serious implications as it may mean that the Competition Commission can intervene in any market in which it believes any feature, or combination of features, of a market for goods or services impedes/restricts or distorts competition in that market. This may change the structure of the market and market dynamics in circumstances where the Act may not have necessarily been previously breached.

- 2.17 Ex post intervention is by its nature in reaction to abusive behaviour. MTN submits that the Competition Authority's current threshold for determining where there is a significant effect on competition in the market should continue to be the basis and focus of the Competition Authority's basis for intervening in a market. This jurisprudence ensures that any interested party does not abuse the market inquiry process, whilst it also negates the potential flood gates of market inquiries which could be triggered from a lower threshold. Viewed holistically, this provision is imperative in ensuring that the Competition Commission can still carry out its mandate and safeguard the market inquiry process.
- 2.18 Furthermore, MTN is concerned that the amendments to market inquiries as envisaged in Section 43E means that the Competition Tribunal has limited supervision in market enquiries process. The Competition Tribunal is only empowered to confirm any divestiture order proposed by the Competition Authority. MTN believes that the Competition Tribunal is well placed to objectively evaluate the substance and findings which arise from market enquiries.
- 2.19 Consequently, MTN believes that, to guarantee objectivity, a market inquiry finding should be confirmed by the Competition Tribunal.

Market inquiries in Regulated Sectors

- 2.20 In respect of regulated sectors, such as the Information and Communication Technology (ICT) sector, MTN submits that the Competition Authority should not initiate market inquiries where a sector regulator has a mandate in terms of the relevant sectors legislation to undertake ex-ante regulation into competition and public interest matters. In these cases, the sector regulators usually have powers to impose pro-competitive conditions where there is potential market failure.

3. Conclusion

- 3.1 MTN supports the objectives of the Bill in respect of economic transformation and meaningful participation in the economy by historically disadvantaged groups. MTN further supports increasing the powers of the Competition Commission. However, the Bill should be consistent with international best practice in its endeavor to achieve its objectives.

- 3.2 MTN submits that the Bill must concentrate on its stated purpose to avoid the unintended consequences of false positives in respect of applying the excessive pricing and price discrimination provisions of the Bill. In this regard, MTN appeals to the Committee to reconsider the significance of the *rule of reason* approach to economic reviews and analysis in the Competition Act.

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