Competition Amendment Bill, B23, 2018

Submission to Parliament

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The Centre for Competition, Regulation and Economic Development (CCRED)

1. CCRED was established at UJ in 2013, evolving from the Centre for Competition Economics which had been setup in 2011 as a virtual centre engaged in teaching and supervision of students at UJ. In a short time, it has become recognised as the leading centre in the field on the African continent. CCRED hosts an Annual Competition and Economic Regulation week, consisting of a conference and short courses, in a different SADC country each year. An annual symposium is also co-hosted in Nairobi. Reflecting CCRED's international network, keynote speakers have included leading professors of competition economics and law in the world: Massimo Motta, Frederic Jenny, Eleanor Fox, Bill Kovacic and Patrick Rey, each addressing aspects in the application of competition principles to questions such as abuse of dominance, cartels, and inequality.

2. CCRED researchers have published many journal articles, and there have been a number of edited books[2] and journal special issues. CCRED also runs a working paper series with 81 papers since 2012. Many of these publications are concerned with the challenges of competition and economic development including specific cases and the application of sections of the Competition Act.

3. Major research projects in recent years include on: Barriers to Entry[3], funded by National Treasury, a review of the performance and capacity of economic regulators[4], funded by EDD; and analysis of structural transformation[5] and conduct of lead and large firms[6], funded by the DTI.

4. The Executive Director of CCRED has been involved in competition policy in South Africa from before the Competition Act and was coordinator of the training programme for new staff in the Competition Commission before it opened its doors in mid-1999, and undertook the 10 year, 15 year and 20 year reviews of competition for the Presidency. He was chief economist of the Competition Commission from 2006 to 2012. CCRED senior researchers and research fellows have worked at the Competition Commission and for specialist economics consultancies in the field of competition. They have undertaken expert

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[2] Klaaren, J., Roberts, S. and Valodia, I. (Eds). (2017). Competition and Economic Regulation: Addressing Market Power in Southern Africa. Johannesburg: Wits University Press.; Roberts, S. (Ed). (2016). Competition in Africa: Insights from Key Industries. Cape Town: HSRC Press.
[3] https://www.competition.org.za/competition-and-barriers-to-entry/
[4] https://www.competition.org.za/archives-projects/
[5] https://www.competition.org.za/overview/
[6] https://www.competition.org.za/industrial-development-research-programme-idrp/

economic analysis on most of the major cases in South Africa, for private parties, the Competition Commission and for the Minister. CCRED is therefore in a unique position to contribute on how the proposed amendments change the evaluation of competition cases as well as on the impact of choices on approach to competition policy on the wider economy.

5. With this experience comes reflection on how the framing of the Act affects the assessment and outcomes of competition law in South Africa. In addition, CCRED provides advisory support on competition issues to various countries in Southern and East Africa which has allowed for reflection on the framing of competition laws and the related outcomes.

6. In the last 5 years CCRED has been concerned with understanding South Africa's post-apartheid economic outcomes with a focus on factors that explain these outcomes. A common thread in the insights from various research has been the adverse effect of concentration on the economy.

Summary

7. The Competition Amendment Bill (hereafter 'the Bill') published in Gazette No 41756 on 5 July 2018, represents an important and welcome step in strengthening the powers of the competition authorities, taking into account the high levels of concentration and racially skewed ownership and control of the economy.

8. The Bill must be approached from this recognition of the extreme concentration of ownership and control within the South African economy. With a small number of large firms dominating most sectors, this remains one of the country's greatest economic challenges.[7] While there are some debates about whether concentration has increased even further over the past two decades, the main point is that it is clear that the high levels of market concentration have not substantially diminished, and that this matters for the sustainability of the economy and society. Companies have market power and are using it to earn good profit margins but investment remains weak.[8] The opening-up of the economy to a diversity of participants has not happened and, if anything, concentration and vertical integration within sectors has increased since 1994, reinforced by high barriers to entry. [9]

9. This does not mean that competition law enforcement can solve all South Africa's development challenges. It is also important to carefully interrogate the provisions being adopted for their workability and possible unintended consequences. As economists we approach this submission in terms of the application of economics to the assessment of

[7] See also reviews by World Bank, OECD, IMF, as well as: Fedderke, J. W., Obikili, N. & Viegi, N., (2016) 'Markups and concentration in South African manufacturing sectors: An analysis with administrative data', WIDER Working Paper No. 2016/40; Mncube, L., Khumalo, L. & Ngobese, M., (2012) 'Do vertical mergers facilitate upstream collusion?' in K. Moodaliyar & S. Roberts, eds. The development of competition law and economics in South Africa. HRSC Press; Roberts, S. (2013) 'Review of Competition and Industrial Structure', for South African Presidency 20 Year Review.

[8] As noted by the OECD and IMF, see also Bosiu, T., Goga, S and Roberts, S. (2017). Concentration, profits and investment: Let's focus on the structure of the economy, not "cash hoarding". Industrial Development Think Tank: Policy Briefing Paper 11.

[9] Bell, J., Goga, S., Mondliwa, P. and Roberts, S. (2018). Structural transformation in South Africa: moving towards a smart open economy for all. A report for the Industrial Development Think Tank, housed at CCRED and supported by the DTI.

possible anti-competitive arrangements. We do not have legal expertise and do not comment on the procedural aspects of the Bill.

10. Competition between firms is at the heart of an economy's dynamism. First, rivalry between firms promotes productivity improvements as firms invest in upgrading and improving production capabilities in order to win market share.[10] Second, new participants bring different products, services and business models to market. In the South African context, this is particularly relevant in the context of opening markets to black entrepreneurs. Third, the exertion of market power can contribute to inequality by facilitating a transfer from the poor to the wealthy in the form of management compensation, profits and shareholder dividends emanating from anticompetitive conduct.

11. We do not care about competition for its own sake, but whether the nature of competition rewards long-term investment, innovation and creativity or whether it incentivises short-term profit maximisation. Markets and competition are in no sense neutral, they are shaped by the rules and the degrees of market power that different participants hold. Competition law is part of the imperfect refereeing system for these market participants. At the same time, it bears highlighting that competition is a rough process, and inefficient firms or those making products which consumers do not want will lose market share and may go under.

12. Competition law enforcement works through tests to identify anti-competitive conduct. In assessing the provisions we can consider the probability that there will be false positives, that is, a finding of anti-competitive conduct when none occurred (over-enforcement), and false negatives, where there was anti-competitive conduct but it was not identified and sanctioned (under enforcement). The balance in the likelihood of false positives and false negatives depends on the likelihood of anti-competitive conduct in the first place, which turns on the level of concentration and the extent of inherited market power. Moreover, where there are higher barriers to entry then the costs of under-enforcement are greater as the dominant firm abusing its position will be able to continue to do so for longer. Countries differ in their economic structure and therefore economic theory is clear that, in economic terms, countries should differ in their competition law regimes.[11]

13. It is not possible to take a view on the enforcement regime without relating it to the potential harm from under-enforcement versus over-enforcement. In this regard, it matters whether the firms in question have a market share of 50% or 80%, how long the position has been held, how high the entry barriers are, and whether the position is being sustained through ongoing investment and innovation to build local productive capabilities, or whether it is a legacy position which it is easy to protect. The more entrenched dominant firms are, the greater the costs of under-enforcement.

14. In South Africa, changing the profile of ownership and control is also critical for improved outcomes. The market inquiry provisions are particularly important here. In other countries,

[10] Roberts, S. (2017). Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27; Motta, M. (2015). Competition and its effects. *Walter Adolf Jöhr Lecture*, University of St. Gallen, 22 May 2015.; Roberts, S. (2016). An Agenda for Opening up the South African Economy: Lessons from Studies of Barriers to Entry.

[11] Evans, D. (2009) 'Why different jurisdictions do not (and should not) adopt the same antitrust rules', *Chicago Journal of International Law*, Summer, 2009 Symposium: Anti-competitive behaviour and international law.; and Brusick, P, and S. Evenett. 2008. 'Should Developing Countries Worry about Abuse of Dominance?' *Wisconsin Law Review*, 269, 274-277.

such provisions have been used to improve the way markets work without there necessarily being a finding of a specific anti-competitive act. The Bill anticipates this in South Africa. However, competition law is just a small part of a wider set of rules, regulations and norms. The research that CCRED has done on barriers to the entry and growth of small firms further highlights the importance of a package of policy measures to open-up the South African economy, in which competition enforcement is one important part.[12] In the absence of such policies, there is a risk that competition law enforcement is viewed as the 'silver bullet', and unrealistic expectations will not be met such that the authorities may be perceived as failing in the eyes of the public.

15. The record of competition law in South Africa is a good one from which much can be learnt and other countries have drawn insights from the South African experience. However, we are not necessarily learning from other countries where we are weak. A reality check indicates that there has been almost no successful enforcement against abuse of a dominant position. This could be because there is little abuse occurring. But, this is not plausible given the high levels of concentration and barriers to entry as long as we assume that businesses are rational and will engage in strategies to protect their profits. It could be because the competition authorities are not effective enough. While there is undoubtedly room for improvement, overall the authorities have been consistently highly ranked internationally. This leaves the law with which they have been working. From the outset the choice made here was in favour of checks on the scope of enforcement to ensure greater certainty for dominant firms out of an abundance of caution for undermining their investment. This needs to be revisited.

16. The concerns in South Africa with high levels of concentration and market power reflect concerns internationally.[13] However, South Africa is clearly in a more extreme and untenable position given the apartheid legacy.[14] There are also reasons to believe that barriers to entry are higher and the supra-competitive returns that can be made in South Africa are greater than most other countries. This includes because of, *inter alia*, the small size of the domestic market, the distance from other industrial economies from which imports can be sourced, and the skewed economic structure. This means that not only is anti-competitive conduct more likely, all else equal, than in many other upper middle-income countries but that the costs of such conduct are likely to be higher and longer lasting.

17. Other developing countries, such as those in ASEAN, as well as other countries on the African continent have embraced a framing of competition in terms of a process of rivalry, and of contraventions in terms of appreciably preventing, distorting, or restricting this process.[15] This is wording which has been adopted in the market inquiry provisions but not with regard to abuse of dominance (aside from price discrimination which has similar

[12] See https://www.competition.org.za/competition-and-barriers-to-entry/
[13] See Baker and Shapiro (2015); Stiglitz J. (2017) 'Towards a broader view of competition policy' in Bonakele, T, E. Fox and L. Mncube (eds), *Competition Policy for the New Era – Insights from the BRICS Countries*, OUP, 2017. Baker, J. and S. Salop (2015) 'Antitrust, Competition Policy, and Inequality', Working Paper 41, http://digitalcommons.wcl.american.edu/fac_works_papers/41 ; De Loecker, J. and J. Eeckhout (2017) 'The rise of market power and the macroeconomic implications', NBER Working Paper NO 23687.
[14] Makhaya, G. and Roberts, S., (2013). Expectations and outcomes: considering competition and corporate power in South Africa under democracy. *Review of African Political Economy*, 40(138), pp.556-571.
[15] Regional competition guidelines produced by ASEAN on competition policy emphasise the competitive process, and the pursuit of fair or effective competition to contribute to improvements in economic efficiency, welfare, growth and development (ASEAN, 2010). Abuse of dominance is defined in terms of harm to the competition process.

wording) or vertical restrictive practices. This is an important and long-running debate to which we return below.

18. Overall, we support the amendments, including much of the changes made from the first published Bill to the one tabled in Parliament. We focus on where we have substantive issues and proposals.

Exclusionary abuse of dominance

19. We believe that exclusionary abuse of dominance is the most important area in which amendments are required. However, the proposed changes in the Bill do not address some of the main challenges with the current Act. (We note that exclusion is also an area which can be addressed through market inquiries, as we discuss below.)

20. South Africa's record on abuse of dominance is striking. Very few dominant firms have been found to contravene the Act.[16]

    a. By our count, twenty-three abuse cases in total have been referred to the Tribunal from September 1999 to July 2018.

    b. The Tribunal has made a determination on twelve while six cases were settled with the Commission after referral (one settlement of which the Tribunal did not confirm). Of the remaining five cases, one was withdrawn and the others are still to be decided.

    c. Of the twelve cases the Tribunal has decided, it has found that abuse occurred in nine (on the part of Patensie, South African Airways (twice), Sasol, Mittal Steel SA, Senwes, Telkom, Sasol Chemical Industries and Media24).[17] However, in four of these the finding was overturned or set aside by higher courts (Sasol, Mittal Steel SA, Sasol Chemical Industries and Media 24) meaning that in almost nineteen years there have only been conclusive findings of abuse of dominance in five cases and with regard to four companies (SAA twice, Telkom and two former agricultural co-ops neither of which paid a penalty).

    d. In addition, five of the settlements (GlaxoSmithKline & Boehringer Ingelheim, Sasol Nitro, Foskor, Telkom, and ArcelorMittal SA) involved substantive undertakings, even while not all having an admission.[18] A further settlement in Astral included an admission under 8(c). On this basis, taking the findings and the substantive settlements, abuse of dominance has been proscribed in eleven cases (five findings and six settlements).

21. This record is peculiar given the levels of dominance in the economy and taking into account the fact that a dominant firm has a strong incentive to use its power to exclude

[16] This includes both exclusionary and exploitative abuse. For a detailed discussion on South Africa's record on competition see Roberts, S. (2017). Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27; and Roberts, S., 2012. Administrability and Business Certainty in Abuse of Dominance Enforcement: An Economist's Review of the South African Record. *World Competition*, *35*, p.273.

[17] The Tribunal dismissed the cases in Mandla-Matla, BATSA and SAB.

[18] Some of these settlements were before a referral, such as GlaxoSmithKline.

rivals if there are strategies it can pursue to protect its position and profits being made from it.

22. It also contrasts to the record of countries like Chile that had decided 57 abuse of dominance cases from 2003 up to 2012, despite the competition law regime being four years younger than South Africa.[19]

23. It is important to recognise at the outset that South Africa adopted more limited provisions than in most other jurisdictions, despite: (a) the objectives of the Act; (b) the extremely high levels of concentration; and, (c) the fact that many, if not most, dominant firms benefitted in their position from apartheid.

24. The South African provisions regarding exclusionary abuse of dominance can be distinguished as follows:

    a. The Commission (or private complainant) proving that the effects of exclusionary acts outweigh the claimed efficiencies in the case of 8(c) and price discrimination under section 9. There is currently no penalty for a first offence even while there have been proven effects. The Bill now introduces a penalty.

    b. There are defined exclusionary acts, namely refusing access to an essential facility under 8(b) and a list of specific discrete conducts under sub-sections of 8(d). The onus is on the respondent to show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act. This means that, assuming the respondent can put up some arguments for pro-competitive gains, the anti-competitive effect must be evaluated by the Commission and found to be of greater significance than the efficiencies.

25. There are two main issues here. First, the formulation is premised on each 'act' listed under 8(d) having a separate and distinguishable effect while in the real world a dominant firm will likely pursue different and changing strategies and the exclusionary effect will be a compound effect of all of these. But, for referral under the South African Act they must all be separately identified and the effects assessed.

26. Second, it is based on quantification of the effect rather than an assessment of the undermining of competition, as such. As set out by the Competition Tribunal in *SAA I* and reiterated in following decisions,[20] the effect must be quantifiable, in terms of the lower prices, higher output and/or improved quality that would have pertained in the absence of the conduct.

27. This differs from the stance in many if not most other countries where the dominant firm is entitled to compete 'on the merits' but has a special responsibility not to allow its conduct to impair genuine undistorted competition (in the EU formulation).[21] There is an implied

[19] Tapia, J. & S. Roberts (2015) 'Abuses of dominance in developing countries: a view from the south, with an eye on telecoms' in M. Gal, M. Bakhoum, J. Drexl, E. Fox, D. Gerber (eds) *Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law*, Cheltenham: Edward Elgar.

[20] Such as in the case relating to the alleged vertical restrictive practices of SAB, where the CAC stated with regard to anti-competitive effects that it 'must follow that some likely effect upon price, output and/or quality of the product which diminishes consumer welfare must be shown to exist in order to trigger the application of 5(1).' (para 60).

[21] The firm can also provide an objective justification for the conduct.

test of materiality here, but not that the effect of the conduct must necessarily be quantified in terms of price and quantity. This is particularly important where we are concerned about the effect of conduct in erecting barriers to firms which are *potentially* efficient/effective competitors, rather than conduct which undermines a rival which was well-established to start with.

28. In effect, under the South African test it is much more likely that multinational rivals can demonstrate a significant effect while potentially efficient smaller firms have little, if any, chance of doing so as if they have I fact been excluded they have not had the change to show what impact they can have. The participation of this class of rivals also has no merit in itself (due to, for example, bringing different choices to consumers). By their nature, these rivals will probably grow incrementally and are likely to enter through targeting a consumer segment and hence not be impacting across the market. They will also not achieve cost efficiencies until they reach minimum efficient scale. As *potentially efficient* competitors, the effects are therefore inherently speculative.

29. The South African formulation was the result of a particular position advanced by big business, as explained by their negotiation team.[22] A higher threshold to prove effects is stipulated (even where there was no penalty for a first offence) on the basis that the dominant firms' incentives to invest and compete vigorously should be protected. However, if the smaller rivals have been excluded before they could become effective competitors then it is impossible to know what the market would have looked like had they not been undermined.

30. The Amendment Bill published on 1 December 2017 removed 8(c) and instead prohibited exclusionary abuse, as such, including a non-exhaustive list of conduct. However, the definition of an exclusionary act in the South African law is 'an act that impedes a firm entering into, or expanding within, a market' (with 'participating in' having now been added). Hard competition on the merits – offering products at cheaper prices - can impede a rival expanding within a market (it is more difficult to attract customers if there is keener price competition or better products).

31. Under the Bill, the 8(c) provision and separate 8(d) list of discrete acts (with additions) has now been re-instated, albeit a penalty can now be imposed for a first offence for 8(c). This is in line with the approach proposed by some submissions on the Bill with the justification that it is important not to dampen vigorous competition by large firms given the highly oligopolistic economy in South Africa.[23]

32. We believe this is a poor argument for not amending the Act to better address exclusionary conduct that weakens smaller challenger firms. If there are two or three large firms (there cannot be more if at least one is to be dominant) then it is quite likely they will <u>not</u> be competing vigorously as they will have likely recognised how to tacitly collude. It is the threat of effective entry by smaller firms which will bring greater competition, but these firms need to grow to realise economies of scale to be able to compete. The narrative is effectively that these dominant firms are all we have so let us give them greater latitude to

[22] See interviews of Nedlac negotiators, reported in chapter 4 of Roberts, S (2000) 'The Internationalisation of Production, Government Policy and Industrial Development in South Africa', unpublished PhD thesis, University of London.
[23] For example, by Genesis Analytics.

compete, even while this implies that potential small competitors can be undermined before they have a chance to mount an effective competitive challenge.

33. The implication of re-introducing the separate 'pigeon-holes' of defined acts can be illustrated with a case example. In Senwes, the conduct and its implication was effectively admitted. The arrangement to price differently for storage longer than six months depending on who the grain was sold to influenced the farmers' behaviour and impacted on competition between traders.[24] There was only uncertainty in the case because of the requirement to identify the conduct according to one of the categories. (In the end it was defined as a margin squeeze, which is now being added as a further category.)

34. In addition, the South African case law indicates that, at least with regard to abuse of dominance, the extent and duration of dominance is not material nor is how the position of dominance was reached and is sustained.[25]

35. The practical impact of the choices can be readily seen in several international cases dealing with substantially the same conduct:

    a. **Draught beer exclusivity: APB in Singapore[26]**

    The Competition Commission of Singapore (CCS) investigated Asia Pacific Breweries (Singapore) Pte. Ltd. in relation to its practice of supplying draught beer to outlets solely on an exclusive basis. This prevented outlets from selling draught beers from competing suppliers and restricted the choices of draught beers available to retailers and consumers. Competing products in bottles and cans were still available. Unless draught beer is defined as a separate product market it is doubtful that there would be a substantial effect, however, smaller breweries can more readily supply draught beer as they do not need to invest in a bottling facility and thus the practice undermines competition from this group of producers. In Singapore APBS agreed a commitment with the CCS to cease its outlet-exclusivity practice. In South Africa CCRED research identified draught arrangements by SAB as undermining the ability of small brewer Soweto Gold to be able to compete in taverns (until it invested in a bottling plant, subsequently being acquired by Heineken). [27]

    b. Fridge exclusivity for carbonated soft drinks in Malaysia, EU, Chile and Singapore vs South Africa

    The EU, Chile, Singapore, Malaysia and Mauritius all use the wording of *"prevents, distorts, or restricts competition*". In all of these countries Coca-Cola has undertaken to open-up fridge space to rival firms (typically 20%) even where the fridges are supplied by Coca-Cola. In **Singapore** this followed an investigation and a settlement. Coca-Cola Singapore Beverages *voluntarily* undertook to remove certain provisions from its agreements with retailers and allow its retailers to use up to 20% of the space in coolers provided by CCSB to hold other brands of

[24] And, the trader who testified to being harmed was a large multinational.
[25] See the CAC decision in Sasol Chemical Industries vs Competition Commission.
[26] Competition and Consumer Commission Singapore Press release dated 28 October 2015.
[27] Matumba, C. and Mondliwa, P. (2015). Barriers to Entry for Black Industrialists - The Case of Soweto Gold's Entry into Beer. CCRED Working Paper 2015/11.

beverages, where these retailers had no access to alternative cooling equipment on their premises.[28] In **Mexico** the Federal Competition Commission in 2007 found Coca-Cola and its bottlers to be in contravention of the Act with regards to exclusionary behaviour towards its key competitors. The Commission found that Coca Cola enticed small stores to sign exclusivity contracts in exchange for free refrigerators, Coke signage and other company merchandise. The investigation was prompted by complaints from PepsiCo Inc. and other Mexican soft drink manufacturers. Other complaints stemmed from very small retailers, the most significant being a woman who was prohibited from selling rival Big Cola's product in her one-room store in an low-income Mexico City neighbourhood.[29] In **Chile** two Coca-Cola bottlers entered into a settlement following a competition case committing not to sign exclusivity contracts with distributors or set exclusionary incentives. The settlement included provisions where, under limited circumstances, space would be granted to competitors in fridges.[30]

c. **Sistic exclusive contracts in Singapore vs Computicket in South Africa.**

In June 2010 the CCS found that ticketing company SISTIC.com had abused its dominant position by requiring venue operators and event promoters to use its services exclusively.[19] In addition to removing the exclusive dealing requirement a penalty was imposed. The decision was upheld by Singapore's Competition Appeal Tribunal and there are now more independent ticketing companies operating in Singapore. By comparison, the Competition Commission of South Africa referred a case of exclusive dealing against Computicket in 2010 to the Competition Tribunal (having started the investigation some two years earlier and before the CCS started its investigation). Notwithstanding that the fact of the exclusive contracts required by Computicket of inventory providers is not in question, legal challenges over the basis for the Commission's referral have meant the merits of the case were only heard by the Tribunal some six years later, and a decision is still pending.

36. If the amendments are accepted in the current drafting then South Africa is taking a relatively conservative approach in comparison to jurisdictions facing similar challenges, which can be expected to result in a continuation of the current status quo rather than strongly tackling strategic barriers to entry in concentrated markets as per the stated intention of the Bill.

37. We therefore propose adopting a definition of exclusionary abuse along the lines in most other countries and the identification of examples of types of conduct (which effect can be mutual reinforcing). This is not a move away from a proper economic analysis of the conduct but places a greater onus on the dominant firm in terms of its special obligation to compete on the merits.

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[28] Media Release by the Competition Commission of Singapore, 'Coca-Cola Singapore Beverages changes business practices in local soft drinks market following enquiry by CCS', 10 January 2013

[29] Travis Bennion Olsen, *Big Cola v. Coca-Cola: How a Convenience Store Owner's Complaint Resulted in One of Mexico's Largest Antitrust Fines*, 42 U. Miami Inter-Am. L. Rev. 87 (2010)
Available at: http://repository.law.miami.edu/umialr/vol42/iss1/4 and http://www.banderasnews.com/0511/nr-uncolaed.htm, accessed on 10/02/16

[30] OECD (2012), 'Annual report on Competition Policy developments in Chile – 2011'; DAF/COMP/AR(2012)34

We further propose that a list of factors be considered when weighing up the evidence similar to those in mergers.

Excessive pricing

38. The legal precedent to date on excessive pricing in South Africa has tended to raise more questions rather than providing certainty on the approach to be adopted. This is partially due to the complex nature of the cases that have been heard by the courts. The proposed amendments to shift the burden of proof to the respondent, remove the requirement to show detriment to consumers, and the call for the Commission to issue guidelines, are welcome steps to improve enforcement in this area. The removal of the requirement to show detriment to consumers is also important to address pricing by vertically integrated firms that are able to shift profits upstream, and where the customers affected are other businesses rather than end consumers.

39. The addition of structural characteristics is welcomed – they indicate the types of markets where prices will not self-correct and where it is appropriate for the competition authorities to focus. These are markets with high barriers to entry, where the firm's dominant position is entrenched, and where the market position is not a result of ongoing innovation or risk taking by the firm and rather past exclusive rights or state support.[31]

Price discrimination

40. The price discrimination amendments shift the onus onto the dominant firm charging the differential prices to demonstrate that the conduct will not impede the ability of small and medium businesses and HDI controlled businesses to participate effectively. The effects assessment has also been changed from "substantially preventing or lessening competition" to "preventing or lessening competition" and includes the effect on small businesses and those owned/controlled by HDIs. Furthermore, a penalty is now applicable. These represent substantial and welcome changes to the provision.

41. We note the pervasiveness of differential prices, including for many pro-competitive reasons. The sections of the Act which are retained provide a range of justifications for differential treatment. The proposed amendment will likely lead to very substantial compliance costs on the part of firms which may be viewed as dominant or else firms will structure contracts with small, medium and HDI controlled firms so that they are not equivalent. This may deter dominant firms in contracting with such firms.

42. One way in which this can be mitigated is by adopting criteria in the assessment which indicate that the extent and duration of dominance is a relevant consideration, as suggested above. This would mean that super-dominant firms which have held that position for some time will indeed have a greater obligation to ensure their pricing does not discriminate against small business (without good justification). However, firms with

[31]Motta, M. and A. de Streel (2006) Exploitative and Exclusionary Excessive Prices in EU Law, in Ehlermann, C-D. and I. Atanasiu (eds.) (2006) European Competition Law Annual, 2003: What is an abuse of a dominant position?, Oxford: Hart Publishing.; Vickers, J. (2006) 'How does the prohibition of abuse of dominance fit with the rest of competition policy?' in Ehlermann and Atanasiu (eds); and Evans, D. (2009) 'Why different jurisdictions do not (and should not) adopt the same antitrust rules', Chicago Journal of International Law, Summer, 2009 Symposium: Anti-competitive behaviour and international law

shares only slightly above 35%, and thus where customers do have alternative suppliers to which to turn, are less likely to fall foul of the provision.

Market inquiries

43. The market inquiry provisions are extremely important as they give the Competition Commission more extensive powers to analyse how markets are working and the remedies which can be implemented to change the market outcomes. While some have argued that this would represent an over-reach on the part of the Commission, in no sense are the markets we have either neutral or fair. They are intrinsically shaped by past interventions and inherited positions, as well as the investments and innovations of lead firms in sectors. Analyses of South African markets, including by CCRED, highlight the extent to which the legacy of apartheid policies and ownership patterns still shapes market structures in 2018.

44. It is worth noting that in other jurisdictions (including the UK), the competition authorities have the power to require structural remedies following a market inquiry, provided the relevant tests are met and subject to appeal by the affected parties. South Africa is in reality catching up to the rest of the world in this regard.

45. As we have highlighted above, the process of competition is a critical part of the way in which the economy works to ensure that markets are, and are perceived to be, fairer for participants. If this is not the case, then a market economy itself will be at threat.

46. This is not about protecting certain competitors, but it is about reducing the barriers to categories of participants such as small HDI-controlled businesses. Some have argued that this will be at the cost of overall economic welfare and it will deter investment by incumbents.

47. This is to miss the point. The continuation of the current structure of ownership and control, with extreme inequality and levels of exclusion, is not sustainable. And, without addressing this, there will be continued high levels of uncertainty about the direction of the country and very low investment levels.

48. In this light, the inquiry measures are, in fact, long overdue. The Commission has built-up considerable expertise in market analysis and, although not a specialist on any particular market, the Commission is also removed from the ongoing lobbying and engagement with powerful interests in a given sector that sector regulators are subject to. The Commission is not alone in becoming a competition and markets authority, as there are similar provisions in the UK and the Netherlands.

49. There are important concerns regarding market inquiries, which we noted in comments on the Bill published in December 2017.

    a. First, how market inquiries can be initiated is critical to the role they will play. The Minister can *require* the Commission to undertake a market inquiry, albeit after consultation with the Commission and consideration of the listed factors. As it is for the Commission to Gazette the terms of reference of the inquiry it can presumably define the scope of the inquiry. This is important, as the Commission has resource constraints and market inquiries are likely to be more effective when

they are focused on a particular set of issues in an identified market or markets. The public pressure on a Minister is likely to push for a very wide range of issues to be examined in a broad set of markets.

b. Second, the resources, expertise and capacity for the Commission to undertake inquiries is critical for their success. The major demand on the Commission of inquiries is evident in the inquiries conducted in recent years.

50. In order to ensure that the initiation of market inquiries is genuinely responsive to wider competition concerns and that they are focused on competition issues, defined in broad terms, avenues need to be considered for inquiries to be shaped, especially by the concerns small-scale entrepreneurs from historically disadvantaged groups and low-income consumers. It is not to privilege these groups but simply recognises that big businesses and wealthier consumers are naturally able to lobby and influence the debate. The route that the UK has adopted is to recognise representative organisations for SMEs and consumers as being 'super-complainants' for these purposes, bringing issues to the Commission's attention which could then be screened by the Commission in a transparent way.[32] This would have the added benefit of raising awareness of the Commission's work and bringing it closer to communities.

51. The adverse effect on competition as it affects smaller businesses is very broadly framed in terms of any feature or combination of features (which may be structure, market outcomes, conduct including parallel conduct of firms and customers) which impedes, restricts or distorts competition.

52. While this can be characterised as a public interest test with regard to the effect on smaller businesses, this assumes that smaller businesses as a group are competitively insignificant, which is incorrect especially when we consider the aspects of new business models and designs. Indeed, healthy competition between large businesses often relies on an eco-system of smaller and medium sized businesses from which the large businesses can harvest ideas (including through acquisition). South Africa urgently needs a healthier entrepreneurial eco-system, as part of competition.

53. International experience of market inquiries have included structural remedies. These are desirable as they are likely to have a lasting impact and require less monitoring than imposing behavioural conditions. For example, remedies following inquiries in the UK have included divestiture of hospitals and of cement and readymix businesses and development or Grocery Supplier Code of practice (flowing from inquiries in these sectors).[33]

54. As the requirement to remedy adverse impacts on competition has now been appropriately changed to reflect a range of concerns, it is important that structural remedies (including requiring divestiture) are amongst the remedies which can be implemented. Any divestiture must have been demonstrated to be appropriate given the market problems

[32] The UK has designated certain consumer bodies as being able to lodge super-complaints relating to where 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers'. A market study is one possible course of action. See https://www.gov.uk/government/publications/what-are-super-complaints/what-are-super-complaints

[33] Coincidentally these have included businesses which are also present in South Africa. Netcare owned the largest hospital group in the UK and Lafarge is one of the main cement businesses which has been required to make divestitures.

and must have taken into account less restrictive means. It may be that structural remedies could in theory be implemented as any other action within the Commissions powers can be taken but it would be preferable for this to be explicit.

Collusion

55. Two amendments affect the collusion provisions of the Act. First, a penalty may now be imposed for horizontal restrictive practices which substantially prevent, lessen competition but which are not price fixing, market division or bid-rigging (that is, they fall under section 4(1)(a)). Second, there is the addition of dividing markets by allocating market shares to section 4(b)(1). This draws on learnings from recent cases.

56. These are both welcome amendments given the extent of collusion uncovered and the likely use of different strategies of firms to collude in ways which will be more difficult to identify.

57. At the same time, however, there is a perception in markets that any collaboration between competitors can fall foul of the Competition Act, potentially with substantial penalties to pay. It is important to recognise that there may be valuable cooperative and collaborative relationships which should not be deterred.

58. We note the proposed amendment to section 10(3)(b), including entry, participation in and expansion of small and medium businesses and firms owned of controlled by historically disadvantaged persons an important consideration in granting exemptions. Indeed, an exemption can be applied for in the circumstances described in paragraph 57, however, provisions relating to prohibited horizontal practices could enable greater certainty here. For example, a group of small suppliers who cooperate in order to compete more effectively with larger incumbents ought not to be treated as a hard-core cartel, where they account for a very small share of the market and are lowering costs and prices. Similarly, cooperative or collaborative arrangements to build skills and technological capabilities ought to be distinguished.

59. We propose that safe harbours are introduced for cooperatives where firms are a small proportion of the market or face intensive competition from low cost imports).

Foreign investment

60. The Amendment Bill introduces a new provision (section 18A) on ‘‘Intervention in merger proceedings involving foreign acquiring firm.” The provision gives the President powers to constitute a Committee which must be responsible for considering whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic.

61. We note that national security screening of foreign investments is the practice in many other countries. However, it is unusual for this legislation to be incorporated in the competition law, as typically there is a separate foreign investment board or similar body which is in a position to evaluate the criteria. This is a separate government process that can be included in other legislation, for example the Protection of Investment Act.