

REPUBLIC OF SOUTH AFRICA

COMPETITION BILL

(As introduced in the National Assembly)

(MINISTER OF TRADE AND INDUSTRY)

[B 98—98]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP MEDEDINGING

(Soos ingedien in die Nasionale Vergadering)

(MINISTER VAN HANDEL EN NYWERHEID)

[W 98—98]

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BILL

To provide for the establishment of a Competition Commission responsible for the investigation, control and adjudication of restrictive practices, abuse of dominant position and mergers; and for the establishment of a Competition Appeal Court; and for matters connected therewith.

PREAMBLE

The people of South Africa recognise:
That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, weak enforcement of anti-competitive trade practices, and unjust restrictions on full and free participation in the economy.

That the economy must be open to greater ownership by a greater number of South Africans.

That credible competition law, and effective structures to administer that law, are necessary for an efficiently functioning economy.

That an efficient, competitive economic environment will benefit all South Africans: workers, owners and consumers alike.

IN ORDER TO—

provide all South Africans equal opportunity to participate fairly in the national economy;

achieve a more effective and efficient economy in South Africa;

provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;

create an environment for South Africans to compete effectively in international markets;

restrain particular trade practices which undermine a competitive economy;

regulate the transfer of economic ownership in keeping with the public interest;

establish independent professional structures to monitor economic competition; and

give effect to the international law obligations of the Republic,

BE IT THEREFORE enacted by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1 30

DEFINITIONS, PURPOSE, APPLICATION AND INTERPRETATION OF ACT

Definitions

1. In this Act—
 - (i) “agreement” includes a contract, arrangement or understanding, whether or not legally enforceable; (xiv) 35
 - (ii) “civil court” means a High Court or Magistrates Court, referred to in sections 166(c) and (d) of the Constitution; (xxi)
 - (iii) “confidential information” means trade, business or industrial information belonging to a firm which has a particular economic value, and which is not generally available to or known by others; (xxv) 40
 - (iv) “Constitution” means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996); (vi)
 - (v) “firm” includes a person, partnership or trust; (iv)

- (vi) “goods or services”, when used with respect to particular goods or services, includes any other goods or services that are reasonably capable of being substituted for them, taking into account ordinary commercial practice and geographical, technical and temporal constraints; (v)
- (vii) “historically disadvantaged persons” has the same meaning as defined in the National Empowerment Fund Act; (viii) 5
- (viii) “horizontal relationship” means a relationship between competitors; (ix)
- (ix) “interest” means a member’s interest as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984); (i)
- (x) “market” means the trade within the Republic in any goods or services; (xi) 10
- (xi) “market power” means the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers; (xii)
- (xii) “merger inquiry rules” means rules made under section 18; (xx) 15
- (xiii) “Minister” means the Minister of Trade and Industry; (xiii) 15
- (xiv) “organ of state” means an organ of state as defined in section 239 of the Constitution; (xxii)
- (xv) “premises” includes land, any building, structure, vehicle, ship, boat, vessel, aircraft or container; (xv)
- (xvi) “prescribed” means prescribed from time to time by regulation in terms of section 80; (xxvi) 20
- (xvii) “private dwelling” means any part of any structure that is occupied as a residence, or any part of any structure or outdoor living area which is accessory thereto and used wholly for the purposes of residence; (xvi)
- (xviii) “prohibited practice” means a practice prohibited in terms of Chapter 2; (xxiii) 25
- (xix) “regulation” means a regulation made under this Act; (xvii)
- (xx) “regulatory authority” means an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of industry; (xviii) 30
- (xxi) “respondent” means a firm against whom a complaint of a prohibited practice has been filed in terms of this Act; (xix)
- (xxii) “restrictive horizontal practice” means any practice listed in section 5; (ii)
- (xxiii) “restrictive vertical practice” means any practice listed in section 6; (iii)
- (xxiv) “small business” has the same meaning as defined in the National Small Business Act, 1996 (Act No. 102 of 1996); (x) 35
- (xxv) “this Act” includes the regulations and Schedules; (vii)
- (xxvi) “vertical relationship” means the relationship between a firm and its suppliers or its customers, or between a firm and its suppliers and customers. (xxiv)

Purpose of Act 40

2. The purpose of this Act is to promote and maintain competition in the Republic in order—

- (a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;
- (c) to promote employment and advance the social and economic welfare of South Africans; 45
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and 50
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of members of historically disadvantaged communities.

Application of Act

3. This Act applies to all economic activity within, or having an effect within, the Republic except— 55

- (a) collective bargaining within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (Act No. 66 of 1995);
- (b) a collective agreement, as defined in section 213 of the Labour Relations Act, 1995;
- (c) the rules of a professional association to the extent that they are exempted in terms of Schedule 1; 5
- (d) transactions by affiliated members of a co-operative society incorporated in terms of the Co-operatives Act, 1981 (Act No. 91 of 1981); or
- (e) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose. 10

Interpretation

- 4.** (1) This Act must be interpreted—
- (a) in a manner that is consistent with the Constitution and gives effect to the purposes set out in section 2; and
 - (b) in compliance with the international law obligations of the Republic. 15
- (2) Any person interpreting or applying this Act may consider applicable foreign and international law.

CHAPTER 2

PROHIBITED PRACTICES

Part A 20

Restrictive practices

Restrictive horizontal practices prohibited

- 5.** (1) An agreement between firms, or a decision by an association of firms, or a concerted practice engaged in by a firm or by an association of firms is prohibited if—
- (a) it is between parties in a horizontal relationship and has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological efficiency or other pro-competitive gain resulting from it outweighs that effect; or 25
 - (b) it involves any of the following restrictive horizontal practices:
 - (i) directly or indirectly fixing a purchase or selling price or any other trading condition; 30
 - (ii) establishing production quotas or otherwise restricting production;
 - (iii) restricting technical innovation or development;
 - (iv) avoiding or restricting investment;
 - (v) dividing markets by allocating customers, suppliers, territories or specific types of goods or services; or 35
 - (vi) collusive tendering.
- (2) For the purposes of subsection (1), an agreement to engage in an action referred to in that subsection is regarded existing between two or more firms if—
- (a) any one of them owns a substantial shareholding, interest or similar right in the other, or they have at least one director in common; and 40
 - (b) any combination of them is involved in such an action, unless the firms concerned or the directors, as the case may be, can establish the absence of an agreement.
- (3) For the purposes of subsection (2), “director” means— 45
- (a) a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973);
 - (b) a member of a close corporation, as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984);

- (c) a trustee of a trust ; or
- (d) a person holding an equivalent position in a firm.

(4) The provisions of subsection (2) do not apply to a company and its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973.

Restrictive vertical practices prohibited 5

6. (1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological efficiency or other pro-competitive gain resulting from it outweighs that effect.

(2) The practice of resale price maintenance is prohibited. 10

Part B

Abuse of dominant position

Restricted application of Part

7. The Minister must annually by notice in the *Gazette* determine a threshold of annual turnover, in general or in relation to specific industries, below which this Part does not apply to a firm. 15

Dominant firms

8. A firm is dominant in a market if it is the leading firm in that market, and—
- (a) it has at least 35% of that market, unless it can show that it does not have market power; or 20
 - (b) it has less than 35% of that market, but has market power.

Abuse of dominance prohibited

9. (1) A dominant firm must not—
- (a) limit output, production or technological development to the detriment of consumers; 25
 - (b) charge an excessive price to the detriment of consumers;
 - (c) refuse to give a competitor access to an essential facility when it is economically feasible to do so;
 - (d) engage in any act, other than an act listed under paragraph (e), that impedes or prevents a competitor's entry into, or expansion in, the market, if the anti-competitive effect of that act outweighs its technological efficiency or other pro-competitive gain; or 30
 - (e) engage in an exclusionary act, unless the firm can show technological efficiency or other pro-competitive gain that outweighs the anti-competitive effects of that action. 35
- (2) For the purposes of this section “exclusionary act” means—
- (a) requiring or inducing a supplier or customer not to deal with a competitor;
 - (b) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
 - (c) selling goods or services on condition that the buyer purchases separate goods or services, or forcing a buyer to accept a condition unrelated to the object of a contract; 40
 - (d) selling goods or services below its marginal or average variable cost; or
 - (e) buying-up a scarce supply of intermediate goods required by a competitor.

Price discrimination by dominant firm prohibited

- 10.** (1) An action by a dominant firm, as the seller of goods or services, that is likely to have the effect of substantially lessening competition is prohibited price discrimination, if—
- (a) it relates to the sale of goods or services of like grade and quality to different purchasers; and 5
 - (b) it involves discriminating between those purchasers in terms of—
 - (i) the price charged for the goods or services;
 - (ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of the goods or services; 10
 - (iii) the provision of services in respect of the goods or services; or
 - (iv) payment for services provided in respect of the good or service.
- (2) Despite subsection (1), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (b) of that subsection is not prohibited price discrimination if the dominant firm establishes that the differential treatment— 15
- (a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale or delivery resulting from the differing places to which, methods by which, or quantities in which, goods or services are supplied to different purchasers;
 - (b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or 20
 - (c) is in response to changing conditions affecting the market for the goods or services concerned, including—
 - (i) any action in response to the actual or imminent deterioration of perishable goods; 25
 - (ii) any action in response to the obsolescence of seasonal goods;
 - (iii) a sale pursuant to a liquidation or sequestration procedure; or
 - (iv) a sale in good faith in discontinuance of business in the goods or services concerned.

Part C 30**Exemption from application of Chapter****Exemption**

- 11.** (1) A firm may apply to the Competition Tribunal to exempt an agreement, or category of agreements, from the application of this Chapter.
- (2) Upon receiving an application in terms of subsection (1), the Tribunal may grant a conditional or unconditional exemption for a specified term of not more than five years, if the agreement, or category of agreements, concerned— 35
- (a) does not impose on the firms concerned any restriction that is not required to attain an objective referred to in paragraph (b); and
 - (b) contributes to any of the following objectives: 40
 - (i) promotion of exports;
 - (ii) promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive;
 - (iii) change in productive capacity necessary to stop decline in an industry.
- (3) The Tribunal may revoke an exemption granted in terms of subsection (2) if— 45
- (a) a condition for the exemption is not fulfilled;
 - (b) the reason for granting the exemption no longer exists; or
 - (c) the exemption was granted on the basis of false or incorrect information.
- (4) Before granting an exemption in terms of subsection (2), or revoking an exemption in terms of subsection (3), the Tribunal must— 50
- (a) give notice in the *Gazette* of the application for an exemption, or of its intention to revoke that exemption; and
 - (b) allow interested parties 30 days from the date of that notice to make written representations as to why the exemption should not be granted or revoked.

- (5) The Tribunal may take into account the written representations.
 (6) The Tribunal must by notice in the *Gazette* give notice of any exemption granted or revoked in terms of this section.

CHAPTER 3

MERGER CONTROL

5

Restricted application of Chapter

12. The Minister must annually by notice in the *Gazette* determine a threshold of annual turnover below which this Chapter does not apply to a merger.

Merger defined

13. (1) For the purpose of this Chapter, “merger” means the direct or indirect acquisition or establishment of control by one or more persons over all significant interests in the whole or part of the firm of a competitor, supplier, customer or other person, whether that control is achieved as a result of—

- (a) purchase or lease of the shares, interest or assets of the competitor, supplier, customer or other person; 15
 (b) amalgamation or combination with such competitor, supplier, customer or other person; or
 (c) any other means.

(2) A person controls a firm if that person—

- (a) beneficially owns more than one half of the issued share capital of the firm; 20
 (b) is entitled to vote, or has the ability to control directly or through any controlled entity of that person the voting of more than one half of the maximum number of votes that may be cast at a general meeting of the firm;
 (c) is able to appoint or to veto the appointment of a majority of the directors of the firm; 25
 (d) is a holding company where the firm is a subsidiary of that person as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);
 (e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; 30
 (f) in the case of a close corporation, owns the majority of members’ interest, or controls directly, or has the right to control the majority of members’ votes in the close corporation; or
 (g) has the ability to materially influence the policy of the firm. 35

Notification of merger required

14. (1) Any party to a merger must notify the Competition Tribunal of that merger no more than seven days after the earlier of—

- (a) the conclusion of the merger agreement;
 (b) the public announcement of a merger bid; or 40
 (c) the acquisition by any one of the parties to a merger, of a controlling interest in another.

(2) Parties to a merger must not implement that merger until they have received a clearance notification from the Tribunal in terms of section 16(1)(a) or an approval in terms of section 17(2). 45

Prohibition of mergers

15. (1) The Competition Tribunal must prohibit a proposed merger, if the Tribunal has determined that it is likely to substantially prevent or lessen competition.

- (2) When determining whether or not a merger or proposed merger is likely to substantially prevent or lessen competition, the Tribunal must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including— 5
- (a) the actual and potential level of import competition in the market;
 - (b) the ease of entry into the market, including tariff and regulatory barriers;
 - (c) the level, trends of concentration and history of collusion in the market;
 - (d) the degree of countervailing power in the market;
 - (e) the likelihood that the acquisition would result in the merged firm having 10 market power;
 - (f) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
 - (g) the nature and extent of vertical integration in the market;
 - (h) whether the business or part of the business of a party to the merger or 15 proposed merger has failed or is likely to fail; and
 - (i) whether the merger will result in the removal of an effective competitor.

Initial consideration

- 16.** (1) Within 30 days after receiving notice of a merger, the Competition Tribunal must— 20
- (a) approve the merger by issuing a clearance certificate and publish a notice thereof in the *Gazette*;
 - (b) issue a certificate to initiate a merger inquiry in terms of section 17, and publish a notice thereof in the *Gazette*; or
 - (c) extend the period in which it has to consider the proposed merger by a period 25 not exceeding 60 days, and in that case, issue an extension certificate to any party that notified it of the merger.
- (2) If, upon the expiry of the 30 day period provided for in subsection (1), the Tribunal has not issued any of the certificates referred to in that subsection, the Tribunal will be regarded as having approved the merger, subject to section 17(3). 30

Merger inquiry proceedings

- 17.** (1) If the Competition Tribunal initiates a merger inquiry, it must consider that merger in accordance with the merger inquiry rules contemplated in section 18.
- (2) Upon completion of a merger inquiry, the Tribunal— 35
- (a) may—
 - (i) approve the merger;
 - (ii) approve the merger subject to such conditions as it may determine; or
 - (iii) prohibit implementation of the merger; and
 - (b) must publish a notice of its decision in the *Gazette*.
- (3) The Tribunal may revoke a decision to approve or conditionally approve a merger 40 if—
- (a) the decision was based on incorrect information for which a party to the merger is responsible;
 - (b) the approval was obtained by deceit; or
 - (c) a firm concerned has breached an obligation attached to the decision. 45
- (4) Despite the time limits set out in section 16, if, in terms of subsection (3), the Tribunal revokes a decision to approve a merger, the Tribunal may prohibit that merger even though any of those time limits may have elapsed.

Merger inquiry rules

- 18.** The Competition Tribunal may by notice in the *Gazette* make rules for merger 50 inquiry proceedings including—

- (a) forms;
- (b) time periods;
- (c) information required;
- (d) additional definitions;
- (e) filing fees; and
- (f) access to confidential information.

Review power of Minister

19. (1) Within 30 days after notice of a decision by the Competition Tribunal in terms of section 16 or 17, any interested party may, by application in the prescribed form, request the Minister to review that decision, on any of the following public interest grounds: 10

- (a) the effect that the merger will have on—
 - (i) a particular industrial sector or region;
 - (ii) employment; or
 - (iii) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to become competitive;
- (b) the ability of national industries to compete in international markets.

(2) Within one month after receiving an application in terms of subsection (1), the Minister must, by notice in the *Gazette*—

- (a) publish the request for a review; and
- (b) invite interested persons to make written representations that they wish to make to the Minister in connection with the factors referred to in subsection (1) within the period stipulated in that notice.

(3) The Minister may take into account the written representations referred to in subsection (2)(b). 25

(4) Within four months after the date that a request is made, the Minister must, by notice in the *Gazette*—

- (a) set aside the decision of the Tribunal;
- (b) amend that decision by ordering restrictions or by including conditions; or
- (c) confirm that decision.

(5) The Minister must give written reasons for any decision made in respect of the review in the notice referred to in subsection (2) and make those reasons available for public inspection in the prescribed manner.

(6) The Minister may make rules for review proceedings as contemplated in section 18, read with the changes required by the context. 35

CHAPTER 4

COMPETITION COMMISSION AND COURT

Part A

Competition Commission

Establishment of Competition Commission 40

- 20.** (1) There is hereby established the Competition Commission.
 (2) The Commission has jurisdiction throughout the Republic.
 (3) The Commission is a juristic person.
 (4) The Commission must exercise its functions in accordance with this Act.

Independence of Competition Commission 45

21. (1) The Competition Commission is independent and subject only to the Constitution and the law.

(2) The Commission must be impartial and must perform its functions without fear, favour or prejudice.

- (3) A member of the Commission—
- (a) must not engage in any activity that may undermine the integrity of the Commission;
 - (b) must not participate in any investigation, inquiry or decision concerning a matter in respect of which that member has a direct financial interest or any similar personal interest; 5
 - (c) must not make private use of, or profit from, any confidential information obtained as a result of performing that member's official functions in the Commission; or
 - (d) must not divulge any such information to any third party, except as required as part of that person's official functions within the Commission. 10
- (3) Despite their respective responsibilities within the Commission, the Management Board, the Competition Tribunal and the Competition Inspectorate must each treat the other as if it were an independent body.
- (4) An organ of state must where applicable assist the Commission to maintain its independence and impartiality, and to effectively exercise or carry out its powers and duties. 15

Part B

Commission Management Board

Functions and composition of Management Board 20

- 22.** (1) The Commission Management Board is the governing body of the Competition Commission, and consists of—
- (a) the Commissioner, who is the presiding member of the Board, and the Deputy Commissioner;
 - (b) the chairperson and deputy chairperson of the Competition Tribunal; and 25
 - (c) a person appointed by the Minister from among the officials responsible for competition policy in the Department.
- (2) The Commission Management Board is responsible for the general administration of the Competition Commission and for carrying out any functions assigned to it in terms of this Act. 30

Meeting procedures

- 23.** (1) The Commission Management Board may meet at any time, and at any place, determined by the Commissioner.
- (2) The decision of three members present at a sitting of the Board constitutes a decision of the Board. 35
- (3) In the event of an equality of votes on any matter, the person presiding at the sitting will have a casting vote in addition to that person's deliberative vote.
- (4) Subject to this section, the Board may make its own rules of procedure, and must keep minutes of its meetings.

Committees 40

- 24.** (1) The Commission Management Board may establish committees subject to such terms and conditions as it regards necessary to assist the Board in the performance of its functions.
- (2) Any such committee must consist of—
- (a) at least one member of the Board appointed by the Board; and 45
 - (b) any number of other persons but not exceeding five to serve for a specific period.
- (3) A person appointed to the Committee is appointed subject to the conditions which the Board considers necessary.
- (4) The Board may in writing delegate to the committee any of the Board's powers and functions. 50

(5) Any delegation in terms of subsection (4) does not prevent the Board from exercising the power or performing the function so delegated.

(6) A committee must report on the performance of its functions to, and at times determined by, the Board.

Staff and facilities of Competition Commission 5

25. (1) The Commissioner may—
- (a) after consulting the Commission Management Board, appoint staff or contract with other persons to assist the Board in carrying out the functions of the Competition Commission; and
 - (b) in consultation with the Board and the Minister of Finance determine the remuneration, allowances, benefits, and other terms and conditions of service of a member of the staff. 10
- (2) The Commission must—
- (a) ensure that the functions of its constituent entities are kept independent from one another; and 15
 - (b) manage its staff and contractors in a manner that avoids potential conflicts of interest arising out of its several functions.

Finances of Competition Commission

26. (1) The Competition Commission is financed from—
- (a) any money that the Minister, in consultation with the Minister of Finance, allocates to the Commission from public funds at the commencement of this Act; 20
 - (b) any money that is appropriated by Parliament for the Commission;
 - (c) fees payable to the Commission in terms of this Act;
 - (d) income derived by the Commission from its investment and deposit of surplus moneys in terms of subsection (6); and 25
 - (e) money received from any other source.
- (2) The financial year of the Commission is the period from 1 April in any year to 31 March in the following year, except the first financial year of the Commission, which begins on the date of coming into operation of this Act, and ends on 31 March of that financial year. 30
- (3) In each financial year, on a date determined by the Minister, the Commission Management Board must submit to the Minister a statement of the Commission's estimated income and expenditure, and requested appropriation from Parliament in respect of the next ensuing financial year. 35
- (4) The Management Board must open and maintain an account in the name of the Commission with a registered bank, or other registered financial institution, in the Republic, and—
- (a) any money received by the Commission must be deposited into that account; and 40
 - (b) every payment on behalf of the Commission must be made from that account.
- (5) Cheques drawn on the account of the Commission must be signed on its behalf by two persons authorised for that purpose by resolution of the Management Board.
- (6) The Management Board may invest or deposit money of the Commission that is not immediately required for contingencies or to meet current expenditures— 45
- (a) on a call or short-term fixed deposit with any registered bank or financial institution in the Republic; or
 - (b) in an investment account with the Corporation for Public Deposits, established in terms of section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984). 50
- (7) The Commissioner—
- (a) is the accounting officer of the Commission in terms of the Exchequer Act, 1975 (Act No. 66 of 1975); and
 - (b) is accountable for all money that the Commission receives or pays, and must keep the accounting records required by that Act. 55

- (8) As soon as reasonably practicable at the end of each financial year, the Commissioner must prepare financial statements in accordance with established accounting practice, principles and procedures, comprising—
- (a) a statement reflecting, with suitable and sufficient particulars, the income and expenditure of the Commission during the preceding financial year; and 5
 - (b) a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year.
- (9) The Auditor-General must audit the Commission's financial records each year.

Annual report

27. (1) As soon as it is reasonably practicable at the end of the Commission's financial year, the Commissioner must prepare and submit to the Minister an annual report, including—
- (a) the audited financial statements prepared in terms of section 26(8);
 - (b) the auditor's report, prepared in terms of section 26(9); and
 - (c) any other information that the Minister, by notice in the *Gazette*, determines. 15
- (2) The Minister must table in the National Assembly each annual report submitted in terms of subsection (1)—
- (a) within 14 days after receiving that report from the Commission, if the National Assembly is in session at that time; or
 - (b) if the National Assembly is not in session, within 14 days after the commencement of the next ensuing session. 20

Liability

28. (1) The State Liability Act, 1957 (Act No. 20 of 1957), applies to the Competition Commission with the changes required by context, but a reference in that Act to "the Minister of the Department concerned" must be interpreted as referring to the Commissioner. 25
- (2) The members of the Competition Tribunal and the Competition Appeal Court, the Commissioner, inspectors, committee members, staff members or contractors shall not be liable for any report, finding, point of view or recommendation that is given in good faith and submitted to Parliament or made known under the Constitution or this Act. 30

Part C

Competition Inspectorate

Establishment and functions of Competition Inspectorate

29. (1) The Competition Inspectorate is hereby established. 35
- (2) The Inspectorate is responsible for—
- (a) implementation of measures to increase market transparency;
 - (b) implementation of measures to develop public awareness of the provisions of this Act;
 - (c) investigation and evaluation—
 - (i) of alleged contraventions of Chapter 2; 40
 - (ii) of applications for exemption in terms of Chapter 2, referred to it by the Competition Tribunal;
 - (iii) of mergers referred to it by the Tribunal; or
 - (iv) of any other matter referred to it by the Tribunal.
 - (d) negotiating and concluding consent orders; and 45
 - (e) referring matters to the Tribunal, and appear before the Tribunal, as required by this Act.
- (2) In addition to the functions referred to in subsection (1), the Inspectorate may—
- (a) report to the Minister on any matter relating to the application of this Act; and
 - (b) perform any other function assigned to it in terms of this or any other Act. 50

Appointment of Commissioner

- 30.** (1) The Minister must appoint a person with suitable qualifications and appropriate experience as the Competition Commissioner.
- (2) The Commissioner is the Chief Executive Officer of the Commission, and must—
- (a) perform the functions that are conferred on him or her by or in terms of this Act; 5
 - (b) manage and direct the activities of the Inspectorate; and
 - (c) supervise the Commission's staff.
- (3) The Minister in consultation with the Minister of Finance, must determine the Commissioner's remuneration, allowances, benefits and other terms and conditions of employment. 10

Appointment of Deputy Commissioner

- 31.** (1) The Minister must appoint a person with suitable qualifications and appropriate experience as Deputy Commissioner.
- (2) The Deputy Commissioner must— 15
- (a) assist the Commissioner in carrying out the functions of the Inspectorate; and
 - (b) perform the functions of Commissioner whenever—
 - (i) the Commissioner is for any reason unable to perform the functions of the Commissioner; or
 - (ii) the office of Commissioner is vacant. 20

Appointment of inspectors

- 32.** (1) The Commissioner may appoint any person in the service of the Commission or any other suitable person as an inspector.
- (2) The Minister may in consultation with the Minister of Finance determine the remuneration paid to a person who is appointed in terms of subsection (1), but is not in the full-time service of the Commission. 25
- (3) An inspector must be provided with a certificate of appointment signed by the Commissioner stating that the person has been appointed as an inspector in terms of this Act.
- (4) When an inspector performs any function in terms of Chapter 5 that inspector must have a certificate of appointment in his or her possession and show it at the request of any person affected by the exercise of the functions of the inspector. 30

Part D***The Competition Tribunal*****Establishment and functions of Competition Tribunal 35**

- 33.** (1) The Competition Tribunal is hereby established.
- (2) The Tribunal has jurisdiction throughout the Republic.
- (3) The Tribunal may upon a matter being referred to it in terms of this Act—
- (a) grant exemptions from the relevant provisions of this Act;
 - (b) authorise or prohibit a merger; 40
 - (c) adjudicate in relation to any conduct prohibited in terms of Chapter 2 or 3, by determining whether prohibited conduct has occurred, and if so, impose a remedy provided for in Chapter 6; and
 - (d) grant orders for costs in terms of section 59.

Composition of Competition Tribunal 45

- 34.** (1) The Competition Tribunal consists of a chairperson and other members appointed by the President on the recommendation of the Minister.

- (2) The President must—
- (a) appoint the chairperson and other members of the Tribunal on the date of the coming into operation of this Act; and
 - (b) appoint a person to fill any vacancy on the Tribunal as it arises.

Qualifications of members of Tribunal 5

35. (1) The chairperson and other members of the Competition Tribunal, when viewed collectively, must represent a broad cross-section of the population of the Republic.

- (2) A person referred to in subsection (1)—
- (a) must be a citizen of the Republic, who is ordinarily resident in the Republic; 10
 - (b) must have experience and expertise relevant to the functions contemplated in section 33;
 - (c) must be committed to the objects and principles enunciated in section 2.
- (3) A person may not be a member of the Tribunal if that person—
- (a) at the relevant time— 15
 - (i) holds an office of profit under the State; or
 - (ii) is an office bearer of any party, movement, organisation or body of a partisan political nature;
 - (b) is an unrehabilitated insolvent;
 - (c) is subject to an order of a competent court holding that person to be mentally 20
unfit or disordered;
 - (d) has before the commencement of this Act been convicted of an offence for which he or she has been sentenced to imprisonment without the option of a fine, unless the President having due regard to the nature of the offence and the circumstances of the case, is satisfied on reasonable grounds that such person 25
is fit and proper to be so appointed;
 - (e) after the commencement of this Act, has been convicted of an offence and sentenced to imprisonment without the option of a fine.

Term of office of members of Tribunal

36. (1) Subject to subsection (2), the chairperson and other members of the Competition Tribunal, must be appointed for a period not exceeding five years. 30

(2) The President may reappoint a member on the expiry of that member's term of office, but no member may be appointed to the Tribunal for more than two consecutive terms.

- (3) The chairperson may, on one month's written notice addressed to the President— 35
- (a) resign from the Tribunal; or
 - (b) resign as chairperson, but remain as a member of the Tribunal.
- (4) A member of the Tribunal other than the chairperson may resign by giving at least one month's written notice addressed to the Minister.
- (5) The President must, on the recommendation of the Minister— 40
- (a) remove the chairperson or any other member of the Tribunal from office if that person becomes subject to any of the disqualifications referred to in section 35(2); and
 - (b) remove the chairperson or a member from office only for— 45
 - (i) serious misconduct;
 - (ii) permanent incapacity; or
 - (iii) engaging in any activity that may undermine the integrity of the Tribunal.

Deputy chairperson of Tribunal

37. (1) The President must, on the recommendation of the Minister, designate a member of the Competition Tribunal as deputy chairperson of the Tribunal. 50

- (2) The deputy chairperson performs the functions of chairperson whenever—
- (a) the office of chairperson is vacant; or

- (b) the chairperson is for any other reason temporarily unable to perform the functions of chairperson.

Remuneration and benefits of members of Tribunal

38. (1) The Minister may, in consultation with the Minister of Finance, determine the remuneration, allowances, and other benefits of the chairperson, deputy chairperson and other members of the Competition Tribunal. 5

(2) The Minister may not during the term of office of a member of the Tribunal, reduce that member's salary, allowances or benefits.

(3) The Minister may determine any other conditions of service not provided for in this section. 10

Competition Tribunal proceedings

39. (1) The chairperson is responsible to manage the caseload of the Competition Tribunal, and must assign each matter referred to the Tribunal to a panel composed of any three members of the Tribunal.

(2) When assigning a matter in terms of subsection (1), the chairperson must designate a member of the panel to preside over the panel's proceedings. 15

(3) If, because of illness, death or withdrawal from an inquiry in terms of section 40, a member of the panel is unable to complete the proceedings in a matter assigned to that panel, the chairperson must—

(a) direct that the inquiry proceed before any remaining members of the panel; or 20

(b) terminate the inquiry before that panel and constitute another panel, which may include any member of the original panel and direct that panel to conduct a new inquiry.

(4) The decision of a panel on any matter referred to it must be in writing and include reasons for that decision. 25

(5) A unanimous decision of a panel is the decision of the Tribunal, but if the decision of a panel is not unanimous, the majority decision is the decision of the Tribunal.

(6) The Tribunal may, by notice in the *Gazette*, make rules for its proceedings, in addition to any rules required in terms of this Act.

Disclosure of interest by members of Tribunal 30

40. If, during any proceedings of an inquiry, it appears to a member of the Competition Tribunal that a matter concerns a financial or other interest of that member contemplated in section 21(3)(c), the member must—

(a) immediately and fully disclose the fact and nature of that interest to the chairperson and to the presiding member at that inquiry; and 35

(b) withdraw from any further involvement in that inquiry.

Acting as member of Tribunal after expiry of term of office

41. If, on the expiry of the term of office of a member of the Competition Tribunal, that member is still considering a matter before the Tribunal, that member may continue to act as a member in respect of that matter only. 40

Part E

Competition Appeal Court

Establishment, status and function of Competition Appeal Court

42. (1) The Competition Appeal Court is hereby established.

(2) The Competition Appeal Court— 45

- (a) is a court as contemplated in section 166(e) of the Constitution with a status similar to that of a High Court;
- (b) has jurisdiction throughout the Republic; and
- (c) is a court of record.

(3) The Appeal Court may consider any appeal from, or review of a decision of, the Competition Tribunal. 5

(4) The Appeal Court has the power to confirm, amend or set aside the decisions or order of the Competition Tribunal, that is the subject of an appeal or review and to give any judgment or make any order that the circumstances may require.

Composition of Competition Appeal Court 10

43. The Competition Appeal Court consists of—

- (a) one member, appointed by the President, who is a judge of the High Court designated by the President as Judge President of the Appeal Court; and
- (b) other members, appointed by the President, who—
 - (i) are citizens of the Republic who are ordinarily resident in the Republic; 15
 - (ii) have experience and expertise relevant to the functions contemplated in section 33; and
 - (iii) are committed to the objects and principles referred to in section 2.

Business of Competition Appeal Court

44. (1) The Judge President of the Competition Appeal Court— 20

- (a) is responsible for supervising and directing the work of the Appeal Court;
- (b) must preside at proceedings of the Appeal Court; and
- (c) by notice in the *Gazette*, may make rules for the proceedings of the Appeal Court.

(2) A matter before the Appeal Court must be heard by three members of the Appeal Court, one of whom must be the Judge President. 25

(3) The Appeal Court is a court of record and its decision must include reasons.

(4) The decision of a majority of the members of the Appeal Court is the decision of the court.

(5) Despite subsection (4), any matter of law arising for decision by the Appeal Court, and any question as to whether a matter for decision is a matter of fact or a matter of law must be decided by the Judge President only. 30

Tribunal provisions applicable to and conditions of appointment of the Judge President

45. (1) Subject to subsection (2), sections 34(2), 35, 36, 38, 40 and 41, each read with the changes required by context, apply to the Competition Appeal Court. 35

(2) Sections 35, 36 and 38 do not apply to the Judge President of the Appeal Court.

(3) The Judge President is appointed for a fixed term determined by the President at the time of appointment.

(4) The Judge President may resign from the Appeal Court by giving written notice addressed to the President. 40

(5) The Judge President holds office until—

- (a) his or her term of office in the Appeal Court ends;
- (b) his or her resignation takes effect;
- (c) he or she is removed from office; or 45
- (d) he or she ceases to be a judge of the High Court.

(6) The tenure of office and remuneration as well as the terms and conditions of appointment applicable to a judge of the High Court in terms of the Judges Remuneration and Conditions of Employment Act, 1989 (Act No. 88 of 1989), are not affected by that judge's appointment and concurrent tenure of office as Judge President. 50

- (7) The Judge President—
- (a) may be removed from office of Judge President of the Appeal Court only if that person has first been removed from the office of a judge of the High Court; and
 - (b) upon having been removed as a judge of the High Court, must be removed from office as a Judge President of the Appeal Court. 5

CHAPTER 5

COMPETITION TRIBUNAL PROCEDURES

Filing a complaint

- 46.** (1) A complaint against a prohibited practice committed by a firm may be filed by— 10
- (a) a regulatory authority; or
 - (b) a person prejudiced by that practice and having a substantial legal interest in obtaining relief from the prohibited practice.
- (2) A person entitled to file a complaint may file the complaint with the Competition Inspectorate in the prescribed manner. 15

Investigation by Inspectorate

- 47.** (1) The Commissioner must upon receipt of a complaint in terms of section 46 direct an inspector to investigate the complaint.
- (2) At any time during an investigation, the Commissioner may designate one or more persons to assist the inspector conducting the investigation. 20
- (3) A person questioned by an inspector conducting an investigation must answer each question truthfully and to the best of that person's ability, but a person is not obliged to answer any question if the answer is self-incriminating.
- (4) If pursuant to any complaint filed with the Competition Inspectorate or on the strength of any other information at the disposal of the Inspectorate, the inspector has reasonable grounds to suspect that a prohibited practice has been or is being committed or is likely to be committed, that inspector has the power in accordance with paragraphs (a) to (c) of subsection (2) of section 29 to— 25
- (a) enter upon or enter any premises in order to inspect any relevant article or document found and cause them to be detained in accordance with this Act, and where applicable, remove the article or document for the purpose of detention; 30
 - (b) to collect or obtain evidence relating to the suspected prohibited act; and
 - (c) to conduct at, on or in such premises whatever search may be reasonably necessary for the purposes of paragraph (a) or (b). 35
- (5) Subject to section 50, the powers conferred on an inspector by subsection (4) may be exercised only on the authority of a warrant issued under section 48 and may be exercised wherever the suspected prohibited act has taken place or is taking place or is likely to take place or is suspected on reasonable grounds to have taken place or to be taking place. 40

Search warrants

- 48.** (1) The warrant contemplated in section 47(5) may be issued in chambers by a Judge of the High Court, a regional magistrate or magistrate, who has jurisdiction over the premises on which the relevant suspected prohibited act is alleged to have taken place or is taking place and will only be issued if, from information on oath or affirmation there are reasonable grounds to believe that a prohibited act has taken place or is taking place or is likely to take place— 45
- (a) on or in those premises; or
 - (b) is in the possession of or under the control of a person who is on or in those premises. 50

- (2) A warrant to enter and search may be issued at any time and must specifically—
- (a) identify the premises that may be entered and searched; and
 - (b) authorise an inspector or a police officer to enter and search the premises and to do anything listed in section 49(4).
- (3) A warrant to enter and search is valid until— 5
- (a) the warrant is executed;
 - (b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;
 - (c) the purpose for issuing it has lapsed; or
 - (d) the expiry of one month from the day of its issue. 10
- (4) A warrant to enter and search may only be executed during the day, unless the judge, regional magistrate or magistrate who issues it authorises the execution thereof by night at times which must be reasonable in the circumstances.

Search under warrant

49. (1) An inspector authorised by warrant issued in terms of section 48 may enter and search premises named in that warrant. 15
- (2) An inspector executing a warrant must immediately before commencing with such execution—
- (a) if the owner, or person in control, of the premises to be searched is present—
 - (i) identify himself or herself and explain his or her authority to that person; and 20
 - (ii) hand a copy of the warrant to that person or to the person named in it; or
 - (b) if such person is not present, affix a copy of the warrant to the premises in a prominent and visible place.
- (3) (a) An inspector who enters and searches any premises under this section must conduct himself or herself with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy. 25
- (b) At the request of the owner or person in control of the premises the inspector executing the warrant must furnish that person with particulars regarding his or her authority to execute such warrant. 30
- (4) An inspector who executes a warrant to enter and search premises may—
- (a) search the premises identified in the warrant;
 - (b) examine any article or document that is on or in the premises;
 - (c) request information about any article or document from the owner or person in control of the premises, or from any person who has control of the article or document, or from any other person who may have the information; 35
 - (d) take extracts from or make copies of any book or document that is on or in the premises; and
 - (e) attach and, if necessary, remove from the premises for examination and safekeeping anything that has a bearing on the investigation. 40
- (5) An inspector who executes a warrant under this section must, before questioning anyone in terms of subsection (4)(c)—
- (a) advise that person of that person's right to be assisted at the time by an advocate or attorney; and
 - (b) allow that person to exercise that right. 45
- (6) An inspector who removes anything from premises being searched must—
- (a) issue a receipt for it to the owner or person in control of the premises; and
 - (b) return it as soon as practicable after achieving the purpose for which it was removed.
- (7) (a) During a search, a person may refuse to permit the inspection or removal of an article or document on the grounds that it is or contains privileged information. 50
- (b) If the owner or person in control of the article or document refuses to give such article or document to the person conducting the search on the grounds that it is or contains privileged information, such person may request the registrar of the High Court that has jurisdiction to attach and remove the article or document for safe custody until that court determines whether or not the information is privileged. 55

(c) No answer given or statement made by any person to an inspector exercising his or her powers in terms of subsection 4(c) or given or made to any inspector exercising like powers by virtue of section 50 will if self-incriminating be admissible as evidence against that person in criminal proceedings instituted in any court against that person, except in criminal proceedings where that person is tried for an offence contemplated in section 74(b) and then only to the extent that such answer or statement is relevant to prove the offence charged. 5

Search without warrant

50. (1) An inspector referred to in section 48(2)(b) may without a warrant enter and search premises other than a private dwelling, to attach and remove an article or document. 10

(2) Before beginning to enter and search in terms of this section, the inspector conducting the search must identify himself or herself and explain his or her authority to the owner or person in control of the premises and must—

- (a) get permission from such owner or person in control of the premises to enter and search the premises, and to attach and remove any article or document; or 15
- (b) believe on reasonable grounds that a warrant would be issued to that person under section 48 if applied for, and that the delay that would ensue by first obtaining a warrant would defeat the object or purpose of the entry and search. 20

(3) An entry and search without a warrant must be carried out during the day, unless doing it at night is justifiable and necessary. 20

(4) Section 49, regarding the manner in which a search must be conducted, apply with the changes required by the context to an inspector acting in terms of this section.

Use of force

51. (1) An inspector who is authorised to enter and search premises under either section 49 or section 50(2)(b) may overcome any resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window on the premises. 25

(2) Before using force, the inspector carrying out an entry and search must audibly demand admission and must announce his or her purpose, unless he or she reasonably believes that doing so may induce someone to destroy or dispose of an article or document that is the object of the search. 30

(3) The Commission may compensate anyone who suffers damage because of a forced entry during a search when no one responsible for the premises was present.

Disposal of complaint

35

52. After completing its investigation, the Competition Inspectorate must—

- (a) refer the matter to the Competition Tribunal, if it determines that a prohibited practice has been established; or
- (b) in any other case, issue a notice of non-referral to the complainant in the prescribed form. 40

Referral to Competition Tribunal

53. (1) If the Competition Inspectorate issues a notice of non-referral in response to a complaint, the complainant concerned may refer the matter directly to the Competition Tribunal.

(2) A referral to the Tribunal, whether by the Inspectorate in terms of section 52(1)(a), or by a complainant in terms of subsection (1), must be in the prescribed form. 45

(3) The chairperson of the Tribunal must, by notice in the *Gazette*, publish each referral made to the Tribunal in the *Gazette*, including—

- (a) the name of the firm whose conduct is the subject of the inquiry; and
- (b) the nature of the conduct that is the subject of the inquiry. 50

Hearings before Competition Tribunal

- 54.** (1) The Competition Tribunal must conduct an inquiry into every matter referred to it.
- (2) The Tribunal is a tribunal of record.
- (3) Inquiry proceedings of the Tribunal are conducted in public— 5
- (a) in an inquisitorial manner;
- (b) as expeditiously as possible;
- (c) as informally as possible; and
- (d) in accordance with the principles of natural justice; and
- (4) Despite subsection (2) the Tribunal member presiding at an inquiry may exclude 10
- members of the public or specific persons or categories of persons from attending the proceedings—
- (a) if evidence to be presented is confidential information to the extent that it cannot otherwise be protected;
- (b) if the proper conduct of the inquiry requires it; or 15
- (c) for any other reason which would be justifiable in civil proceedings in a High Court.
- (5) At the conclusion of an inquiry, the Tribunal must make any order permitted in terms of Chapter 6, and issue written reasons for its decision.
- (6) The Competition Tribunal must provide the participants and other members of the 20
- public reasonable access to the record of each inquiry, subject to any ruling to protect confidential information made in terms of subsection (4)(a).

Right to participate in inquiry

- 55.** The following persons may participate in an inquiry contemplated in section 54(1) in person or through a representative and may put questions to witnesses, inspect any 25
- books, documents or items presented at the inquiry:
- (a) the Commissioner, or any person appointed by the Commissioner;
- (b) the complainant;
- (c) the firm whose conduct forms the basis of the inquiry; and
- (d) any other person who has a material interest in the inquiry, unless, in the 30
- opinion of the presiding member of the Tribunal, that interest is adequately represented by another participant.

Powers of member presiding at inquiry

- 56.** The member presiding at an inquiry may—
- (a) direct or summon any person to appear at any specified time and place; 35
- (b) question any person under oath or affirmation;
- (c) order any person—
- (i) to produce any book, document or item necessary for the purposes of the inquiry; or
- (ii) to perform any other act in relation to this Act; and 40
- (iii) to give directions prohibiting or restricting the publication of any evidence given to the Competition Tribunal.

Rules of procedure

- 57.** (1) The Competition Tribunal may, by notice in the *Gazette*, make rules to regulate the procedure at inquiries. 45
- (2) Subject to the Tribunal's rules of procedure, the Tribunal member presiding at an inquiry may determine any matter of procedure for that inquiry, with due regard to the circumstances of the case, and the requirements of section 54(3).

Witnesses

- 58.** (1) Every person giving evidence at an inquiry must answer any relevant question. 50

(2) The law regarding a witness's privilege in a criminal case in a court of law applies equally to a person who provides information during an inquiry.

(3) The Tribunal may order a person to answer any question, or to produce any article or document, even if it is self-incriminating to do so.

(4) If incriminating evidence is obtained directly or indirectly under this section, the evidence may not be admissible in any court of law or before any body as evidence in any criminal proceedings against that person, except on a charge of perjury or on a charge contemplated in section 74 of this Act or in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955). 5

Costs 10

59. (1) Subject to subsection (2), each party participating in an inquiry must bear its own costs.

(2) If the Tribunal has not made a finding against the respondent, the Tribunal member presiding at an inquiry may award costs to the respondent, and against a complainant who referred the complaint in terms of section 53(1). 15

Appeals

60. (1) Subject to the rules of the Competition Appeal Court, a participant in an inquiry referred to in section 55(a), (b) or (c) may—

(a) appeal against any decision of the Competition Tribunal, other than a decision in terms of section 63(3), to the Appeal Court; or 20

(b) apply to the Appeal Court to review a decision of the Competition Tribunal.

(2) Subject to the Constitution, the Appeal Court has exclusive and final jurisdiction over any matter that may be appealed to it, or reviewed by it.

(3) The Appeal Court may make an order for the payment of costs, against any party in the hearing or against any person who represented a party in the hearing, according to the requirements of the law and fairness. 25

(4) A judgment of the Appeal Court is binding on the Competition Tribunal.

CHAPTER 6

REMEDIES AND ENFORCEMENT

Interim relief 30

61. (1) At any time, whether or not an inquiry has commenced into an alleged prohibited practice, a person referred to in section 46(1) may apply to the Competition Tribunal for an interim order in respect of that alleged practice, and the Tribunal may grant such an order if—

(a) there is evidence that a prohibited practice has occurred; 35

(b) an interim order is reasonably necessary to—

(i) prevent serious and irreparable damage to that person; or

(ii) to prevent the objects of this Act from being frustrated;

(c) the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and 40

(d) the balance of convenience favours the granting of the order.

(2) An interim order in terms of this section must not extend beyond the earlier of—

(a) the conclusion of an inquiry into the alleged prohibited practice; or

(b) the date that is six months after the date of issue of the interim order.

(3) If an interim order has been granted, and an inquiry into that matter has not been concluded within six months after the date of that order, the Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months. 45

Orders of Tribunal

- 62.** (1) In addition to its other powers conferred by this Act, the Competition Tribunal may—
- (a) make an appropriate order in relation to a prohibited practice, including—
 - (i) interdicting any prohibited practice; 5
 - (ii) ordering a party to modify an agreement or decision;
 - (iii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to eliminate the continuance of a prohibited practice;
 - (iv) ordering divestiture in terms of section 64; 10
 - (v) imposing an administrative fine in terms of section 63 with or without the addition of any other order in terms of this section;
 - (vi) declaring conduct of a firm to be a prohibited practice, for the purposes of section 67;
 - (vii) declaring the whole or any part of an agreement to be void; 15
 - (viii) ordering access to an essential facility on reasonable terms;
 - (b) confirm a consent agreement in terms of section 65 as an order of the Tribunal; or
 - (c) condone any non-compliance with its rules and procedures on good cause shown. 20
- (2) At any time, the Tribunal may stay an inquiry for a reasonable period of time if there is reason to believe that the inquiry relates to an act that might qualify for exemption in terms of section 11.
- (3) Despite any other provision of this Act, if the Tribunal stays an inquiry in terms of subsection (2), the respondent may apply for an exemption within the period allowed by the Tribunal. 25

Administrative fines

- 63.** (1) The Tribunal may impose an administrative fine only—
- (a) for a practice prohibited in terms of section 5(1)(b), 6(2) or 9(a), (b), (c) and (e); 30
 - (b) for a prohibited practice in terms of section 5(1)(a), 6(1), 9(d) or 10(1), if the conduct is substantially a repeat by the same firm of conduct previously found by the Tribunal to be a prohibited practice; or
 - (c) if the parties to a merger have—
 - (i) failed to give notice of the merger as required in terms of section 14; 35
 - (ii) proceeded to implement the merger in contravention of a decision by the Tribunal to prohibit that merger;
 - (iii) proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Tribunal in terms of section 17; or 40
 - (iv) proceeded to implement the merger without the approval of the Tribunal.
- (2) An administrative fine imposed in terms of subsection (1) may not exceed 10% of the firm's annual turnover in the Republic and exports from the Republic during the preceding financial year.
- (3) When determining an appropriate fine, the Tribunal must consider the following factors in relation to the contravention: 45
- (a) The nature, duration, gravity and extent of the practice or contravention;
 - (b) any loss or damage suffered as a result of the practice or contravention;
 - (c) the behaviour of the respondent;
 - (d) the market circumstances in which the practice took place; 50
 - (e) the level of profit derived;
 - (f) the degree to which the respondent has co-operated with the Competition Commission; and

(g) whether the respondent has previously been found in contravention of the Act.

(4) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the Constitution.

Divestiture

64. (1) If a merger occurs in contravention of Chapter 3, the Competition Tribunal may— 5

(a) order a party to the merger to sell any shares, interests or other assets it has acquired pursuant to the merger; or

(b) declare void any agreement to which the merger was subject.

(2) In addition to or in lieu of making an order under section 60, the Tribunal may make an order directing any firm or any other person to sell any shares, interests or other assets of the firm if— 10

(a) the firm has contravened section 9; and

(b) the prohibited practice—

(i) cannot adequately be remedied in terms of another provision of this Act; 15
or

(ii) is substantially a repeat by that firm of conduct previously found by the Tribunal to be a prohibited practice.

(3) An order made by the Tribunal in terms of subsection (2) is of no force or effect unless confirmed by the Competition Appeal Court. 20

(4) An order made in terms of subsection (1) may set a time for compliance, and any other terms that the Tribunal considers appropriate having regard to the commercial interests of the party concerned.

Consent orders

65. (1) If a complaint of a prohibited practice has been investigated by the Competition Inspectorate, and the Inspectorate and the respondent agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 62. 25

(2) A consent order does not preclude a complainant from applying for—

(a) a declaration in terms of section 62(1)(a)(v); or 30

(b) an award of civil damages in terms of section 67.

Status and enforcement of orders of Tribunal

66. (1) Any decision, judgment or order of the Tribunal or Competition Appeal Court may be served, executed and enforced as if it were an order of the High Court.

(2) The Competition Commission may institute proceedings in the High Court on its own behalf for recovery of an administrative penalty imposed by the Tribunal. 35

(3) The proceedings contemplated in subsection (2) may not be initiated more than three years after the imposition of the administrative penalty.

Civil actions

67. (1) Except where this Act provides otherwise, the Competition Tribunal and the Competition Appeal Court share exclusive jurisdiction in respect of all matters in terms of this Act, but only a civil court may award damages to a plaintiff in terms of this section. 40

(2) A person who has suffered loss or damage as a result of a prohibited practice may commence an action to recover the loss or damage in a civil court against a person who the Tribunal has determined committed the prohibited practice. 45

(3) A civil court may not award damages under this section unless the plaintiff, when instituting proceedings, has filed with the Registrar or Clerk of the Court a notice from the chairperson of the Tribunal or the Judge President of the Appeal Court in the prescribed form— 50

- (a) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of the Act;
 - (b) stating the date of the finding of the Tribunal or the Appeal Court; and
 - (c) setting out the provision of the Act in terms of which the Tribunal or the Appeal Court made its finding. 5
- (4) A certificate issued in terms of subsection (3) is conclusive proof of its contents.
- (5) An appeal or application for review against an order made by the Tribunal in terms of section 62 suspends any right under subsection (2) to commence an action with respect to the same matter.
- (6) A person's right to claim damages in terms of this Act comes into existence on— 10
 - (a) the date that the Tribunal made an order in terms of this Act; or
 - (b) in the case of an appeal, the date that the appeal process is concluded.
- (7) If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and— 15
- (a) if the issue raised is one in respect of which the Tribunal or Appeal Court has made an order, the court must apply the determination of the Tribunal or the Appeal Court to the issue; or
 - (b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that— 20
 - (i) the issue has not been raised in a frivolous or vexatious manner; and
 - (ii) the resolution of that issue is required to determine the final outcome of the action.

Variation of order

- 68.** (1) The Competition Tribunal or the Competition Appeal Court, acting of its own accord or on application of a person or firm affected by a decision or order, may vary or rescind a decision or order— 25
- (a) erroneously sought or granted in the absence of a party affected by that decision or order;
 - (b) in which there is ambiguity, an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or 30
 - (c) granted as a result of a mistake common to all of the parties to the proceedings.

Limitations of bringing action

- 69.** (1) A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased. 35
- (2) A complaint may not be initiated against any firm that is, or has been, a respondent in proceedings under another section of the Act relating substantially to the same conduct.

Standard of proof

- 70.** In any proceedings in terms of this Act, the standard of proof is on a balance of probabilities. 40

CHAPTER 7

OFFENCES

Breach of confidence

- 71.** (1) It is an offence to disclose any confidential information concerning the affairs of any other person or firm obtained in carrying out any function in terms of this Act. 45
- (2) Subsection (1) does not apply to information disclosed—

- (a) for the purpose of the proper administration or enforcement of this Act;
- (b) for the purpose of the administration of justice; or
- (c) at the request of an inspector or Tribunal member entitled to receive the information.

Hindering administration of Act 5

72. It is an offence to hinder, oppose, obstruct or unduly influence any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by this Act.

Failure to attend when summoned

73. It is an offence if having been directed or summoned to attend an inquiry a person— 10

- (a) without sufficient cause fails—
 - (i) to appear at the time and place specified; or
 - (ii) to remain in attendance until excused; or
- (b) attends as required, but— 15
 - (i) fails to produce a book, document or other item which he or she been ordered to produce, and which is in his or her possession or under his or her control; or
 - (ii) refuses to be sworn in or to make an affirmation.

Failure to answer fully or truthfully 20

74. A person commits an offence who, having been sworn in or having made an affirmation—

- (a) subject to section 58, fails to answer any question fully and to the best of that person's ability; or
- (b) gives false evidence, knowing or believing it to be false or misleading. 25

Failure to comply with Act

75. (1) A person commits an offence who contravenes, or fails to comply with, a decision or order of the Competition Tribunal or the Competition Appeal Court.

(2) A person commits an offence who—

- (a) does anything calculated to improperly influence the Tribunal concerning any matter connected with an investigation; 30
- (b) anticipates any findings of the Tribunal concerning an investigation in a way that is calculated to influence the Tribunal's proceedings or findings;
- (c) does anything in connection with an investigation that would have been contempt of court if the proceedings had occurred in a court of law; 35
- (d) knowingly provides false information to the Competition Commission;
- (e) defames the Tribunal or the Appeal Court, or a member of either, in their respective official capacities;
- (f) wilfully interrupts the proceedings or misbehaves in the place where an inquiry is being conducted; 40
- (g) acts contrary to a warrant to enter and search;
- (h) without authority—
 - (i) enters or searches premises; or
 - (ii) attaches or removes an article or document.

Penalties 45

76. (1) Any person convicted of any offence in terms of this Act, is liable—

- (a) in the case of a contravention of section 75(1), to a fine not exceeding R500 000-00 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment; or
- (b) in any other case, to a fine not exceeding R2 000-00 or to imprisonment for a period not exceeding six months, or to both such fine and such imprisonment. 5

Jurisdiction of magistrates' court

77. Despite anything to the contrary contained in any other law, a magistrates' court has jurisdiction to impose any penalty provided for in this Act.

Serving documents

78. Unless otherwise provided in this Act, a notice, order or other document which, in terms of this Act, must be served on or given to a person, must be regarded as having been properly served or given when it has been—
- (a) delivered to that person;
 - (b) sent by registered post to that person's last known address; or
 - (c) published in the *Gazette*. 15

Proof of facts

79. (1) In any criminal proceedings in terms of this Act—
- (a) if it is alleged that a person at a firm is or was an employee that person must be regarded to be an employee at that firm;
 - (b) if it is proved that a false statement, entry or record or false information appears in or on a book, document, plan, drawing or computer storage medium, and is found in the possession of a person, such a person must be regarded as having made or kept such statement, entry, record or information, as the case may be. 20
- (2) A statement, entry or record or information in or on any book, document, plan, drawing or computer storage medium is admissible in evidence as an admission of the facts in or on it by the person who made, entered, recorded or stored it unless it is proved that person did not make, enter, record or store it within the scope of his or her functions. 25

CHAPTER 8

GENERAL PROVISIONS 30

Regulations

80. The Minister may, by notice in the *Gazette*, make regulations regarding any matter—
- (a) which may or must be prescribed under this Act; and
 - (b) which is necessary to prescribe in order to achieve the purposes of this Act. 35

Guidelines

81. (1) The Competition Tribunal may prepare guidelines to indicate the policy approach of the Tribunal to any matter within its jurisdiction in terms of this Act.
- (2) A guideline prepared in terms of subsection (1)—
- (a) must be published in the *Gazette*; and 40
 - (b) is not binding on the Tribunal in the exercise of its discretion or the interpretation of this Act.

Official seal

82. The President may, by proclamation in the *Gazette*, prescribe an official seal for each of the Competition Tribunal and the Competition Appeal Court. 45

Act binds State

83. This Act binds the State.

Information exchange with foreign agencies

84. The President may assign to the Competition Commission any duty of the Republic, in terms of an international agreement relating to the objects of this Act, to exchange information with a similar foreign agency. 5

Repeal of laws, and transitional arrangements

85. (1) Subject to subsection (2), the laws specified in Schedule 2 are repealed to the extent indicated in the third column of that Schedule.

(2) An exemption granted in terms of section 14(5) of the Maintenance and Promotion of Competition Act, 1979 (Act No. 86 of 1979), is regarded as having been granted in terms of section 11 of this Act and is valid for a period of six months from the date on which this Act comes into operation. 10

Short title and commencement of Act

86. This Act is called the Competition Act and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 15

SCHEDULE 1

EXEMPTION OF PROFESSIONAL RULES IN TERMS OF SECTION 3(c)

Part A

1. A professional association may apply in the prescribed manner to the Competition Tribunal to have all or part of its rules exempted from the provisions of Part A of Chapter 2 of the Act, provided the rules do not contain any restriction that has the effect of substantially preventing, or lessening, competition in a market not reasonably required to maintain professional standards, or the ordinary function of the profession.
2. Upon receiving an application in terms of item 1, the Competition Tribunal may exempt the rules concerned if it has—
 - (a) given notice of the application in the *Gazette*;
 - (b) allowed interested parties 30 days from the date of that notice to make representations concerning the application; and
 - (c) consulted the responsible Minister.
3. At any time the Tribunal may in the prescribed manner revoke an exemption granted under item 2 on good cause shown, provided it has—
 - (a) given notice in the *Gazette*, of its intention to revoke the exemption;
 - (b) allowed interested parties 30 days from the date of that notice to make representations concerning the exemption; and
 - (c) consulted the responsible Minister.
4. A professional rule is exempt, or its exemption revoked, only as of the date notice of exemption or revocation, as the case may be, is published in the *Gazette*.
5. The Competition Commission must maintain for public inspection a record of all professional rules that have received exemption, or for which exemption has been revoked.
6. For the purpose of this Schedule—

“professional association” means an association referred to in Part B of this Schedule;

“professional rules” means rules regulating a professional association that are binding on its members;

“rules” includes regulations, codes of practice and statements of principle;

“responsible Minister” means a Minister, or member of an Executive Council of a Province, responsible for the regulation of a professional association.

Part B

The Governing Bodies of the following professional associations registered in terms of the following Acts are professional associations for the purposes of this Act:

Accountants and Auditors

Public Accountants and Auditors Act, 1991 (Act No. 80 of 1991).

Architects

Architects Act, 1970 (Act No. 35 of 1970).

Engineering

Engineering Profession of South Africa Act, 1990 (Act No. 114 of 1990)

Estate Agents

Estate Agents Act, 1976 (Act No. 112 of 1976)

Attorneys

Attorneys Act, 1979 (Act No. 53 of 1979)

Admission of Advocates Act, 1964 (Act No. 74 of 1964)

Natural sciences
Natural Scientific Professions Act, 1993 (Act No.106 of 1993)

Quantity Surveyors
Quantity Surveyors Act, 1970 (Act No. 36 of 1970)

Surveyors
Professional and Technical Surveyors Act, 1984 (Act No. 40 of 1984)

Town and Regional Planners
Town and Regional Planners Act, 1984 (Act No. 19 of 1984)

Valuers
Valuers Act, 1982 (Act No. 23 of 1982)

Medical
Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974)
Nursing Act, 1978 (Act No. 50 of 1978)
Dental Technicians Act, 1979 (Act No. 19 of 1979)
Pharmacy Act, 1974 (Act No. 53 of 1974)
Veterinary and Para-veterinary Professional Act, 1982 (Act No. 19 of 1982)
Chiropractors Homeopaths and Allied Health Service Professions Act, 1982 (Act No. 63 of 1982)

Miscellaneous
Any other professional associations to whom the provisions of this Schedule have been declared applicable by the Minister by notice in the *Gazette*.

SCHEDULE 2
REPEAL OF LAWS
(Section 85)

No. and year of law	Short title	Extent of repeal
Act No. 96 of 1979	Maintenance and Promotion of Competition Act, 1979	The whole
Act No. 58 of 1980	Maintenance and Promotion of Competition Amendment Act, 1980	The whole
Act No. 62 of 1983	Maintenance and Promotion of Competition Amendment Act, 1983	The whole
Act No. 12 of 1985	Maintenance and Promotion of Competition Amendment Act, 1985	The whole
Act No. 5 of 1986	Maintenance and Promotion of Competition Amendment Act, 1986	The whole
Act No. 96 of 1987	Maintenance and Promotion of Competition Amendment Act, 1987	The whole
Act No. 88 of 1990	Maintenance and Promotion of Competition Amendment Act, 1990	The whole

MEMORANDUM ON THE OBJECTS OF THE COMPETITION BILL, 1998

1. INTRODUCTION

BACKGROUND AND MOTIVATION FOR POLICY REVIEW

On 27 November 1997 the Department of Trade and Industry published Proposed Guidelines for Competition Policy in a document entitled FRAMEWORK FOR COMPETITION, COMPETITIVENESS AND DEVELOPMENT (The Guidelines). This document sets out the fundamental principles which would underpin competition policy. It proposed that a law be introduced to prohibit anti-competitive practices and, in the case of dominant firms, abuse of their dominant position, as well as to regulate mergers and acquisitions with respect to their likely impact upon competition.

Competition policy and its associated legislation and institutions are concerned with promoting and maintaining high levels of competition. In particular, competition policy is concerned with the potentially negative impact on competition of concentrated structures of economic power and the conduct that may emanate from these structures.

It is generally acknowledged that the South African economy is characterised by unusually high levels of product market concentration. This domination of key product markets—a phenomenon popularly referred to as ‘monopolisation’—may be, and frequently is, abused to the detriment of consumers, potential and actual competitors, small firms and new entrants to the market, and even public authority. Indeed excessive levels of market concentration are a potential threat to the functioning of the market economy itself. Furthermore, many South African markets not subject to monopolisation—that is, to domination by a single firm, are nonetheless dominated by two or three extremely large firms. This latter market structure lends itself to collusive, as opposed to competitive, inter-firm relations, to the potential detriment of the functioning of the market economy and those interests identified above.

Not only are South African market structures highly concentrated, ownership and control of the economy is also unusually centralised. This phenomenon is manifest in unusually high levels of vertical integration and ownership by a single shareholder or groups of shareholders of a producer as well as its key suppliers and customers. These ownership structures are particularly threatening to the interests of small enterprise and new market entrants. Moreover, ownership concentration does not only take the form of common ownership along a vertical production and marketing chain. It is also manifest in ubiquitous cross shareholding and common board membership (‘interlocking directorships’) between competitors, which is also a situation that lends itself to abusive and collusive anti-competitive conduct.

Government’s commitment to an urgent and comprehensive review of competition policy is underpinned by these factors. It is concerned about the threat that the industrial structure poses to the efficiency and adaptability of the economy through the exploitation and outright exclusion of key participants and potential participants. These fundamental concerns have, in the recent past, been strengthened by the need to forestall the potential threat that the restructuring of state-owned enterprises poses to competition. Moreover, the global reduction in barriers to international trade has placed competition policy high on the agenda of the multilateral trade initiatives and institutions and it surfaces with increasing regularity in bilateral engagements with some of our most important trading partners.

This important area is still governed by the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979). This Act established the Competition Board, the principal institution responsible for administering the Act. It is commonly accepted that the existing Act does not adequately address the important tasks relating to anti competitive practices. In general, the Act narrowly delimits the Board’s areas of

concern, which are major potentially anti-competitive practices (for example, vertical mergers) do not even fall within the ambit of the Act. The Board's decisions are subject to ministerial override generating uncertainty, political lobbying and scant respect for the Board. The Board has no punitive powers and must rely on the criminal justice system to prosecute and punish offenders. It is inadequately resourced. These shortcomings are particularly crippling in an area where the implementing authority relies on the willingness of the weak to report transgressions committed by powerful suppliers, customers or competitors. There is little incentive for a small firm or group of consumers to risk retributive action by a powerful interest where there are strong grounds for expecting little support from a virtually powerless authority.

Against this background the core elements of Government's approach to competition policy, an approach enshrined in the Bill, is summarised as follows:

- The overriding objective of competition policy and its associated instruments is the promotion of competition in order to underpin economic efficiency and adaptability, international competitiveness, the market access of SMMEs, diversification of ownership in favour of members of historically disadvantaged communities, and the creation of new employment opportunities.
- Procedures and remedies to be provided for in the proposed legislation will be triggered by a combination of structural and behavioural factors. In specified instances, behaviour, regardless of the size or structure of the offending firm, will trigger remedies under the Bill. For example a single firm or combination of firms may transgress the competition law by engaging in a defined 'restrictive practice'. In other instances remedies will be triggered by a combination of structure and behaviour. For example, a 'dominant' firm may commit practices that constitute an 'abuse' of its dominant position. In key instances—mergers and acquisitions for example—contemplated structural change will attract the attention of the competition authorities.
- Infringement of competition legislation will not be subject to criminal sanction, the only exceptions being in respect of breaches of confidence, hindering administration of the Act and failures to attend when summoned and to answer truthfully to the commission. Insofar as competition matters are concerned, an independent authority comprising an investigative (a 'competition inspectorate') and an adjudicative (a 'competition tribunal') division will administer the Act. The competition tribunal will have the authority to issue compliance orders and interdicts, to levy fines and to impose structural remedies. The latter set of remedies will include the right to prohibit a merger and, in specified circumstances, to order divestiture. Presumptions in the Act will discourage cross-shareholdings and directorship interlocks. Injured parties will have the right to claim civil damages, the quantum of which will be determined by the civil courts.
- The legislation provides for a right of appeal from the decisions of the Competition Tribunal to a specially constituted judicial authority, the Competition Appeal Court. The Competition Tribunal and the Competition Appeal Court will have—with a few specified exceptions—sole jurisdiction over competition matters. The one exception relates to the civil courts' responsibility for calculating the quantum of damages; the other relates to the question of ministerial override. In general, the decisions of the competition authorities will not—in contrast with the current situation—be subject to ministerial override. However, in one area—mergers and acquisitions—interested parties may appeal to the Minister on specified public interest grounds. The tribunal will not adjudicate on public interest grounds. In providing for limited public interest considerations in the legislation South Africa is in keeping with international precedent. The competition laws of

most countries share certain common objectives, principally to maintain healthy rivalry among firms in markets for goods and services. However, as the World Trade Organisation notes in its 1998 report most countries link the goal of maintaining inter-firm rivalry with broader economic and social objectives including the protection of consumers from the undue exercise of market power, the promotion of trade, the promotion of democratic values such as economic pluralism and the dispersion of socio-economic power and the protection of the public interest including consideration leading to industrial competitiveness and employment and the promotion of small and medium sized business.

This Bill in which these broad principles are enshrined comprises eight chapters. These are, firstly, a chapter dealing with the definitions, application and interpretation of the Bill. Second, the chapter dealing with prohibited practices, in particular vertical and horizontal restrictive practices and abuse of a dominant position. The third chapter deals with merger control. Chapter 4 deals with the Competition Commission and Court covering matters related to the establishment of the Commission and its independence, the management of the Commission, the investigative (the ‘competition inspectorate’) and adjudicative (the ‘competition tribunal’) branches of the Commission, and the proposed Competition Appeal Court. Chapter 5 deals with procedural matters. Chapter 6 is concerned with remedies and enforcement. Chapter 7 deals with specified criminal offences under the proposed Act and the final chapter details some *pro forma* general provisions.

The remainder of this memorandum summarises the provisions contained in each of these chapters.

2. CHAPTER 1

This chapter sets out definitions and objectives of the Bill. It provides for the promotion and maintenance of competition to facilitate the realisation of a number of specified economic and social objectives. These are economic efficiency and adaptability, competitive prices and product choices, the maximisation of employment opportunities, entry into world markets, ease of access by SMMEs to the economy, and a greater spread of ownership, principally in order to increase the ownership stake of historically disadvantaged persons. The Bill specifically provides that the Bill must be interpreted with reference to these objectives.

Chapter 1 also provides that the Bill applies to all economic activity with the exception of collective bargaining agreements, the rules of specified professional associations, the transactions of co-operative societies, and concerted practices and actions designed to achieve a non-commercial, socio-economic objective. Note prior to placing a professional society in the exempted schedule, its rules would be subject to scrutiny by the competition authority.

3. CHAPTER 2

This chapter deals with the prohibition against restrictive horizontal and vertical practices and the abuse of a dominant position.

Clause 5 provides for the prohibition of restrictive horizontal practices. Specified agreements between firms are prohibited outright. These include price-fixing agreements, collusive tendering and market-sharing agreements. There is also a general provision that stipulates that any other horizontal agreement that prevents or lessens competition is prohibited unless a party to the agreement can prove efficiency gains that outweigh the negative impact on competition. The existence of a horizontal agreement is frequently difficult to establish and this clause also provides that where a horizontal restrictive practice is alleged, an agreement will be rebuttably presumed to exist if the firms in question share a common director or one firm owns a substantial share in the other.

Clause 6 deals with restrictive vertical practices. The practice of resale price maintenance is prohibited outright. Beyond this specific prohibition, all agreements between firms in a vertical relationship—for example supplier-producer or producer-customer, that lessen competition are prohibited unless a party to the agreement can prove efficiency gains that outweigh the negative impact on competition.

Clauses 7-10 deal with abuse of a dominant position. The Bill stipulates that a firm that enjoys a market share in excess of 35% is considered dominant unless it can establish that it does not enjoy market power, that is, that it does not have the power to control prices, exclude competition or to behave independently of its competitors, customers or suppliers. A firm with a market share of less than 35% may, on the other hand, be considered dominant, if it can be shown that it does indeed possess market power.

In common with the approach to restrictive practices, there is an outright prohibition on specified practices when undertaken by a dominant firm. Other specified practices by a dominant firm are prohibited unless the firm can establish the existence of countervailing technological or efficiency gains.

A firm may apply to exempt an agreement from provisions of chapter two. Clause 11(2) sets out the circumstances under which an exemption can be granted for a maximum of five years. In line with the general objectives of the Bill, a firm or group of firms may apply for an exemption if it can be shown that the contemplated agreement will contribute to the promotion of exports or to promoting the ability of small firms or firms owned by historically disadvantaged persons to become competitive. An agreement may also be exempted if it is intended to arrest decline in an industry.

4. CHAPTER 3

This chapter deals with the control of mergers and acquisitions which constitutes an important form of structural remedy in the bill. This chapter should be read in the light of the guidelines' assessment of the weaknesses in existing legislation. In particular, the guidelines draw attention to the absence of compulsory pre-notification of mergers or acquisitions, to the failure to consider vertical and conglomerate mergers and acquisitions and to the absence of adequate mechanisms for the unscrambling of such transactions.

Clause 15 sets out the circumstances in which it is mandatory for the Competition Tribunal to prevent a merger or a proposed merger. In order to do so the Tribunal must determine that the merger or proposed merger is likely to substantially lessen competition. In making this determination the Tribunal must have regard to the strength of competition in the relevant market and to the probability, after the merger, of the firms in the market behaving competitively or co-operatively. The Bill specifies a number of factors which must be considered in making this determination.

Clause 19 stipulates that an interested party can request the Minister to review the decision of the Tribunal on a number of specified public interest grounds. These are the effect of a merger on a particular industrial sector or region, employment, the ability of small firms or firm controlled or owned by historically disadvantaged persons to become competitive and the ability of national industries to compete in international markets. It should be noted that this definition of public interest is drawn from the objectives of the Bill as set out in Clause 1. Clause 19 (3) prescribes a limit of four months within which the Minister must act. The Minister may exercise three options, namely to overturn, confirm or amend the order of the Tribunal.

5. CHAPTER 4

This Chapter provides for the establishment of a Commission and the Appeal Court. Clause 20 establishes one body with three component arms: a Management Board, responsible for the general administration of the commission, an Inspectorate (the investigative arm) and a Tribunal (the adjudicative arm).

Clause 21 entrenches the independence of the Commission. The requirements imposed on all personnel are the same as are prescribed by the Constitution.

Part B of this chapter grants the Management Board the authority to manage the commission in an independent manner. Clause 26 is a detailed provision in respect of the financing of the commission. Thus, Clause 26(3) requires the Board to submit a statement to the Minister of its estimated income and expenditure and the requested appropriation from Parliament.

Clause 29 sets out the function of the inspectorate. Although part of the one-body Commission for administrative purposes, the inspectorate exists as a separate body for the purposes, *inter alia*, of investigation and appearance before the Tribunal as well as other functions set out in Clause 29.

Clause 33 sets out the functions of the Tribunal, these being to grant exemptions, to authorise or prohibit a merger, to adjudicate in relation to any of the prohibited practices specified in the Bill and to impose remedies, and to grant orders for costs.

Clause 34 sets out the composition of the Tribunal. The appointments are to be made by the President on the recommendation of the Minister. Clause 36 provides for the circumstances under which a person may be removed from the Tribunal. Despite these limited conditions a member has independence of tenure for a maximum of two consecutive terms of five years each.

Part E deals with the Competition Appeal Court. It has the power to consider an appeal from the Tribunal or to review a decision thereof. It will have the status of a High Court and will be presided over by a judge of the High Court and two assessors who have specialist experience of competition law and policy.

6. CHAPTER 5

Chapter 5 sets out the procedures for filing a complaint before the Tribunal. Clause 46 provides that, apart from a regulatory authority, a person prejudiced by a prohibited practice and who has a substantial legal interest in obtaining relief can submit a complaint.

The provision relating to search warrants contained in Clause 48—50 follows a similar provision in the Income Tax Act.

The thrust of this chapter is to encourage public participation of interested parties (Clause 55) in respect of persons who have material interest in the inquiry. In addition Clause 54 (5) provides that all participants and members of the public should have reasonable access to the record of an inquiry subject to the protection of confidential information.

Clause 60 provides for a right of appeal to the Competition Appeal Court which will also have the power of review of the Tribunal's decision. Clause 60(2) gives the Competition Appeal Court exclusive and final jurisdiction in these matters.

Clause 60 provides a deterrent to parties initiating unsubstantiated complaints in that an award of costs can be made against a complainant who pursues a complaint to the Tribunal after the inspectorate has refused to proceed and has issued a notice of non referral.

7. CHAPTER 6

Chapter 6 provides for the remedies under the Bill. In terms of Clauses 61 and 62, the Tribunal will have power to issue interim and final interdicts. It will also have the power to impose administrative fines for breaches, the maximum fine being 10% of the breaching firms annual turnover in the Republic (Clause 63). Clause 64 creates a power of divestiture in the case of a prohibited merger. Apart from compelling a sale of any shares or interest, the Tribunal can declare void any agreement to which the merger has been subjected. This divestiture power affords the tribunal a significant power to remedy structural defects as prohibited in Chapter three. Clause 64 (2) also creates a power of divestiture in the event that this is needed to prevent persistent abuse of dominance. A divestiture order must be confirmed by the Competition Appeal Court in order to be effective.

In general this Chapter provides that only the Tribunal and Competition Appeal Court have the power to adjudicate over the contents of the Bill. Thus, if civil action is initiated by a party in a civil court, the latter cannot consider an issue which falls within the scope of this Bill. It must either apply the determination of the Tribunal if that has occurred or, if the court is satisfied that the issue is not frivolous or vexatious (and is required to determine the case) it has to refer this aspect of overall dispute to the Tribunal. Civil

courts do however retain jurisdiction to award damages for anti-competitive actions and the bill exclusively gives them this power.

8. CHAPTER 7

Chapter seven provides for offences under the Act. These relate only to non-compliance in respect of the powers of the various bodies and officials under the Bill. The bill has sought to deal with the substantial breaches of the prohibited practices without recourse to the criminal law.

9. CHAPTER 8

Chapter eight contains the general provisions of the Bill. Included in this chapter is a section that provides for the Tribunal to issue guidelines to indicate the Tribunal's policy approach on any matter within its jurisdiction. Although the guidelines are non-binding they will give clarity to the public on the Tribunal's approach to the interpretation of the Act.

10. SCHEDULES

A. PROFESSIONAL ASSOCIATIONS

Schedule 1 deals with the manner in which professional associations' rules are exempted from the provisions of the Competition Bill. The schedule in brief provides that a professional association can apply to the Tribunal to have its rules exempted from the provisions of the Competition Bill. The Tribunal may make a decision on the exemption only after consultation with the relevant line Ministries.

If the Competition Tribunal does not exempt a professional rule, this does not affect the validity of such a rule. It merely means that such a rule is not excluded from the Bill.

The Minister is given the power to extend the list of professions to whom the right to apply for an exemption applies.

B. TRANSITIONAL MEASURES

The second schedule to the Bill provides for certain transitional measures, namely:

- That professional rules will be deemed to be exempt in terms of this Act for a period of one year after the date of commencement of the Act. The purpose of this is to allow professions the time to apply to have their rules exempt;
- Exemptions granted under the existing Maintenance and Promotion of Competition Act will be deemed to be in force for a period of six months after the date of commencement of the Act. The purpose of this is to allow parties in favour of whom such exemptions have been granted to apply once again to the Competition Tribunal for an exemption (on the assumption that such an exemption is still available to them under the new Act) within a reasonable time period so as not to prejudice their existing rights. Where exemptions are not competent under the new Act, these rights will lapse after a period of six months.

11. PARLIAMENTARY PROCEDURE

In the opinion of the Department and the State Law Advisers, the Bill must be dealt with in accordance with section 75 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996).

