Vodacom's written submission in response to the invitation for comments on the 2018 Competition Amendment Bill [B 23—2018]

INTRODUCTION

Vodacom (Pty) Ltd ("Vodacom") welcomes the opportunity to comment on the proposed Competition Amendment Bill, B 23 - 2018 ("the Bill") as published by the Minister of Economic Development ("the Minister"). We further confirm our willingness to participate in any further consultative process which the Minister may undertake in the future. Certain submissions made by Vodacom in respect of the 2017 Competition Amendment Bill ("2017 Bill") are repeated for the sake of completeness.

Our submission comprises of three parts:

- Part A sets out the Executive Summary
- Part B sets out Vodacom's Principal Comments
- Part C details Vodacom's Specific Comments on the wording of the Bill.

PART A: EXECUTIVE SUMMARY

Vodacom notes that the introduction of the Bill takes place against the backdrop of calls for significant restructuring of the economy in order to foster greater inclusivity and participation by the historically disadvantaged sections of the South African population.

In light of the important objectives and far-reaching consequences of the Bill, Vodacom calls for careful consideration of the proposed amendments in view of internationally recognised economic theory and precedent as well as the South African constitutional dispensation and the policy framework within which the Bill is meant to function.

Vodacom respectfully submits that the following key aspects of the Bill require particular attention:

- The various public interest objectives regarding BEE and the furtherance of small businesses should be aligned with Government's various other objectives and legislation in these areas, such as the Broad-Based Black Economic Empowerment (referred to as the "BBBEE ") Act (Act 53 of 2003 as amended by Act 46 of 2013). The introduction of sections 8(1)(d)(vii), 8(4) and 9(3) as currently conceived risks hindering the objectives of the Competition Act, by undermining effective competition and harming consumers. There are more effective means by which to further the BEE public interest objectives in the context of competition law, and examples from the EU have been provided.
- The introduction of novel provisions dealing with price discrimination in relation to the purchase or goods or services, in the context of section 9 of the Bill, should, if they are implemented, be reconsidered because the proposed amendments do not give appropriate recognition to the economic test that should be employed to determine whether the conduct is anti-competitive and they introduce a price discrimination abuse of dominance in relation to the purchase of goods and services, which will result in anti-competitive outcomes..
- In various places the Bill seeks to introduce guidelines to be published by the Competition Commission ("Commission") in a way which does not accord with the Constitutional Court's position on the permissible legal effect of such guidelines. In certain instances, the guidelines proposed in the Bill will, in fact, be required to set out the substantive elements of contraventions where the Act does not contain these elements or where definitions of elements of contraventions would be deleted pursuant to the Bill.
- The introduction of executive oversight provisions in relation to mergers create an onerous dual notification obligation which will significantly impede the conclusion of many transactions with no prospect of harming the national security interests of the Republic.

- The proposed amendments dealing with market inquiries are vague in relation to the trigger for intervention, provide for remedies which are too wide and should rather be exercised by the Competition Tribunal ("Tribunal") than the Commission since the Commission in primarily an administrative body. In order to satisfy the relevant constitutional principles and address the above concerns, Vodacom proposes various amendments.
- There is a need to align the Commission's interventions in the realm of market inquiries with the role of the Independent Communication Authority of South Africa ("ICASA").
- The amendments that seek to penalise a contravention of any of the prohibited practices with a penalty upon a first offence, the significant increase in the percentage of the penalty in the case of a second contravention and the attempt to impose administrative penalties on the holding companies of firms are too onerous.

PART B: PRINCIPAL COMMENTS

1. Background

1.1 The proposed amendments to the Competition Act (contained in the Bill) introduce substantive and procedural changes in competition law and policy in South Africa.

1.2 Vodacom makes reference to its submissions in relation to the 2017 Bill (attached hereto) and repeats certain parts of the submissions dealing with the objectives of the Bill.

2. PROVISIONS WHICH SEEK TO FAVOUR NON-DOMINANT FIRMS, SMALL AND MEDIUM BUSINESSES OR A FIRM CONTROLLED OR OWNED BY A HISTORICALLY DISADVANTAGED PERSON ("PROTECTED FIRMS")

2.1. Vodacom notes that one of the objectives of the amendments is to address the skewed ownership profile of the economy. In principle, this objective can be furthered in the Competition Act without undermining the central objectives of South Africa's competition legislation (for example, to achieve a more effective and efficient economy in South Africa, and to ensure that consumers can freely select the quality and variety of goods they desire).

However, Vodacom is concerned that certain aspects of the Bill (particularly those which seek to favour certain types of business over others) risk undermining competition rather than promoting it, which will then have an adverse impact on efficiency and ultimately on consumers. In particular, the measures proposed for sections 8(1)(d)(vii) 8(4) and 9(3) are likely to create unintended distortions and inefficiencies in the market, which will produce poor outcomes for all consumers, reducing their access to low prices and high quality products and services. The insertion of these sections introduces a significant amount of uncertainty in the sense that dominant firms are burdened with the obligation of favouring non-dominant firms, small and medium businesses or a firm controlled or owned by a historically disadvantaged person ("Protected Firms ") in a way which may lead to outcomes which do not, in fact, foster healthy competition. It is not axiomatic that the favouring of such firms in all markets will necessarily lead to pro-competitive outcomes and they may cause the market to be skewed in a way which hampers economic development.

2.2. The promotion of consumer welfare is not incompatible with measures designed to protect small and medium businesses (particularly firms owned or controlled by historically disadvantaged persons) and one of the ways to protect the interests of these groups is through measures which

provide small and medium businesses (particularly firms owned or controlled by historically disadvantaged persons) with carefully targeted state support and specific exemptions from the application of competition law, to enable them to enhance their bargaining power when dealing with large customers, through the establishment of cooperatives or producer organisations. In the EU there are rules which permit producers to cooperate, and the EU provides exemptions from the competition rule for such organisations (see for example, https://ec.europa.eu/agriculture/producer-interbranch-organisations/producer-organisations-association_en), in a way which does not undermine the protection of consumer welfare.

2.3. These types of provisions are in line with the practices of the EU and other OECD countries. However, any provision which seeks to regulate the prices that dominant firms agree with specific categories of supplier, or the impact of discriminatory pricing on only specific categories of competitor or customer, would be at odds with international precedent, and would likely create significant uncertainty and undermine competition, to the detriment of consumers. For example, dominant firms would be forced to assess whether or not a price they offer to pay could be construed as "excessively low", without any insight into the supplier's level of efficiency or cost base. This may result in larger firms instead avoiding dealings with small or medium firms, rather than risk the uncertainty of an infringement of the Competition Act.

2.4. Vodacom notes that Section 8(d)(vii) is vague because there is no objectively determinable price at which it is evident that the relevant protected firms will be able to participate in the economy. The fact that the Commission may publish Guidelines to clarify what this means is contrary to the rule of law. There are significant interpretational difficulties with section 9(3), in particular. There are practical difficulties that will arise from this aspect of the proposed amendments to section 8(d)(vii) and 9(3) because there are no direct international precedents for standards of pricing or conduct which will not impede the relevant Protected Firms from "participating effectively". "Effective participation" is also not referenced to a particular market, which compounds the vagueness of the drafting.

2.5. It is significant to note that section 8(1) (d)(vii) seeks to protect a broader class of *non-dominant firms* (although small and medium businesses or a firm controlled or owned by a historically disadvantaged person also fall within this broader class) whereas and section 9(3) seeks only to protect small and medium businesses or a firm controlled or owned by a historically disadvantaged person. It is not clear what the reason is for the broader class of firms that enjoy protection under section 8(1) (d)(vii) and Vodacom notes that the fact that a broader class of firms

enjoy protection significantly increases the scope and onerous nature of the proposed amendment.

2.6. Vodacom considers that the current provisions will not achieve their stated objective (and may in fact hinder it), and also undermines other central objectives of the Competition Act. Vodacom proposes that alternative approaches (such as a broader fairness requirement which does not relate to pricing, and specific exemptions) should be considered instead.

3. **Market inquiry provisions**

3.1. One of the most significant proposed amendments relates to the far-reaching powers to be provided to the Commission to impose remedies after completion of a market inquiry. These amendments appear to be partly based on the Enterprise Act in the United Kingdom. Only two other OECD countries besides the UK have similar provisions besides the UK, being Mexico and Iceland.

3.2. The Commission will have powers to impose a remedy to address an adverse effect on competition, when particular prescribed features of the market impede, restrict or lessen competition. Essentially the remedy amounts to a binding order.

3.3. The prescribed features which may negatively affect competition include: "*concentration*" as well as "*conscious parallel or co-ordinated conduct*". These terms have not been defined. The inclusion of "*conscious parallel or co-ordinated conduct*" seems to conflate the substantive assessment of the negative effect on competition with the "features" contained in section 43A(3) and Vodacom accordingly respectfully suggests that it be deleted.

3.4. The Commission may make an order which is "reasonable and practical". The "orders" may include a recommendation of divestiture to be made by the Tribunal.

3.5. Vodacom respectfully comments on the market inquiry amendments as follows:

3.5.1. This is an exceptional provision and these types of extensive remedial powers that are found in the proposed amendments have been used only in a limited number of international jurisdictions. This reflects the hesitancy with which such wide powers are afforded to administrative bodies.

3.5.2. They are particularly far-reaching because the firm concerned would have no advance notice that its conduct or even its mere participation in the market would attract such significant sanctions or regulatory- type interventions.

3.5.3. In order to avoid possible constitutional litigation, based on rule of law and vagueness arguments, in relation to the proposed amendments, certain areas require further attention, being:

- the establishment of a clear and rational basis for the Commission's finding, located in sound economic principles and referenced to the recognised test based upon a substantial prevention or lessening of competition (which includes a consumer welfare element); and

- the limitation of the wide ambit of the orders which the Commission may impose.

3.6. Finding of the Commission – threshold test

3.6.1. It is recommended that the threshold for the Commission's finding, on the basis that it will be entitled to impose remedies, should be increased.

3.6.2. Currently, the test is whether the feature or combination of features "impedes, restricts or distorts competition".

3.6.3. It is submitted that the words "impedes, restricts or distorts competition" should be replaced with the words "substantially prevents or lessens competition." This test bears a particular meaning within the context of the Competition Act and introduces the consideration of consumer welfare considerations. In the UK Enterprises Act, the roles of consumer welfare fulfil an important role in constraining the intervention in markets. The use of this recognised test also increases the bar for intervention, which is justified in light of the extensive powers sought to be provided to the Commission.

3.6.4. It is submitted that if this restriction is not introduced the provision is likely to present constitutional litigation.

3.7. Remedy to be imposed by the Commission

3.7.1. The remedies which the Commission may impose will need to be curtailed to comply with the Constitution and to be consistent with overlapping legislative provisions.

3.7.2. The wide nature of the powers of the Commission to impose a remedy is illustrated by contrasting them with the careful way in which the Tribunal's power to make an order in the case of a prohibited practice is framed. In the case of prohibited practices, the relevant conduct

of the firm that would constitute a "prohibited practice" is clearly defined and the potential remedies that the Tribunal may impose are also clearly defined: the Tribunal may make the range of orders set out in section 58(1)(a) of the Competition Act.

3.7.3. In contrast, the only limitation on the remedies which the Commission may impose is that it is "reasonable and practicable" in terms of section 43D(1). Despite the provisions of 43D(4), the nature of the remedies which the Commission may seek to impose have not been defined or curtailed and are not likely to withstand constitutional scrutiny.

3.7.4. In terms of Schedule 8 of the UK Enterprises Act, the types of orders which it is competent for the UK Competition Commission to make are set out in detail. Listing the particulars of the order which the Commission will be entitled to make satisfies the constitutional principles set out below.

3.8. Concurrent jurisdiction of ICASA

3.8.1. Vodacom points out that the remedies imposed pursuant to a market inquiry may be *ex ante* rather than *ex post fac*to in nature and, as such, the roles of ICASA and the competition authorities will need to be considered. It will not be feasible to have two regulators fulfilling *ex ante* functions.

3.8.2. In terms of its governing legislation ICASA "*...may not take any action where a matter has already been brought to the attention of and is being dealt with by that other authority or institution*".[1] It is incongruous to exclude the jurisdiction of ICASA, the industry regulator, as a result of the fact that the Commission has initiated a market inquiry in the relevant sector.

3.8.3. Accordingly, it is suggested that ICASA should enjoy precedence in respect of any market inquiry and the Commission should be obliged to engage with it prior to launching a market inquiry in the relevant sector.

3.8.4. The proposed amendment to Section 43B(2A), which provides that: *"(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*." does not go far enough in addressing Vodacom's concerns regarding the duplication of regulatory functions in the Telecommunications industry.

[1] Section 4B(9) of the ICASA Act.

4. Abuse of dominance provisions

4.1. As a general remark, in OECD countries, abuse of dominance is typically conceptualised as an economic question which requires an economic analysis of the actual or likely effects on competition, in the form of impact on consumer welfare. It should be for the investigating authority to demonstrate a substantial lessening of competition. It is procedurally unfair to require firms to prove that their conduct does not amount to an abuse of a dominant position. It is also inappropriate to extend form-based assessments over substantive evidence based assessments: it is widely accepted that certain types of conduct can be pro-competitive in certain market contexts, and anti-competitive in others, so it is important to review each case on its own merits.

4.2. Various reverse onus provisions have been created in relation to section 8 and the substantive elements of certain contraventions have been deleted. It is respectfully submitted that these proposed amendments create irrational and unfair consequences when applying the Competition Act and the intention for the Commission to address these shortcomings through binding guidelines will not satisfy constitutional requirements.

4.3. Various more technical amendments have been suggested to the abuse of dominance provisions, which Vodacom will comment on under our specific comments below.

5. Amendments to administrative penalties and "Yellow card" provisions

5.1. Vodacom submits that the administrative penalties provided for in Section 59(2A) at 25% of annual turnover may jeopardise the financial stability of many firms. It is not clear to what extent consideration has been given to whether or not this level of penalty would not result in disproportionate harm to firms and stakeholders such as employees, customers and suppliers.

5.2. Further, the proposed amendment of section 59(3A) in terms of which administrative penalties may be levied against firms that form part of a single economic entity with the firm that contravened the Competition Act is unacceptable since the related firms cannot be punished, in law, merely as a result of the fact that they are associated, through structural links, with the firm that contravened the Act.

5.2.1. The principle of separate legal personality and accountability is a fundamental part of South African company law.

5.2.2. Whilst there are established principals which allow for the corporate identity of a firm to be disregarded in certain circumstances, the grounds for doing so are limited to fraud, serious

misconduct or where the separate legal personality of the entity is being abused as an alter-ego for the persons sought to be held liable.

5.2.3. It would be contrary to the principals of natural justice to hold a person liable for a penalty where that person was never a respondent before the Tribunal with the benefit of the *audi alteram partem* rule. For this amendment to meet constitutional muster, the Act must set a proper and express basis for a referral (engaging in prohibited practice) against the respondent holding company or shareholder for the actions of its subsidiary or controlled entity. It is not lawful to seek to create *ex post facto* liability on a person where the act creates no potential liability on the part of the parent as respondent in the first place.

5.3. Finally, in light of the extensive nature of the proposed amendments, Vodacom is concerned about the removal of the "yellow" card provisions (where the first contravention by a firm of a particular section of the Competition Act does not attract a penalty) in relation to administrative penalties, particularly in light of the significant nature of the proposed amendments, and the intention to seek penalties against firms forming part of a single economic entity. These provisions are disproportionate to the harm they seek to address.

PART C: SPECIFIC COMMENTS

We set out below, Vodacom's comments on the specific provisions of the Bill.

6. Amendments to section 1 (definitions)

6.1. Vodacom wishes to comment on the amendment to the definitions below:

6.1.1. '**exclusionary act**' means an act that impedes or prevents a firm from entering into, participating in or expanding within [,] a market;" [existing definition, except for underlining]

6.1.1.1. The definition states that participate "refers to the ability of or opportunity for firms to sustain themselves in the market, and "participation" has a corresponding meaning."

6.1.1.2. The addition of "participating in" means that any dominant firm which purchases products or services from Protected Firms at economically justifiable lower or differential prices could be accused of an "exclusionary act". This would penalise dominant firms for being efficient, and would run counter to the objectives of the Competition Act (for example, to achieve a more effective and efficient economy), and counter to the objectives of accepted best practice competition policy which aims to enhance consumer welfare. No amount of guidance produced by the Commission can alleviate this concern.

6.1.2. The Bill introduces a definition of '**foreign acquiring firm**' as meaning an acquiring firm –

"(a) which was incorporated, established or formed under the laws of a country other than the Republic; or

(b) whose place of effective management is outside the Republic;"

6.1.2.1. Many existing South African businesses will fall within this definition by virtue of their corporate structures. It would result in a significant administrative burden if all these firms were to be required to comply with section 18A as a matter of course for all mergers.

6.1.3. " '**predatory prices**' means prices for goods or services below the firm's average avoidable cost or average variable cost;"

6.1.3.1. Vodacom proposes that this provision is amended, to include "which have no legitimate business purpose" at the end. Without this amendment, it is possible that dominant firms may face strong competition from other established firms in the market (who may run promotions below their average avoidable cost), and will be unable to meet the competition, for fear of accusations of predatory pricing. Vodacom's proposed

amendment deals with this concern, and brings the test in line with international precedent. (See http://www.oecd.org/competition/abuse/2375661.pdf)

6.1.3.2. Alternative, the wording of section 8(1)(d)(iv) should be retained as it is and pricing below average avoidable costs ("AAC") be dealt with under section 8(c), in terms of the current case law.

6.1.4. "'**workers**' means employees as defined in the Labour Relations Act, 1995 (Act No. 66 of 1995), and in the context of ownership, refers to ownership of a broad-base of workers;"

6.1.4.1. The BBBEE Codes specifically speak only of employees and not workers and the concept of "broad-base of workers" is not defined in terms of BBBEE Codes. The BBBEE Codes refer to (1) an employee scheme option plan (2) black designated groups or (3) co-operatives. Vodacom suggests that the reference in the above definition to "broad-base of workers" be reconsidered in light of the concepts used in the BBBEE Codes.

7. Amendment of section 2, 3, and 4

Vodacom has no comment on these proposed amendments.

8. Amendment of section 8

8.1. Section 8(1)(a) –

8.1.1. The word 'customers' has been inserted in the phrase "to the detriment of customers".

8.1.2. The notes to the Bill state "it is not only consumers that should be protected from excessive prices, but all customers involved in commercial transactions."

8.1.3. By changing the provision to focus only on customers, the 2018 Bill limits the scope of the provision to only the customers of the dominant company, whereas consumers applies to all consumers, whether they are customers or not (for example consumers who cannot buy a product because it is too expensive). By focusing on whether there is harm to consumers, the analysis will be based on whether or not there is harm to competition as a whole. Competition law should first and foremost aim to protect competition in order to enhance consumer welfare on a broad basis. Competition legislation should not protect individual firms or special categories of firms in a manner that risks adversely impacting on the broader consumer welfare imperative.

8.1.4. Vodacom therefore recommends that the words "to the detriment of consumers" be retained.

8.2. Section 8(1)(d)(ii) –

8.2.1. This section has been amended by adding the words "or services" and "or customers" in the provision "refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible".

8.2.2. The extension of the provision to "services" is not justified because of the unique and personal nature of the provision of services. If this amendment is introduced, a firm may be forced to supply scare services and thus dilute their investment in human capital and intellectual property or compromise their particular differentiation or business strategy.

8.2.3. The extension of this provision to customer renders the word "competitor" redundant, as a competitor seeking supply will always be a customer. For this reason Vodacom suggests that a further qualification be introduced, adding the requirement that there must be a detrimental impact on consumers, as underlined below:

"refusing to supply scarce goods to a competitor or customer when supplying those goods is economically feasible, and there is a detrimental impact on consumers."

8.2.4. Firms are less likely to invest in new technologies and innovate if they are required to supply access to the fruits of their innovation or their investment in human capital to less efficient competitors. For example, a technology company may be less likely to invest in the creation of platforms for new products and services if it fears that it will be required to provide access to those platforms. Without Vodacom's proposed amendment, the provision is therefore likely to run counter to the objectives of the Act. Vodacom's amendment brings this provision closer into line with international precedent.

8.3. Section 8(1) (d)(iv) –

8.3.1. "Predatory price" has been defined in the definitions section and Vodacom has commented on the proposed definition.

8.4. Section 8(1) (d)(vi) –

8.4.1. Vodacom considers that the provision as currently drafted has a scope significantly wider than solely a margin squeeze. This would capture all types of input foreclosure: for example, restriction or refusal to supply, or reduction in quality of service at the upstream level to downstream competitors. This is unlikely to be the intention. Vodacom proposes that the definition be expanded, to include the following: "by charging a price for the input which makes it impossible for a downstream competitor who is as efficient as the dominant

firm to compete." This amendment would bring this provision into line with international precedent.

8.4.2. Furthermore, it is recommended that the definition for a margin squeeze should make it clear which one of the tests for a margin squeeze, namely the equally efficient competitor or the reasonably efficient competitor test, should be employed, as proposed above.

8.4.3. In light of the fact that this prohibited practice will attract a penalty on the first offence (in terms of the proposed amendments), greater clarity should be provided regarding the elements of this prohibited practice.

8.5. Section 8(1)(d)(vii) –

8.5.1. This amendment deals with an abuse of dominance "*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*".

8.5.2. It is not clear how the purchaser will, from a practical perspective, be able to determine what the relevant price level, referred to in this provision, will be as the purchaser will likely not have the relevant information to be able to judge whether the relevant price will impede the ability of the supplier to participate effectively.

8.5.3. As stated above Vodacom considers that provisions which place a burden on dominant firms to protect other types of firms run contrary to the objectives of the Competition Act, as they incentivise dominant firms to avoid dealing with this category of firm, and in any event it is not possible for a dominant firm to assess what is an appropriate price at which to purchase from such a firm so as to ensure such a firm can participate effectively. There are better ways in which to promote the interests of these firms, as explained above.

8.5.4. As the provisions currently stand, it implies that an inefficient supplier may be protected since a Protected Firm can argue that it cannot participate effectively, even though its operations are run inefficiently.

8.5.5. We are not aware of jurisdictions where specific legislative provisions have been introduced to achieve similar results. The amendments risks undermining competition rather than promoting it and may create unforeseen distortions and inefficiencies.

8.5.6. Vodacom suggests that this provision should be deleted, since it is vague and assumes that the purchaser will have knowledge of facts that is not within its frame of reference. For this reason and that the proposed amendment does not comply with constitutional requirements in this regard.

8.6. Section 8(2) –

8.6.1. The section seeks to introduce a justification ground of "reasonability". Section 8(2) appears to place the onus on a dominant firm to demonstrate that its prices are not excessive or at a level that impedes the ability of the supplier to participate effectively and Vodacom submits that this is contrary to international best practice.

8.6.2. Vodacom therefor submits that the words '*prima facie*' be removed from 8(2) since it accepted internationally that abuse of dominance cases must be proven on at least the balance of probabilities and that that section be reworded to make it clear that the firm has the potential defence of showing that the price was reasonable.

8.6.3. In any event, in relation to an excessive pricing, it is not clear when a *prima facie* case would be established that prices are excessive, and how could a dominant firm demonstrate that the price it is paying is reasonable?

8.6.4. As mentioned above, here are no direct international precedents for standards of pricing or conduct which will not impede the relevant Protected Firms from "participating effectively". "Effective participation" is also not referenced to a particular market, which compounds the vagueness of the drafting.

8.7. Section 8(3) –

8.7.1. The factors included in this section are relevant to excessive pricing assessments but do not give any form of substantive guidance as to when prices may in fact be excessive and at risk of contravening the Act. The assessment of excessiveness is core to the determination of whether a contravention of the Act has occurred.

8.7.2. When prices will be considered excessive is a policy decision, which must be translated into legislation by the legislature. The Act currently contains a fixed policy reference point relative to which excessiveness could be assessed being the definition of an excessive price. Absent such a policy reference point the Act effectively creates an undefined contravention and leaves the establishment of the elements of the contravention (being the policy reference point from which excessiveness is to be determined), in the hands of the Competition Commission. This is an unlawful delegation of the legislature's exclusive legislative competence under the Constitution and will also risk policy incongruence arising. The problem is exacerbated by the deletion of the consumer harm element of the current excessive pricing contravention.

8.7.3. The appropriate approach should be to establish the threshold for excessive prices in the Competition Act, as per the original definition, and then expand on this by setting out specific factors which can be taken into account when assessing whether or not prices are excessive when measured against this threshold. Alternatively, section 8(3) should state that an excessive price is one which is significantly and persistently above a competitive

price determined by taking into account all relevant factors, including those proposed to be inserted into the Act.

8.7.4. As indicated at paragraph 3.5 above, it might be argued that the reverse onus provision proposed in section 8(2) establishes a reasonableness test for excessive pricing. However, this does not address the fact that the Bill fails to introduce a proper definition of when a price will be *prima facie* unreasonable and hence excessive.

8.7.5. Please see Vodacom's comments regarding the proper nature of guidelines in relation to the amendments to section 79 below.

8.8. Section 8(4) –

8.8.1. This section requires the Commission to publish guidelines in terms of section 79 in relation to section 8(d)(vii). Since the guidelines now have an influence on the interpretation of the Act (see amendments to section 79), the proposed amendments would infringe upon the principle that regulations cannot cure the deficiency in or vagueness of legislation.

9. **Amendment of section 9**

9.1. Section 9(1) and 9(2) -

9.1.1. Section 9(1)(a) – the effect of the deletion of the word "substantially" creates a more onerous obligation on dominant firms, particular in light of the removal of the yellow card provision. This provision seems unreasonable in light of the fact that price differentiation is such a common feature of legitimate business and is not generally viewed as resulting in anti-competitive outcomes; rather, it is submitted that the behaviour is generally pro-competitive or common business practice. Businesses charge different prices to different purchasers all the time; many business activities would be commercially unviable were suppliers unable to do so.

9.1.2. Furthermore, the list in section 9(2) omits an important reason for prices to vary, which is to allow for differential contributions to fixed costs. This is simply normal business practice. Prices cannot always directly reflect costs. Any business bears some costs that are directly driven by production or sales but also many others that are not directly driven by volume. The airline industry provides a good example of this:

9.1.2.1. Only a very small proportion of the costs of an airline ticket truly reflect costs caused by that passenger. Even for a single flight, the costs of fuel, crew and operating/maintaining the aircraft are essentially fixed no matter how many passengers are aboard. There is no reason for these to be shared out equally among all passengers, indeed it will normally be very inefficient to do so. If the airline charges all passengers

the same, it might not be able to cover these costs since not all of the passenger are willing to buy the ticket if a standard single ticket price was applied (a price that fills the aircraft might be too low to cover costs, while a price high enough to cover each passenger's 'share' of costs might not fill the aircraft and therefore again would not cover costs).

9.1.2.2. Consequently, airlines try to price tickets differently, so that customers willing to pay more can contribute a large amount to the fixed costs, while others who cannot afford to pay a standard price and are willing to buy the ticket at a reduced price are charged a lower fare, thus filling the aircraft. There are various ways of doing so, such as offering higher quality in business class or the greater convenience of ticket flexibility or otherwise enhancing the offer so that there is a demand for higher price tickets. Enhancement may include an allowance for more luggage than standard, the passenger selecting a preferred seat, and flexibility to change flying time.

9.2. Section 9(3) -

9.2.1. In terms of this proposed amendment: "*When 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*."

9.2.2. Please refer to Vodacom's submissions above regarding the discrepancies between the classes of firms covered by 9(3), and 8(4) and 8(1)(d)(vii).

9.2.3. It is not clear how section 9(3) fits in the scheme of section 9 since it is neither a substantive provision which prohibits discrimination if it affects *small and medium businesses and firms controlled or owned by historically disadvantaged persons* nor a justification grounds which permits discrimination if it falls within the above class of firms. Further, we reiterate that the consideration of this policy objective, separate from the competitive outcomes, may pose a challenge for the competition authorities and a transparent and consistent application of these policy considerations will be difficult to achieve.

9.3. Section 9(4) -

9.3.1. Finally, we note that section 9(4) states that the provisions against price discrimination also "*apply to a dominant firm as the purchaser of goods or services*." It is not at all clear how this would operate.

9.3.2. How does the justification ground based on cost factors (see section 9(2)(a) , apply to the purchase of goods or services - does it imply that the buyer must ascertain the supplier's costs, for example? If it faces two suppliers with different costs, selling the same product, must it pay them different prices? If this is the implication then it would in effect be obliged

to pay medium and smaller firms the same and more than other larger firms. Prices paid for goods and services will not be based on the cost of an efficient operator but on the viability of each and every firm that the dominant firm purchases goods and services from, irrespective of their efficiency or not. This implies that the pricing of the dominant firm may increase as the input cost increases in order to protect medium and small firms to the detriment of the consumer and/or export market.

9.3.3. A further implication is that a dominant firm may merely refuse to deal with the categories of Protected Firms.

9.3.4. The simple extension of these provisions to buyer behaviour does not seem to have been properly conceptualised. For the reasons set out above, Vodacom opposes the extension of the price discrimination provision to encapsulate price discrimination in relation to buyers of goods and services and the relaxation of the burden of proof on the Competition Authorities.

10. **Amendment of section 10**

Vodacom submits that the original wording: "*ability of*" and "*to become competitive*", should be retained in section 10(3)(b)(ii) because of the need to avoid uncompetitive distortions of the market. The environment for competition should be fostered; if firms nonetheless do not enter a market, it should not be for the competition authorities to promote such entry.

Vodacom does not have comments on the remainder of the proposed amendments to section 10.

11. **Repeal of Chapter 2A**

Vodacom notes that Section 10A has not yet taken effect and does not have any comment on the repeal of Chapter 2A.

12. **Amendment of section 12A**

12.1. Section 12A(1) –

Vodacom does not have comments on the proposed amendments, however section 12A(1)(a)(ii) and 12A(1)(b) now seem to be duplicating each other. It is therefore recommended that 12A(1)(a)(ii) be deleted and 12A(1)(a)(i) be combined with 12A(1)(a).

12.2. Section 12A(2)(i) to (k) –

Vodacom has no comments on these amendments.

12.3. Section 12A(3)(c) and (e) –

12.3.1. The section has been amended to introduce the consideration in the context of merger investigation of the entry into, participation and expansion of historically disadvantaged persons within the market and the greater spread of ownership, in particular levels of ownership by historically disadvantaged persons.

12.3.2. For convenience, Vodacom repeats its comments regarding this important aspect of the proposed amendments as contained in its submissions to the 2017 Bill:

"4.2 Vodacom appreciates that all organs of state are mandated in terms of section 10 of the Broad-Based Black Economic Empowerment ("BBBEE") Act (Act 53 of 2003 as amended by Act 46 of 2013) to apply the Codes of Good Practice on BBBEE when engaging on economic matters with private sector. In terms of the BBBEE Act, that Act seeks to: (a) promote the achievement of the constitutional right to equality; (b) increase broad-based empowerment and the effective participation of black people in the economy; (c) increase employment and more equitable income distribution; and (d) to establish a national policy on BBBEE so as to promote the economic inclusion and promote equal opportunity and equal access to government services.

4.3 However, the BBBEE Act does not cover every sphere of our economy and therefore the Commission has a role to play, in this space, within the ambit of its jurisdiction.

4.4 In the past few years, the Commission has accelerated its focus on preserving and fostering black economic empowerment ("BEE") when considering mergers. As an illustration, in the merger between Nokia and Alcatel-Lucent1, the Commission was concerned that the merger would have an impact on BEE and would dilute the shareholding of the BEE shareholders. Accordingly, it imposed conditions to retain the effective BEE shareholding. There are various other examples of the Commission pursuing this objective as well as seeking to positively improve the BEE status of firms involved in mergers.

4.5 Vodacom submits that it is necessary to achieve both internal consistency as well as consistency with other BEE legislation and policies and that the proposed amendments should provide greater certainty and clarity regarding the development of a consistent and substantive set of rules that will govern determinations by the Commission of BEE concerns in line with Government's BBBEE policies."

13. **Amendment of section 15**

Section 15(1)(b) –

It is not clear what the purpose of this section is. The heading of section 15 has been amended to refer to the enforcement of merger conditions but the new section 15(1)(b) does not refer to the enforcement of a merger condition. It merely refers to "*an appropriate decision regarding a condition relating to a merger*". It is submitted that it should be clarified what kind of decision might be taken and under what circumstances such a decision could be taken by the Commission.

After a merger has been approved, the Commission is *functus officio*. It cannot have an unspecified right to take further decisions regarding a merger condition, if that is what is intended. If the purpose of the condition is simply to confirm the power of the Commission to impose merger conditions, that condition is redundant as it is already provided for in existing sections 14 to 16 of the Competition Act.

14. Amendment of section 16

Section 16 (3) –

Similar comments as have been raised in relation to section 15(1)(b) apply to section 16 (3).

15. Amendment of section 17

Section 17(1)(b) and (c) –

The ability of the Commission or the Minister to appeal a merger approval will potentially delay the merger approval process.

16. Insertion of section 18A

16.1. Vodacom does not object to the introduction of executive oversight in relation to mergers which pose risks to matters of national security. However, Vodacom has certain concerns regarding the current provision:

16.1.1. The composition and prerequisites for serving on the committee should be described in more detail. The committee should consist of individuals from different areas in government, including for example the revenue service, ITAC, economic development, the security services, the judiciary and the armed forces and the president should not be precluded from appointing suitably qualified members of civil society to the committee where appropriate and necessary. The committee must have an express mandate to protect the national interest by balancing the need for protecting critical national security interests against the need to further foreign direct investment as a key driver of economic growth and social and economic stability in the Republic.

16.1.2. There should be a substantive threshold which first requires the committee to have reasonable grounds to believe that a particular merger places national security at risk before requiring notification of that merger. Absent such a threshold, section 18A may result in a large number of notifications depending on the manner in which the areas, markets, sectors, inter alia, in which mergers which may trigger the national security oversight, are designated by the President.

16.1.2.1. The mandatory notification of all mergers subject to designation would delay many mergers which are not a risk to the public interest. Furthermore, the basis upon which designation is permitted should be determined with reference to objective factors related to the express mandate of the committee.

16.1.2.2. Vodacom recommends that the designation mechanism or objective factors should be described in more detail to avoid the risk of overbroad designations.

16.1.2.3. Vodacom submits that the Committee should only be allowed to intervene where there are reasonable grounds to believe that there is risk to the national security that arises as a result of the merger, which grounds should be determined in a transparent manner.

16.1.2.4. Designation should not restrict the ability of merging parties to notify the Competition Commission and simultaneous notification to the committee. Vodacom suggest that the Commission should continue to investigate the competition and public interest implications of the transaction in parallel.

16.1.2.5. Provision can be made for the Commission's investigation to be suspended in circumstances where there is material risk of harm to national security flowing from the merger investigation proceeding.

16.1.3. The factors that the Committee must take into account are overbroad compared to other jurisdictions, including the Canadian legislative provisions on which the section has been modelled.

16.1.3.1. The factors in section 18A appear to be closely modelled on similar provisions that can be found in Canadian law[2]. However, there are important differences which will have the effect that section 18A would allow for much broader and potentially unjustified intervention into matters not capable of materially impacting on national security.

16.1.3.2. For example, one of the proposed factors in section 18A is the impact on the supply of important goods or services to citizens, or the supply of goods or services to government. This provision can be found in almost exactly the same form in the relevant Canadian legislation, but the Canadian legislation refers to the supply of "critical" goods and services to consumers. The use of the term "critical" is important and clearly indicates that instances of potential intervention should not arise lightly. There should be an appropriate balance between the imperative of protecting the national security whilst not creating unnecessary intervention in matters not likely to be of impact on national security.

16.1.3.3. Another example of where the factors have been broadened in this manner is where the proposed section identifies the impact "on the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of citizens and the effective functioning of government;". In Canada this provision reads: The potential impact of the investment on the security of Canada's critical infrastructure. Critical infrastructure refers to processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government. Again the deviations from the Canadian provision suggest that the threshold for intervention under section 18A is envisaged to be lower.

16.1.3.4. In the EU, the notion that intervention should not occur lightly and in relation to critical infrastructure and critically important goods / services as a basis for intervention is also emphasised as part of the factors to be considered in the EC's guidance opinions to member states. Member states are required to give this guidance "the utmost account".

16.1.3.5. Vodacom submits that given the potential adverse implications for economic growth through foreign investment that unnecessary executive intervention can give rise to, a high duty of care should be applied in South Africa when intervention is considered and this duty of care should be expressly described in the legislation.

17. **Amendment of section 21**

Vodacom has no comment on these proposed amendments.

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[2] Guidelines on the National Security Review of Investments under the Investment Canada Act (R.S.C., 1985, c. 28 (1st Supp.))

18. **Insertion of section 21A**

Vodacom has no comment on these proposed amendments.

19. **Amendment of section 22**

Vodacom has no comment on these proposed amendments.

20. **Amendment of section 23**

Please see Vodacom's comments below on the composition of the market inquiry panel. The appointment of market inquiry panels should be approached in a similar manner to the appointment of Tribunal panel members.

21. **Amendment of section 25**

Vodacom has no comment on these proposed amendments.

22. **Substitution of section 26(2)**

Vodacom supports the appointment of acting part-time members. However, the emphasis should remain on ensuring that the Tribunal is constituted by full or part-time members with fixed tenure and the appointment of acting members should be the exception rather than the rule. This will promote a Tribunal that has sufficient experience as well as independence.

23. **Amendment of section 31**

23.1.1. Vodacom notes that the proposed amendment in section 31(2)(b) seeks to limit a Tribunal panel to no more than one acting member. However, complex matters may require panel members with sufficient experience and the Chairperson should have the ability to properly resource panels by appointing non-deliberating assessors to assist panel members, if necessary.

23.1.2. In relation to the amendment in section 31(5) which would permit a single member to decide interlocutory matters, it is suggested that the Chairperson must be required to

appoint a panel member with the requisite legal training and experience to deal with the relevant interlocutory matter.

24. **Amendment of section 43A**

Please see paragraph 3 of Vodacom's principle comments above regarding the introduction of revised powers granted to the Commission flowing from market inquiries.

24.1. Section 43A(1)

Vodacom has no comment on the proposed amendments to this provision.

24.2. Section 43A(2)

Please refer to Vodacom's principal comments above. As indicated in paragraph 3.6.3 of the principle comments, it is submitted that the words "impedes, restricts or distorts competition" should be replaced with the words "substantially prevents or lessens competition."

24.3. Section 43A(3)

24.3.1. Vodacom suggests that the words "conscious parallel or co-ordinated conduct" in section 43A(3)(d) should be defined.

24.3.2. It is not clear what section 43A(3)(e) is meant to refer to. It is suggested that it should be deleted or clarified.

25. **Amendment of section 43B**

25.1. Section 43B(1)(b)

Vodacom has no comment on the proposed amendment.

25.2. Section 43B(2)

Vodacom has no comment on the proposed amendment.

25.3. Section 43B(2A)

Vodacom concurs with the provision that consultation with the relevant regulatory authority is required before commencing a market review in order to avoid duplication of efforts by two separate regulatory authorities, which can be a very resource intensive exercise for all stakeholders involved, however as stated in paragraph 3.8.4 of the principle comments above this is not sufficient in addressing Vodacom's concerns regarding the duplication of regulatory functions in the Telecommunications industry. Please refer to Vodacom's principle comments regarding the role of ICASA as the industry regulator in paragraph 3.8 above.

25.4. Section 43B(3)(cA)

25.4.1. This amendment suggests that the Competition Commission will have a status as quasi-judicial body equal to that of the Competition Tribunal. The proposed changes to section 60 further devolve power from the Tribunal to the Commission in the case of divestiture by placing the power previously held by the Competition Appeal Court to confirm divestiture recommendations based on market enquiries in the hands of the Competition Tribunal.

25.4.2. The overall effect of the amendments to the market enquiry provisions will be to allow for a process in terms of which:

25.4.2.1. The Competition Commission has the election to initiate a market inquiry on a relatively low threshold of perceived harm to the economic process.

25.4.2.2. The Competition Commission is responsible for appointing the presiding officer and other panel members to undertake the inquiry.

25.4.2.3. The Competition Commission determines the scope of the inquiry unilaterally and is able to change the scope of the inquiry unilaterally by notice in the gazette.

25.4.2.4. The Commission is vested with powers to summons evidence and witnesses during the enquiry.

25.4.2.5. The Commission is ultimately empowered to impose broad unspecified remedies pursuant to a finding of adverse effect on competition based on a very low effects threshold.

25.4.3. Based on the aforementioned, the proposed amendments can result in a failure to adhere to the separation of powers doctrine, with the same entity conducting the investigation, presiding over the matter and imposing remedies. Vodacom remains concerned that the market enquiry provisions potentially do not meet constitutional muster. At the very least the remedies that the Commission can impose after completing a market inquiry should be properly circumscribed in the Act.

26. **Insertion of a new section 43C Insertion and the renumbering of old section 43C as 43E**

26.1. Section 43C(1)

Vodacom refers to paragraph 3. of its principal comments regarding the extension of the Commission's powers in relation to market inquiries above.

26.2. Section 43C(3)(a)

It is suggested that consistent use be made of the term "remedies" in relation to the binding orders which the Commission is entitled to make.

26.3. Section 43C(4)

It is submitted that the nature of the remedies which the Commission is entitled to impose be dealt with in greater detail in order to comply with the relevant constitutional principles.

27. **Insertion of section 43D**

27.1. Section 43D(1)

Please refer to our comments in paragraph 20.4. above in relation to the need to specify the types of remedies that the Commission is entitled to impose pursuant to a market inquiry as well as paragraphs 3.1 to 3.7 of Vodacom's principle comments above.

28. **Amendment of current section 43C** (to be renumbered 43E)

Vodacom has no comment on this proposed amendment.

29. **Insertion of section 43F**

Vodacom has no comment on this proposed amendment, subject to its comments above regarding market inquiries in paragraph 3. of its principle comments above.

30. **Insertion of section 43G**

Vodacom submit that the right to participate in market inquiries must be determined in accordance with the rules of natural justice. Vodacom has no further comment on this proposed insertion.

31. **Amendment of section 44**

Vodacom has no comment on the proposed amendments.

32. **Amendment of section 45**

Vodacom submits that the proposed right of the *Minister* (as defined) to have access to a firm's confidential information provided for in 45(3)(a) should be subject to the condition that the firm/s concerned are notified that access is being granted to *the Minister and that the Minister will be subject to the same obligation as the Competition Authority to keep such information confidential*. In the case of other Ministers and regulatory authorities, Vodacom suggests that such access be sought in terms of section 44(3)(b) so that a firm may choose to protect its rights under the process envisaged in amended section 44.

33. **Amendment of section 49D**

Vodacom has no comment on the proposed amendments.

34. **Insertion of section 49E**

Vodacom has no comment on the proposed amendments.

35. **Amendment of section 54**

Vodacom has no comment on the proposed amendments.

36. **Amendment of section 58**

Vodacom has no comment on the proposed amendments.

37. **Amendment of section 59**

37.1. Section 59(1)(a) & (b)

Vodacom submits that section 59(1)(a) and (b) should be retained in their current form, based on its comments in paragraph 5.3 of its principal comments above.

37.2. Section 59(2A)

As stated under paragraph 5 of Vodacom's principle comments the administrative penalties at 25% of annual turnover may result in disproportionate harm to firms and stakeholders such as employees, customers and suppliers and we submit that the previous maximum level of 10% of annual turnover should be retained in the case of a second contravention. Vodacom therefore submit that Section 59(2A) be deleted in its entirety.

37.3. Section 59(3A)

The proposed amendment in terms of which administrative penalties may be levied against firms that form part of a single economic entity with the firm that contravened the Competition Act is unacceptable since the related firms cannot be punished, in law, merely as a result of the fact that they are associated, through structural links, with the firm that contravened the Act. Vodacom therefore submit that Section 59(3A) be deleted in its entirety.

38. **Amendment of section 60**

Vodacom is opposed to a divestiture remedy following a market inquiry. Divestiture is an invasive and punitive remedy that should only be used in relation to prohibited practices, as is currently the case. The devolvement of responsibility for approving a divestiture remedy pursuant to a market enquiry is already dealt with above, under paragraph 20.4 as well as paragraphs 3.4 and 3.5 of the principle comments, as being problematic. Confirming divestiture orders should remain the purview of the Competition Appeal Court.

39. **Amendment of section 62**

Vodacom has no comment on the proposed amendments.

40. **Amendment of section 63**

Vodacom has no comment on the proposed amendments.

41. **Amendment of section 67**

Vodacom disagrees with the proposed amendment since the Commission should not initiate an investigation into a practice that has allegedly prescribed. Vodacom therefore submit that the amendments should be rejected.

42. **Amendment of section 74**

Vodacom has no comment on the proposed amendments.

43. **Amendment of section 79**

43.1. Vodacom does not agree with the deletion of section 79((2)(b) because of the fact that the Guidelines should not bind the exercise of the powers of the competition authorities.

43.2. The imposition of an obligation that a person interpreting the Act must take into account the guidelines is unconstitutional because it places the power to make law in the hands of the Competition Commission.

43.3. The Constitutional Court has recently held that because South Africa has changed from a system of legislative supremacy to a constitutional democracy, the interpretation of legislation can no longer take place with reference to unilateral practice that was established by one of the litigating parties. As stated by the Constitutional Court in *Marshall and others NNO v Commission for the South African Revenue Service 2018 (7) BCLR 830 (CC)* at para 10:

> *"Missing from this reformulation is any explicit mention of a further contextual change, that from legislative supremacy to constitutional democracy. 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.* (Emphasis added)

43.4. It should not be left to the Competition Commission to create guidelines having any binding effect. In particular, guidelines should not be capable of establishing *prima facie* cases that

may alter the onus. This appears to be the case in relation to the abuse of dominance provisions related to excessive pricing and impeding participation of suppliers.

43.5. As mentioned at paragraph 3.6 above, the elements of these potential contraventions should form part of the primary legislation and should be determined by the legislature. The Act does not currently describe these contraventions in sufficient detail to pass Constitutional muster. Responsibility for determining these elements cannot be placed on the Commission as the administrative and prosecutorial body under the Act.

44. Amendment of section 83

Vodacom has no comment on the proposed amendments.

45. Transitional provisions – Vodacom's further suggested amendments

As a result of the fact that the proposed amendments would introduce significant substantive as well as procedural amendments to the Competition Act, it is submitted that there should be appropriately crafted transitional provisions that regulate how the proposed amendments will be implemented in relation to continuing conduct in respect of pending complaint proceedings or market inquiries that have already commenced.