COMPETITION LAW

A NEW COMPETITION ACT

CDH

Extensive changes to the Competition Act were signed into law on 13 February 2019. The changes will come into effect on a date to be fixed by the President by Proclamation in the Government Gazette.

In the 2019 State of the Nation Address, the President highlighted high levels of economic concentration as a factor that stifles the growth of the South African economy. The amendments to the Competition Act form part of Government's efforts to foster greater inclusion and to create more opportunities – in particular for Small and Medium Enterprises ("SMEs") and businesses owned or controlled by historically disadvantaged persons ("HDPs"). The amendments are largely predicated on a conviction that the South African economy is overly concentrated, with attendant barriers to entry for new entrants that might otherwise stimulate both transformation and competition. In enforcing the new provisions, the regulator will need to draw a balance between the interests of larger firms and their potential efficiencies, and the imperative of developing underrepresented sectors of the economy. Effective and well-targeted enforcement can do much to foster an environment that is less hostile to competition from new entrants; but reducing barriers to entry ought not to be confused with shielding new entrants from the rigours of competition so as not to render local industry impotent in competing for a share of global economic growth.

The following table sets out the changes to the Act, and what is important to know about those changes.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
DEFINITION OF SMES AND HDP FIRMS Section 1 • The Minister is empowered to determine which firms will qualify as SMEs.	1(1) 'medium-sized business' means a medium-sized firm as determined by the Minister by notice in the Gazette 'small and medium business' means either a small business or a medium-sized business; 1(1) 'small business' ~~has the meaning~~ means a small firm determined by the Minister by notice in the Gazette, or if no determination has been made, as set out in the National Small Business Act, 1996 (Act 102 of 1996)	• The amendments apply to small and medium businesses. Accordingly, the definition of a "medium-sized business" is most important. • Draft regulations have been published. The draft regulations invoke a notice published in terms of the National Small Business Act. The current notice (dated 15 March 2019) establishes sector-based thresholds for identifying medium-sized or small businesses based on fulltime employees and annual turnover.
HORIZONTAL AND VERTICAL AGREEMENTS: Sections 4 and 5 • The allocation of market shares expressly included in the concept of collusive market division. • The Minister is empowered to make regulations regarding "the application of" section 4 (restrictive horizontal practices) and section 5 (restrictive vertical practices).	4(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if: (b) it involves any of the following restrictive horizontal practices: (ii) dividing markets by allocating market shares, customers, suppliers, territories, or specific types of goods or services ... 4(6) The Minister must make regulations in terms of section 78 regarding the application of this section. 5(4) The Minister must make regulations in terms of section 78 regarding the application of this section.	• While an agreement on allocating market shares was often understood as a means to facilitate market division, the amendment clarifies that such an agreement can amount to market division on its own. • The Minister has been granted more extensive powers throughout the amended Act, in particular through additional powers to make regulations on the substantive meaning or application of certain provisions. Previous versions of the amendments provided only for "guidelines" from the Commission on similar matters; but this was criticised for allowing the regulator to "write the rules" for its own enforcement. • While Ministerial regulations may assist in clarifying certain grey areas - one key area could be in respect of "characterisation" of certain conduct to fall outside of the *per se* cartel provisions – there are potential constitutionality concerns with empowering the Minister to make substantive law through secondary legislation, particularly where such additional rubric creates material obligations or liability. A further concern is the extent that regulations might be calculated to supplant or circumvent existing case precedent built over nearly 20 years.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
EXCESSIVE PRICING: Section 8(1)(a) and new Section 8(2) and 8(3) • Definition of "excessive pricing" relating to "economic value" replaced with expanded text of the considerations to apply in determining whether a price is "unreasonably higher than a competitive price". Factors include: respondent's price-cost margin, internal rate of return, return on capital invested or profit history; the respondent's prices for the goods or services in other markets; comparator firms prices and profits in competitive markets; duration of pricing; and the market characteristics. • Onus on dominant firms to show that a price is "reasonable" where there is a "prima facie" case of excessiveness. • Minister is empowered to make regulations regarding the "calculation and determination" of an excessive price.	8(1)(a) It is prohibited for a dominant firm to charge an excessive price to the detriment of consumers or customers. ... 8(2) If there is a prima facie case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable. 8(3) Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include: (a) the respondent's price-cost margin, internal rate of return, return on capital invested or profit history; (b) the respondent's prices for the goods or services: (i) in markets in which there are competing products; (ii) to customers in other geographic markets; (iii) for similar products in other markets; and (iv) historically; (c) relevant comparator firm's prices and level of profits for the goods or services in a competitive market for those goods or services; (d) the length of time the prices have been charged at that level; (e) the structural characteristics of the relevant market, including the extent of the respondent's market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the respondent's own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market; and (f) any regulations made by the Minister, in terms of section 78 regarding the calculation and determination of an excessive price.	• The reverse onus and expanded list of factors to consider apparently arises from the Commission's concern regarding the perceived difficulty in successfully prosecuting cases of excessive pricing. However, the new rules largely codify existing case law and commentary in circumstances where excessive pricing cases worldwide involve highly complex evaluations. Whether the amendments will make cases easier to prosecute is still to be seen. • It is not clear what will establish a "prima facie" case, where the onus shifts to the respondent to show why it is reasonable. Regulations may help to clarify but should not be tantamount to introducing substantive new legislative provisions. • What is welcome is that earlier versions of the amendments had removed an evaluation of "reasonableness" when determining whether a price was excessive. This has standard has now found its way back into the amended Act.
MARGIN SQUEEZE Section 1 and Section 8 • Engaging in a margin squeeze is now explicitly a contravention of the abuse of dominance provisions. • In terms of the new definition, a vertically integrated supplier that is dominant in the upstream market engages in margin squeeze when the margin between the price at which it sells its downstream product and the price it charges competing downstream producers for a key input is too small to allow downstream competitors to participate effectively.	S8(1) It is prohibited for a dominant firm to: (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act (vi) engaging in margin squeeze 1(1) 'margin squeeze' occurs when the margin between the price at which a vertically integrated firm, which is dominant in an input market, sells a downstream product, and the price at which it sells the key input to competitors, is too small to allow downstream competitors to participate effectively;	• Case law has established that a margin squeeze can constitute a contravention of section 8(c) of the Act, but this amendment makes it a self-standing offence. While it does not introduce a new contravention, margin squeeze cases have traditionally been reserved for circumstances where the input concerned is a *sine qua non* to compete (not merely a "key input") and where competitors have no outside options such that they are unable to compete (rather than "effectively compete"). The new wording appears to "lower the bar" for complaints and may threaten some of the efficiencies inherent in vertical integration.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
PREDATORY PRICING Sections 1 and 8(d)(iv) • Predatory pricing remains a contravention, and a new definition provides that "predatory pricing" means pricing below average avoidable cost or average variable cost.	1(1) 'average avoidable cost' means the sum of all costs, including variable costs and product-specific fixed costs, that could have been avoided if the firm ceased producing an identified amount of additional output, divided by the quantity of the additional output; 'average variable cost' means the sum of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of that product; 'predatory prices' means prices for goods or services below the firm's average avoidable cost or average variable cost 8(1) It is prohibited for a dominant firm to: (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act (iv) selling goods or services ~~below their marginal or average variable cost~~ at predatory prices	• This costing standard to be applied to predatory pricing has already been developed in terms of the case law, but the Act now codifies this. • It is unfortunate that an element of likely recoupment by the alleged predator is not built into the more detailed definition, although this element may be relevant for assessing the anticompetitive effect.

BUYER POWER
 	
New Section 8(4)
• Dominant firms in designated sectors may not:
  • impose "unfair" prices or trading terms on small, medium or HDP firms; and
  • avoid or refuse to purchase from small, medium or HDP firms in order to circumvent the buyer power provisions (an "anti-avoidance" provision).
• A reverse onus on dominant firms to prove that purchase prices or trading conditions are fair, if a prima facie case of unfairness is established. Also, a reverse onus to prove that it has not contravened the anti-avoidance provision.
• The provision only applies to sectors designated by the Minister by regulation. The Minister is also to issue regulations dealing with the "relevant factors and benchmarks" to be apply in determining if prices or conditions are unfair.
	8(4)(a) It is prohibited for a dominant firm in a sector designated by the Minister in terms of paragraph (d) to directly or indirectly, require from or impose on a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons, unfair:
	(i) prices; or
	(ii) other trading conditions.
	(b) It is prohibited for a dominant firm in a sector designated by the Minister in terms of paragraph (d) to avoid purchasing, or refuse to purchase, goods or services from a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons in order to circumvent the operation of paragraph (a).
	(c) If there is a prima facie case of a contravention of paragraphs (a) or (b), the dominant firm alleged to be in contravention must show that:
	(i) in the case of paragraph (a), the price or other trading condition is not unfair; and
	(ii) in the case of paragraph (b), it has not avoided purchasing, or refused to purchase, goods or services from a supplier referred to in paragraph (b) in order to circumvent the operation of paragraph (a).
	(d) The Minister must, in terms of section 78, make regulations:
	(i) designating the sectors, and in respect of firms owned or controlled by historically disadvantaged persons, the benchmarks for determining the firms, to which this subsection will apply; and
	(ii) setting out the relevant factors and benchmarks in those sectors for determining whether prices and other trading conditions contemplated in paragraph (a) are unfair.
		• Regulating buyer power as the simple flip-side of selling power is controversial, because in general, using power to negotiate pricing downwards operates to the benefit of consumers and lowers inflation. However, the policy considerations in favour of supporting the growth small or black-owned businesses is evidently paramount.
		• Faced with "mega firms" like Google, Facebook, Amazon and Apple, regulators around the world are becoming more preoccupied with questions of "fairness" on the part of such dominant firms. South Africa is one of the first to introduce specific rules and one can expect initial litigation to turn on the concept.
		• Current draft regulations suggest that terms might be unfair if they inhibit an efficient firm from sustainably operating and growing its business or are otherwise "unconscionable".
		• Compliance may depend on a dominant firm's ability to demonstrate a supplier development policy aimed at bolstering supply from small or black-owned firms in general. In other words, support for the "designated class" of vulnerable firms may be more important than fairness to an individual firm.
		• In terms of draft regulations, possible designated sectors may include:
		  • the food and grocery retail,
		  • apparel retail,
		  • online trading platforms,
		  • construction,
		  • finance and insurance, and
		  • private healthcare.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
PRICE DISCRIMINATION Section 9 • While in general, differential treatment of purchasers remains an infringement only if it "substantially prevents or lessens competition", a lower standard is applied if the differential pricing is to small, medium or HDP firms. Such pricing will be an infringement if it impedes such firms' ability to "participate effectively". • "participate" defined as "the ability of or opportunity for firms to sustain themselves in the market". • Where there is evidence of an inability to participate effectively, differential pricing cannot be defended on the basis of quantities supplied to different buyers. • Reverse onus to show that the differential pricing does not impede effective participation if there is a "prima facie" case. • A dominant firm cannot avoid selling to small, medium or HDP customers in order to avoid the operation of this provision. • Minister to publish regulations setting out factors and benchmarks for determining whether a dominant firm's action impedes the effective participation of small, medium or HDP firms.	9(1) An action by a dominant firm, as the seller of goods or services, is prohibited price discrimination, if: (a) it is likely to have the effect of (i) substantially preventing or lessening competition; or (ii) impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively; … 9(1A) It is prohibited for a dominant firm to avoid selling, or refuse to sell, goods or services to a purchaser that is a small and medium business or a firm controlled or owned by historically disadvantaged persons in order to circumvent the operation of subsection (1)(a)(ii) … 9(2) Despite subsection (1), but subject to subsection (3), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of that subsection (1) is not prohibited price discrimination if the dominant firm establishes that the differential treatment: (a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from (i) the differing places to which goods or services are supplied to different purchasers; (ii) methods by which goods or services are supplied to different purchasers; or (iii) quantities in which goods or services are supplied to different purchasers; … 9(3) If there is a prima facie case of a contravention of section (1)(a)(ii): (a) subsection (2)(a)(iii) is not applicable; and (b) the dominant firm must, subject to regulations issued under section 9(4), show that its action did not impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to participate effectively. 9(3A) If there is a prima facie case of a contravention of subsection (1A), the dominant firm alleged to be in contravention must show that it has not avoided selling, or refused to sell, goods or services to a purchaser referred to in subsection (1A) in order to circumvent the operation of subsection (1)(a)(ii). 9(4) The Minister must publish regulations in terms of section 78— (a) to give effect to this section, including the benchmarks for determining the application of this section to firms owned and controlled by historically disadvantaged persons; and (b) setting out the relevant factors and benchmarks for determining whether a dominant firm's action is price discrimination that impedes the participation of small and medium businesses and firms controlled or owned by historically disadvantaged persons. 1(1) 'participate' refers to the ability of or opportunity for firms to sustain themselves in the market, and "participation" has a corresponding meaning	• Most notable is that volume-based discounting should not be applied to the detriment of small, medium or HDP buyers. • Dominant firms will find it difficult to assess the impact of their pricing on customers without detailed information about the customer's own costs, margins and other measures of efficiency. • Compliance may depend on a dominant seller being able to demonstrate investment in a downstream value chain to develop smaller routes to market.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
EXEMPTIONS Section 10 • The Commission must make a decision on an exemption application within one year, unless agreed otherwise by the Commission and applicant. • Exemptions may now also be granted if they promote the effective entry into, participation in and expansion within a market by small, medium and HDP firms. • The Minister can, by regulation, grant an exemption to a category of agreements or practices.	10(2A) Unless the Competition Commission and the applicant agree otherwise, the Competition Commission must grant or refuse to grant the exemption referred to in subsection (2) within one year of the receipt of the application or within such period as may be prescribed in terms of section 78. 10(3) The Competition Commission may grant an exemption in terms of subsection (2) (a) only if: ... (b) the agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives: (i) maintenance or promotion of exports; (ii) promotion of the effective entry into, participation in and expansion within a market by ~~ability of~~ small and medium 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; (iv) the economic development, growth, transformation or stability of any industry designated by the Minister, after consulting the Minister responsible for that industry; or (v) competitiveness and efficiency gains that promote employment or industrial expansion. ... 10(10) The Minister may, after consultation with the Competition Commission, and in order to give effect to the purposes of this Act as set out in section 2, issue regulations in terms of section 78 exempting a category of agreements or practices from the application of this Chapter.	• The time period for determination of exemption applications is welcome as currently the Commission can take up to 18 months or longer to reach decision on exemptions.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
CONSIDERATION OF MERGERS Section 12A • Commission must consider the extent of common ownership and common directorships by Merging Parties with firms in related markets. • Commission must consider mergers concluded by the Merging Parties within a recent period (which will be stipulated by the Commission). • When considering the public interest, the Commission and Tribunal must consider the impact on small, medium and HDP firms and the promotion of a greater spread of ownership – including by workers.	12A(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and (a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine- (i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or ~~(b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).~~ 12A(1A) Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3). 12A(2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition 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 (i) the extent of ownership by a party to the merger in another firm or other firms in related markets; (j) the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and (k) any other mergers engaged in by a party to a merger for such period as may be stipulated by the Competition Commission. 12A(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on: ... (c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market ~~become competitive~~; ... (e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market. 1(1) 'workers' means employees as defined in the Labour Relations Act, 1995 (Act No. 66 of 1995), and in the context of ownership, refers to ownership of a broad-base of workers	• The amendments largely codify merger control policy already in effect but are likely to lead to more complicated merger filings to ensure sufficient information is provided. • It remains to be seen how the Commission will deal with so-called "creeping mergers" (i.e. a series of small transactions with a cumulative impact). • The specific inclusion of ownership by workers as a potential public interest factor is noteworthy.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
REVOCATION AND AMENDMENT OF MERGER APPROVALS OR CONDITIONS: Sections 15 and 16 • Where a decision was based on misinformation, deceit or where a merger condition is breached, the Commission and Tribunal, in addition to revoking merger approval, may now make an appropriate decision concerning conditions related to a merger, including issues on employment and small, medium or HDP firms.	Revocation of merger approval and enforcement of merger conditions 15(1) The Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger or in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) and (c) 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. 16(3) Upon application by the Competition Commission, the Competition Tribunal may revoke its own decision to approve or conditionally approve a merger or in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) and (c), and section 15, read with the changes required by the context, applies to a revocation or other decision in terms of this subsection.	• This closes a gap by expanding the Commission and Tribunal's power to not only revoke decisions, but also to amend conditions if the original decision was improperly obtained or in the event of a breach by merging parties of any obligation attaching to the merger.
MERGER APPEALS AND INTERVENTIONS Section 17 and 18 • The Commission and the Minister will now have an automatic right of appeal a Tribunal merger decision (although the Minister must have participated in the merger proceedings to be entitled to appeal). • Minister's power to intervene in merger proceedings on public interest grounds is extended to small mergers, not only intermediate and large mergers.	17(1) Within 20 business days after notice of a decision by the Competition Tribunal in terms of section 16, an appeal from that decision may be made to the Competition Appeal Court, subject to its rules, by (a) any party to a merger; ~~or~~ (b) the Competition Commission; (c) the Minister on matters raised in terms of section 12A(3), where the Minister participated in the Competition Commission's or Competition Tribunal's proceedings in terms of section 18 or on application for leave to appeal to the Competition Appeal Court ... 18(1) In order to make representations on any public interest ground referred to in section 12A (3), the Minister may participate as a party in any ~~intermediate or large~~ merger proceedings before the Competition Commission, Competition Tribunal or Competition Appeal Court, in the prescribed manner.	• Prior to amendment, only a party to the merger or affected employees/trade unions could appeal a merger decision. Mergers notifications typically require timeous decision making and introducing a right for the Commission or Minister to appeal Tribunal approvals could introduce additional layers of delay. • The Act has not been amended to provide for the award of costs in the event of an unsuccessful appeal by the Commission or Minister.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
NATIONAL SECURITY AND FOREIGN ACQUISITIONS Section 18A • The acquisition of a South African firm by a foreign acquiring firm will need to be notified to a Committee convened by the President if the merger relates to a list (including markets, industries, goods or services, sectors or regions) of national security interests to be published by the President. • The merger must be notified to the Committee and the Commission simultaneously. • The Committee must consider whether the merger "may have an adverse effect on the national security interests of the Republic". • If the merger is required to be notified to the Committee and this has not been done, the Commission or Tribunal cannot consider the merger notified to them. If the decision has been taken by the competition authority, that decision will be deemed to be revokes, unless the Committee determines otherwise. • Where the Committee decides to prohibit a transaction (and the Minister must publish that prohibition decision in the Gazette), the Commission and Tribunal are not allowed to take a decision on the merger.	18A(1) The President must constitute a Committee which must be responsible for considering in terms of this section whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic. ... 18A(4) In determining what constitutes national security interests for purposes of this Act, the President must take into account all relevant factors, including the potential impact of a merger transaction: (a) on the Republic's defence capabilities and interests; (b) (b) on the use or transfer of sensitive technology or know-how outside of the Republic; (c) on the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of citizens and the effective functioning of government; (d) on the supply of critical goods or services to citizens, or the supply of goods or services to government; (e) to enable foreign surveillance or espionage, or hinder current or future intelligence or law enforcement operations; (f) on the Republic's international interests, including foreign relationships; (g) to enable or facilitate the activities of illicit actors, such as terrorists, terrorist organisations or organised crime; and (h) on the economic and social stability of the Republic. ... 18A(6) A foreign acquiring firm which is required to notify the Competition Commission in terms of section 18A(1) of an intended merger must, at the time of the notification of the merger to the Competition Commission, file a notice with the Committee referred to in subsection (1) in the prescribed form and manner if the merger relates to the list of national security interests of the Republic as identified by the President in terms of subsection (3). 18A(7) Within 60 days of receipt by the Committee referred to in subsection (1) of a notice in terms of subsection (6), or such further period which the President may agree to, on good cause shown, the Committee must consider and decide on whether the merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic identified by the President in terms of subsection (3). ...	• This is not a clearly thought-out provision and appears to have been hastily included in the amendments to provide for governmental oversight of transactions with national security implications, without having to undertake the time and difficulty of promulgating separate legislation. • There is concern that the provision may create room for political interference in commercial transactions, or at least an overly broad set of considerations. • A "foreign acquiring entity" includes instances where a South African firm controlled by a foreign entity is the direct acquiring firm. • Although the provision contemplates simultaneous notification, the timelines for the exercise of a security veto are not aligned with the merger investigatory periods which will lead to procedural uncertainty.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
NATIONAL SECURITY AND FOREIGN ACQUISITIONS...*continued* • The Committee is entitled to revoke an approval its approval was based on incorrect information; the approval was obtained by deceit; or a firm concerned has breached an obligation attached to the approval. If this occurs, the Commission's or Tribunal's approval or conditional approval is deemed to be revoked. • The Tribunal is empowered to impose a penalty for a failure to notify the transaction to the Committee.	18A(13) (c) Unless the Committee determines otherwise, the Competition Commission's or Competition Tribunal's approval or conditional approval of a merger involving a foreign acquiring firm is deemed to be revoked if the foreign acquiring firm failed to notify the Committee in terms of subsection (6). ... 18A(14) The Competition Tribunal may impose an administrative penalty in accordance with the provisions of section 59(3) on the parties to a merger involving a foreign acquiring firm for any contravention contemplated in section 59(1)(d), read with the changes required by the context. Appeals 61(2A) Despite subsections (1)(a) and (2)(b), neither the Competition Tribunal nor the Competition Appeal Court has jurisdiction over matters regulated by section 18A, except section 18A(14). 1(1) 'foreign acquiring firm' means an acquiring firm: (a) which was incorporated, established or formed under the laws of a country other than the Republic; or (b) whose place of effective management is outside the Republic;	
DEPUTY COMMISSIONER Sections 19 and 23 • There now will be at least two Deputy Commissioners, one of whom will be appointed by the Minister for Market Inquiries.	19(2) The Competition Commission consists of the Commissioner and ~~one~~ two or more Deputy Commissioners, appointed by the Minister in terms of this Act. 23(2) The Minister must designate (b) one or more full-time or part-time Deputy Commissioners who are responsible for conducting market inquiries.	• This is in line with the intended expansion of market inquiry processes and powers.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS

ADDITIONAL COMMISSION POWERS:
 	
New subsections 21(1)(gA) – (gF) and new sections 21A, 49E, 79A and 83(3)
• The Commission is now officially empowered to:
  • grant or refuse leniency;
  • issue advisory opinions; and
  • conduct impact studies.
• In relation to impact studies, the Commission is empowered to study the impact of any decision, ruling or judgment, and can request information from any firm in order to compile its impact study report. The report must them be Gazetted and tabled in Parliament. A firm requested for information may object to the request at the Tribunal.
• The Commission is empowered to develop a new leniency policy, and until it does so, the current one stands.
• The Commission is entitled to issue non-binding advisory opinions, after the Minister has issued regulations.
	Functions of Competition Commission
	
	21(1) The Competition Commission is responsible to:
	
	(gA) initiate and conduct market inquiries in terms of Chapter 4A;
	(gB) conduct impact studies in terms of section 21A;
	(gC) grant or refuse applications for leniency in terms of section 49E;
	(gD) develop a policy regarding the granting of leniency to any firm contemplated in section 50;
	(gE) issue guidelines in terms of section 79; and
	(gF) issue advisory opinions in terms of section 79A;
	
	Impact Studies
	
	21A(1) The Competition Commission may study the impact of any decision, ruling or judgment of the Commission, the Competition Tribunal or the Competition Appeal Court.
	
	21A(2) The Commission may request information from any firm in order to compile its impact study report.
	...
	21A(6) A firm that receives a request for information in terms of subsection (2) may lodge an objection with the Competition Tribunal within business days of receiving the request.
	
	21A(7) The Competition Tribunal must determine the objection referred to in subsection (6) and may make any appropriate order after having considered all relevant information, including:
	(a) the nature and extent of the information requested;
	(b) the purpose and scope of the impact study;
	(c) the relevance of the information requested to the impact study.
	
	Leniency
	
	49E(1) The Competition Commission must develop, and publish in the Gazette, a policy on leniency, including the types of leniency that may be granted, criteria for granting leniency, the procedures to apply for leniency and the possible conditions that may be attached to a decision to grant leniency.
	
	49E(2) The Competition Commission may grant leniency, with or without conditions, in terms of its leniency policy.
	
	Advisory opinions of Commission
	
	79A The Minister may, after consultation with the Competition Commission, issue regulations to provide for non-binding advisory opinions to be issued by the Competition Commission, including the fees payable in respect of a non-binding opinion.
		• The Commission has largely been exercising these powers to date. The amendments now provide a statutory framework.
		• Of particular significance is the power to compel information to conduct impact studies.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
COMMISSION DELEGATION OF AUTHORITY New sections 22(3A) – (3D) • The Commissioner may create a policy on delegation of his authority in the Commission.	22(3A) The Commissioner, after consultation with the Minister, may determine a policy regarding the delegation of authority in the Competition Commission in order to facilitate administrative and operational efficiency. 22(3B) The delegation of authority referred to in subsection (3A) may: (a) provide for the delegation to a Deputy Commissioner or another staff member of the Commission of: (i) any of the Commissioner's powers, functions or duties conferred or imposed upon the Commissioner under this Act, except those referred to in sections 24 and 25(1)(b); and (ii) any of the Competition Commission's powers, functions or duties conferred or imposed upon the Commission under this Act, except those referred to in section 15; and (b) in appropriate circumstances, include the power to sub-delegate a delegated power. ...	• With the extensive new powers of the Commission, this provision allows the Commissioner to delegate certain decisions that he is empowered to take in terms of the Act in order to increase efficiency.
COMMISSION'S RIGHT OF APPEARANCE IN COURT Section 25 • The Commissioner may designate a staff member to appear on behalf of the Commission in any court.	25(2) Subject to the provisions of this Act, the Commissioner may designate a staff member of the Competition Commission who has suitable qualifications or experience, to appear on behalf of the Commission in any court of law.	• This is in line with the Commission's drive to increase the capacity of its in-house legal services division and to reduce its reliance on external service providers.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
CONSTITUTION OF THE TRIBUNAL Sections 26 and 31 • The number of permanent members appointed to the Competition Tribunal have been increased from 10 to 14. • The Minister is entitled to appoint acting members of the Tribunal, although no more than one person on a Tribunal panel can be an acting member. • Interlocutory decisions such as extending time periods, condoning late filing, granting access to confidential information and compelling discovery can be decided by one Tribunal member rather than a panel.	26(2)(a) The Competition Tribunal consists of a Chairperson and not less than three, but not more than ~~ten~~ 14, other women or men appointed by the President, on a full or part-time basis, on the recommendation of the Minister, from among persons nominated by the Minister either on the Minister's initiative or in response to a public call for nominations, and any other person appointed in an acting capacity in terms of paragraph (b). (b) The Minister, after consultation with the Chairperson of the Competition Tribunal, may appoint one or more persons who meet the requirements of section 28, as acting part-time members of the Competition Tribunal for such a period as the Minister may determine. (c) The Minister may re-appoint an acting member at the expiry of that member's term of office. (d) Sections 30 to 34 and 54 to 55, read with the changes required by the context, apply to acting members of the Competition Tribunal. 31(2) When assigning a matter in terms of subsection (1), the Chairperson must: (a) ensure that at least one member of the panel is a person who has legal training and experience; ~~and~~ (b) ensure that no more than one member of the panel is an acting member appointed in terms of section 26(2)(b); and (c) designate a member of the panel to preside over the panel's proceedings ... 31(5) ~~If the Competition Tribunal may extend or reduce a prescribed period in terms of this Act,~~ The Chairperson of the Competition Tribunal or another member of the Tribunal assigned by the Chairperson, sitting alone, may make an order of an interlocutory nature that, in the opinion of the Chairperson, does not warrant being heard by a panel comprised of three members, including: (a) extending or reducing ~~that period~~ a prescribed period in terms of this Act; (b) condoning late performance of an act that is subject to a prescribed period in terms of this Act; ~~that period.~~ (c) granting access to information contemplated in sections 44 to 45A and any conditions that must be attached to the access order; and (d) compelling discovery of documents.	• Provisions to add capacity to the Tribunal are welcome. • The Minister's ability to appoint acting members directly may raise concerns for the prospect of political interference in Tribunal decisions, but the proviso that there cannot be more than one acting member on a panel is a safeguard.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS

MARKET INQUIRIES
 	
Sections 43A to 43G and section 23
• As before, the Commission may conduct a market inquiry if it has reason to believe that any feature or combination of features of a market distorts or restricts competition within that market; or to achieve the purposes of the Act. In addition, now, the Minister may require the Commission to conduct a market inquiry.
• A market inquiry must be completed within 18 months, although the Commission can apply to the Minister for an extension.
• In making a decision on whether there are any market features which distort or restrict competition, the Commission must have regard to the impact of the adverse effect on competition on small, medium and HDP firms. The new section 43A(2) provides that a market feature which impedes, restricts or distorts competition establishes an "adverse effect on competition".
• A market "feature" includes, in terms of the new section 43A(3):
  • the structure of a market (such as concentration levels and barriers to entry, which include "the instruments in place to foster transformation in the market and past or current advantage that is not due to the respondent's own commercial efforts or investment, such as direct or indirect state support for a firm or firms in the market");
	Interpretation and application of this Chapter
	
	43A(1) In this Chapter, 'market inquiry' means a formal inquiry in respect of the general state of competition, the levels of concentration in and structure of a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm.
	
	43A(2) An adverse effect on competition is established if any feature, or combination of features, of a market for goods or services impedes, restricts or distorts competition in that market.
	
	43A(3) Any reference to a feature of a market for goods or services includes:
	(a) the structure of that market or any aspect of that structure, including:
	(i) the level and trends of concentration and ownership in the market;
	(ii) the barriers to entry in the market, the regulation of the market, including the instruments in place to foster transformation in the market and past or current advantage that is not due to the respondent's own commercial efforts or investment, such as direct or indirect state support for a firm or firms in the market;
	(b) the outcomes observed in the market, including:
	(i) levels of concentration and ownership;
	(ii) prices, customer choice, the quality of goods or services and innovation;
	(iii) employment;
	(vi) entry into and exit from the market;
	(v) the ability of national industries to compete in international markets;
	(c) conduct, whether in or outside the market which is the subject of the inquiry, by a firm or firms that supply or acquire goods or services in the market concerned;
	(d) conscious parallel or co-ordinated conduct by two or more firms in a concentrated market without the firms having an agreement between or among themselves; or
	(e) conduct relating to the market which is the subject of the inquiry of any customers of firms who supply or acquire goods or services.
	
	Initiating and conducting market inquiries
	
	43B (1)(a) The Competition Commission, acting within its functions set out in section 21 (1), ~~and on its own initiative or in response to a request from the Minister,~~ may conduct a market inquiry at any time, subject to subsections (2) to (6):
	(i) if it has reason to believe that any feature or combination of features of a market for any goods or services ~~prevents~~ impedes, distorts or restricts competition within that market; or
	(ii) to achieve the purposes of this Act.
	(b) The Minister may, after consultation with the Competition Commission and after consideration of the factors in paragraph (a) (i) and (ii), require the Competition Commission to conduct a market inquiry contemplated in paragraph (a) during a specified period.
		• Subject to resource constraints, market inquiries appear set to become a significant regulatory tool. However, there are a great number of procedural requirements that could lead to numerous challenges throughout the process and attendant delay.
		• The following is worth noting:
		  • the Commission's mandate includes looking not only to market distortions but also barriers to transformation and the effect on small, medium or HDP firms.
		  • "Conscious parallel or coordinated conduct" in concentrated markets is specifically mentioned as a feature to be considered.
		  • the Minister can require the initiation of a market inquiry;
		  • the Commission is empowered to "take action" to remedy, mitigate or prevent an adverse effect on competition. However, it is not clear to what extent any remedial action is limited to recommendations as opposed to binding.
		• The panel of a market inquiry must be chaired by a Deputy Commissioner, whereas previous chairs have been independent. This will assist in reducing some of the costs of inquiries, but may blur the lines between inquiry and prosecution.
		• Although section 43D(1) empowers the Commission to "take action" to remedy, mitigate or prevent the adverse effect on competition, and might be read as being able to take a binding decision on the outcome, it is not clear what that action could be. Other provisions refer only to recommendations on policy, law or conduct of another regulatory authority, which suggests more of an advocacy role. Provisions also allow for the initiating of complaints or referrals, and the recommendation of a divestiture order, but these are not binding decisions and are subject to Tribunal oversight and due process.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
MARKET INQUIRIES...*continued* • the outcomes observed in the market including, amongst others, levels of concentration and ownership; employment; conscious parallel or co-ordinated conduct by two or more firms in a concentrated market without the firms having an agreement between or among themselves. • A Deputy Commissioner must chair a market inquiry and additional "suitably qualified" persons can be appointed to the panel. • A process for dealing with confidentiality claims in market inquiries is set out in new section 43B(3A), in terms of which the Commission may accept or reject confidentiality claims. Its decision can be appealed to the Tribunal. • If the Commission decides that there is an adverse effect on competition, it must "take action" to remedy, mitigate or prevent the adverse effect on competition, which can include a recommendation to the Tribunal to order a divestiture in terms of section 60(2)(c). Any decision it takes to remedy, mitigate or prevent the adverse effect, must be "reasonable and practicable" and take into issues of proportionality. • The Commission is required, before the completion of the market inquiry, to take appropriate steps to communicate findings, decisions and remedial action to any materially affected party and call for their comments.	43B(2) The Competition Commission must, at least 20 business days before the commencement of a market inquiry, publish a notice in the Gazette announcing the establishment of the market inquiry, setting out the terms of reference for the market inquiry and inviting members of the public to provide written representations to the market inquiry. 43B(2A) Before publishing the notice referred to in subsection (2), the Competition Commission must notify and consult with the relevant regulatory authority if the intended market inquiry will investigate a sector over which the regulatory authority has jurisdiction in terms of any public regulation. 43B(2B) The Competition Commission must appoint a Deputy Commissioner referred to in section 23(2)(b) to chair a market inquiry and may appoint one or more additional suitably qualified persons to the panel that conducts the market inquiry. ... ~~43C Outcome of market inquiry Upon completing a market inquiry, the Competition Commission must publish a report of the inquiry in the Gazette, and must submit the report to the Minister with or without recommendations, which may include, but not limited to recommendations for new or amended policy, legislation or regulations; and recommendations to other regulatory authorities in respect of competition matters.~~ **Matters to be decided at market inquiry** 43C(1) In a market inquiry, the Competition Commission must decide: (a) whether any feature, including structure and levels of concentration, of each relevant market for any goods or services impedes, restricts or distorts competition within that market; and (b) on the procedures to be followed at the market inquiry. 43C(2) In making its decision in terms of subsection (1)(a), the Competition Commission must have regard to the impact of the adverse effect on competition on small and medium businesses, or firms controlled or owned by historically disadvantaged persons. 43C(3) If the Competition Commission decides that there is an adverse effect on competition, it must determine: (a) the action that must be taken in terms of section 43D; (b) whether it must make recommendations to any Minister, regulatory authority or affected firm to take action to remedy, mitigate or prevent the adverse effect on competition; (c) if any action must be taken in terms of paragraph (b), the action that must be taken in respect of what must be remedied, mitigated or prevented. 43C(4) In determining the matters in subsection (3), the Competition Commission must have regard to the need to achieve as comprehensive a solution as is reasonable and practical. **Duty to remedy adverse effects on competition** 43D(1) Subject to the provisions of any law, the Competition Commission may, in relation to each adverse effect on competition, take action to remedy, mitigate or prevent the adverse effect on competition. 43D(2) The action taken in terms of subsection (1) may include a recommendation by the Competition Commission to the Competition Tribunal in terms of section 60(2)(c), and the Competition Tribunal may make an appropriate order in relation thereto. ...	

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS

MARKET INQUIRIES...*continued*
• The Commission must publish a report in the Gazette upon completion of the market inquiry which "may" include recommendations for new or amended policy, legislation or regulation and recommendations to other regulatory authorities.
• On the basis of information acquired in the market inquiry, the Commission can:
  • initiate a complaint and enter into a consent order with or without further investigation;
  • initiate a complaint for further investigation;
  • initiate and refer a complaint without further investigation;
  • take any other action within its powers and as set out in its recommendations in the report; or
  • take no further action.
• The Minister or any person who is materially and adversely affected by the determination of the Commission may appeal that determination to the Tribunal. The Tribunal can confirm the determination; amend or set aside the determination (and may remit it to the Commission) or make any determination or order that is appropriate.
• A remittal must be completed within six months, which can be extended for a further six months.
	Outcome of market inquiry
	
	43E(1) Upon completing a market inquiry, the Competition Commission must publish a report of the inquiry in the Gazette, and must submit the report to the Minister with recommendations, which may include, but are not limited to:
	(a) recommendations for new or amended policy, legislation or regulations; and
	(b) recommendations to other regulatory authorities in respect of competition matters.
	...
	43E(3) On the basis of information obtained during a market inquiry, the Competition Commission may:
	(a) initiate a complaint and enter into a consent order with any respondent, in accordance with section 49D, with or without conducting any further investigation;
	(b) initiate a complaint against any firm for further investigation, in accordance with Part C of Chapter 5;
	(c) initiate and refer a complaint directly to the Competition Tribunal without further investigation;
	(d) take any other action within its powers in terms of this Act recommended in the report of the market inquiry; or
	(e) take no further action.
	
	43E(4) Before the completion of the market inquiry, the Competition Commission must take appropriate steps to communicate, and where necessary on a confidential basis, to any person who is materially affected by any provisional finding, decision, remedial action or recommendation of the market inquiry in terms of this section and call for comments from them.
	
	Appeals against decisions made under this Chapter
	
	43F(1) The Minister, or any person referred to in section 43G(1) who is materially and adversely affected by the determination of the Competition Commission in terms of section 43D, may, within the prescribed period, appeal against that determination to the Competition Tribunal in accordance with the Rules of the Competition Tribunal.
	43F(2) In determining an appeal in terms of subsection (1), the Competition Tribunal may:
	(a) confirm the determination of the Competition Commission;
	(b) amend or set aside the determination, in whole or in part; or
	(c) make any determination or order that is appropriate in the circumstances.
	
	43F(3) If the Competition Tribunal sets aside the decision of the Competition Commission, in whole or in part, it may remit the matter, or part of the matter, to the Competition Commission for further inquiry in terms of this Chapter.
	
	43F(4) Any remittal to the Competition Commission in terms of subsection (3) must be completed within six months from the date of the order of the Competition Tribunal.
	
	43F(5) The Competition Tribunal may, on good cause shown, extend the period referred to in subsection (4) for one further period of six months.
	
	43F(6) Any person referred to in subsection (1) who is aggrieved by a determination or order of the Competition Tribunal in terms of subsection (2) may appeal against that determination or order to the Competition Appeal Court.	

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
MARKET INQUIRIES...*continued* • Section 43G provides for participation by and representations to market inquiry from: firms, including small and medium businesses; trade unions; officials and staff of the Commission or witnesses, who in the opinion of the Commission, would substantially assist with the work of the inquiry; regulatory authorities; the Minister; any Minister responsible for the sector; and any other person who has a material interest and whose interest is not adequately represented by another participant or who would assist with the work of the inquiry. The Commission must take reasonable steps to promote the participation of small and medium businesses.	Participation in and representations to market inquiry 43G(1) In accordance with the procedures adopted by the inquiry, the following persons may participate in a market inquiry: (a) firms, including small and medium businesses, in the market that is the subject of the inquiry; (b) any registered trade union that represents a substantial number of employees or the employees or representatives of the employees if there are no registered trade unions at the firms referred to in paragraph (a); (c) officials and staff of the Competition Commission or witnesses, who in the opinion of the Commission, would substantially assist with the work of the inquiry; (d) a regulatory authority referred to in section 82(1); (e) the Minister; (f) at the request of the Minister, any Minister responsible for the sector that includes, or is materially affected by, the market that is the subject of the inquiry; and (g) any other person: (i) who has a material interest in the market inquiry; (i) whose interest is, in the opinion of the Competition Commission, not adequately represented by another participant; and (i) who would, in the opinion of the Competition Commission, substantially assist with the work of the inquiry. 43G(2) The Competition Commission must take reasonable steps to promote the participation of small and medium businesses, who have a material interest in the inquiry and are, in the opinion of the Competition Commission, not adequately represented. 43G(3) Subject to the procedures and time periods adopted for the inquiry, any person may make representations to the market inquiry on any issue related to the terms of reference published in terms of section 43B (2). 43G(4) Subject to the procedures and time periods adopted for the inquiry, participants referred to in subsection (1) may be required to respond to surveys and questionnaires, requests for information and submissions issued by the Commission.	

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
CONFIDENTIALITY Sections 44 and 45 • The Commission is now empowered to determine if information is confidential, after it has advised the party who submitted the confidentiality claim and provided opportunity for that party to submit representations. • A person aggrieved by the Commission's determination can refer the issue to the Tribunal. A person aggrieved by that decision can refer the matter to the Competition Appeal Court. • If information is determined to be confidential, an order regarding access can be made, and an appropriate determination concerning access includes making the information available to legal representatives and economic advisors subject to confidentiality undertakings. • Any Minister and regulatory authority is granted access to a firm's confidential information, but the information can only be used for the purposes of this Act (unless required to be disclosed in terms of any other law or the Minister has reasonable grounds to believe the information discloses a potential criminal offence).	44(2) From the time information comes into the possession of the Competition Commission, Competition Tribunal or Minister until a final determination has been made concerning that information, the Commission, Tribunal and Minister must treat as confidential, any information that is the subject of a claim in terms of this section. ~~The Competition Commission is bound by a claim contemplated in subsection (1), but may at any time during its proceedings refer the claim to the Competition Tribunal to determine whether or not the information is confidential information.~~ 44(3) In respect of information submitted to the Competition Commission, the Competition Commission may ~~The Competition Tribunal may determine whether or not the information is confidential.; and~~: (a) determine whether the information is confidential information; and (b) if it finds that the information is confidential, make any appropriate determination concerning access to that information. 44 (4) The Competition Commission may not make a determination in terms of subsection (3) before it has given the claimant the prescribed notice of its intention to make the determination and has considered the claimant's representations, if any. 44(5) A person contemplated in subsection (1) who is aggrieved by the determination of the Competition Commission in terms of subsection (3) may, within the prescribed period of the Commission's decision, refer the decision to the Competition Tribunal. 44(6) The Competition Tribunal may confirm or substitute the Competition Commission's determination or substitute it with another appropriate ruling. 44(7) In respect of confidential information submitted to the Competition Tribunal, the Tribunal may: (a) determine whether the information is confidential information; and (b) if it finds that the information is confidential, make any appropriate determination concerning access to that information. 44(8) A person aggrieved by the ruling of the Competition Tribunal in terms of subsection (6) or (7) may, within the prescribed period and in accordance with the Competition Appeal Court's rules: (a) refer the Tribunal's ruling to the Competition Appeal Court, if the Tribunal grants leave to appeal; and (b) petition the President of the Competition Appeal Court for leave to refer the Tribunal's ruling to the Competition Appeal Court, if the Tribunal refuses leave to appeal. 44(9) Unless the Competition Commission, Competition Tribunal or Competition Appeal Court holds' otherwise, an appropriate determination concerning access to confidential information includes the disclosure of the information to the legal representatives and economic advisors of the person seeking access: (a) in a manner determined by the circumstances; and (b) subject to the provision of appropriate confidentiality undertakings.	• The amendments arguably water down the existing confidentiality regime, in terms of which claims of confidentiality stood unless challenged before the Tribunal even if the information did not meet the definition of confidential information in the Act. Now, the onus is on disclosing firms to object if the Commission determines that information should not be treated as confidential. However, information cannot be disclosed pending an objection. • The Minister has already had a right to access merger filings filed with the Commission, and this now makes it clear that the Minister is entitled to receive the confidential information relating to mergers, and also all other matters. • Note that the Act envisages disclosure of confidential information to other regulatory authorities if required to be disclosed in terms of another law or the information discloses a potential criminal offence. This arguably runs contrary to a right against self-incrimination.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
CONFIDENTIALITY*...continued*	Disclosure of information ... 45(3) Subject to section 44(2) and for the purposes of their participation in proceedings contemplated in this Act, including merger proceedings: (i) the Minister may have access to a firm's confidential information, which information may only be used for the purposes of this Act unless required to be disclosed in terms of any other law or the Minister has reasonable grounds to believe the information discloses a potential criminal offence; and (ii) any other relevant Minister and any relevant regulatory authority may have access to a firm's confidential information unless the Tribunal determines otherwise, which information may only be used for the purposes of this Act unless required to be disclosed in terms of any other law or the Minister has reasonable grounds to believe the information discloses a potential criminal offence.	
CONSENT ORDERS Section 49D • A firm that falls within the scope of a market inquiry can now enter into a consent order with the Commission.	S 49D (1) If, during, on or after the completion of the investigation of a complaint or a market inquiry, the Competition Commission and the respondent, or any person that is the subject of action by the Competition Commission in terms of section 43E, 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 58 (1) (b).	• It is difficult to tell when it would be appropriate to enter a consent order in the context of a market inquiry. If it relates to alleged prohibited practice, then a consent order would only flow from a complaint initiated by the Commission. If it results from the "action" that can be taken by the Commission pursuant to a market inquiry, it is not clear what the parameters of the consent order would be in terms of admission of liability or administrative penalties.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
PENALTIES Section 59 • All prohibited practices are subject to a penalty, even for a first-time offence (thereby removing the "yellow card" for certain offences requiring a rule of reason analysis). • The maximum penalty is increased to 25% of turnover for repeat offenders. • An additional aggravating factor is the impact on small, medium or HDP firms and whether it constitutes a repeat contravention. • A penalty can include the turnover of controllers of the respondent where the controlling firms had, or should have had, knowledge of the prohibited conduct. • Controlling firms can be ordered to be joint and severally liable with the respondent for payment of the fine.	Administrative penalties 59(1) The Competition Tribunal may impose an administrative penalty only- ~~(a)~~ for a prohibited practice in terms of section 4(1), 5(1) and (2), 8(1), 8(4), 9(1) or 9(1A) ~~4(1)(b), 5(2) or 8(a), (b) or (d);~~ ~~(b) for a prohibited practice in terms of section 4(1)(a), 5(1), 8(c) or 9(1), if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice;~~ 59(2) An administrative penalty imposed in terms of subsection (1) may not exceed 10 per cent of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year. 59(2A) An administrative penalty imposed in terms of subsection (1) may not exceed 25 per cent of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice. 59(3) When determining an appropriate penalty, the Competition Tribunal must consider the following factors: … (d) the market circumstances in which the contravention took place including whether, and to what extent, the contravention had an impact upon small and medium businesses and firms owned or controlled by historically disadvantaged persons; … (h) whether the conduct has previously been found to be a contravention of this Act or is substantially the same as conduct regarding which Guidelines have been issued by the Competition Commission in terms of section 79. 59(3A) In determining the extent of the administrative penalty to be imposed, the Competition Tribunal may: (a) increase the administrative penalty referred to in subsections (2) and (2A) to include the turnover of any firm or firms that control the respondent, where the controlling firm or firms knew or should reasonably have known that the respondent was engaging in the prohibited conduct; and (b) on notice to the controlling firm or firms, order that the controlling firm or firms be jointly and severally liable for the payment of the administrative penalty imposed.	• The removal of the "yellow card" increases risk of non-compliance and could chill conduct by dominant firms. However, first time offences are in line with many jurisdictions. • New provisions not only increase the potential maximum fine, but also introduces the idea of parental liability based on knowledge or constructive knowledge – even if the holding company did not direct the action of the subsidiary. This is not in line with the notion of separate corporate identity.

SECTION/DESCRIPTION	EXTRACTS OF PROVISION	COMMENTS
PRESCRIPTION Section 67 • A referral may not be made if the complaint was initiated more than three years after the prohibited practice ceased.	S67 (1) A complaint in respect of a prohibited practice that ceased more than three years before the complaint was initiated may not be ~~initiated more than three years after the practice has ceased~~ referred to the Competition Tribunal.	• This is a subtle but logical change, since the Commission would be unable to determine if conduct ceased without investigating the conduct. • The amendments now make it clear that the Commission may investigate the matter, but may not refer it to the Tribunal if the matter has prescribed.
REGULATIONS Section 78 • Before making regulations, the Minister is required to consult with the Commission and interested parties.	78(1) The Minister, by notice in the Gazette, may make regulations that are required to give effect to the purposes of this Act. 78(2) Before making the regulations referred to in sections 4, 5, 8 and 9, the Minister must consult with the Competition Commission and publish a notice in the Gazette; (a) stating that draft regulations have been prepared; (b) specifying the place, which may include a website, where a copy of the draft regulations may be obtained; and (c) inviting interested parties to submit written comments on the draft regulations within a reasonable period; and (d) consider any comments submitted within the period contemplated in paragraph (c).	• The Minister is given extensive opportunity to direct the enforcement of provisions through issuing regulations on a range of issues including: the "application" of s4 (restrictive horizontal practices) and s5 (restrictive vertical practices); concerning the "calculation and determination" of an excessive price; designating sectors to which the buyer power provisions apply and dealing with the "relevant factors and benchmarks" to be applied in determining if prices or conditions are unfair; and setting out factors and benchmarks for determining whether a dominant firm's pricing impedes the participation of small, medium or HDP firms. • This significantly expands the scope of the Minister's influence, and it is questionable whether a Minister is constitutionally entitled to issue regulations which involve interpreting or creating substantive law. • The fact that the Minister is required to consult beforehand at least imposes some restriction on that power.
COMMISSION GUIDELINES Section 79 • The Commission may issue (and amend) guidelines. • It must publish draft guidelines for comment before publishing final guidelines in the Gazette.	79(1) The Competition Commission may prepare, amend, replace and issue guidelines to indicate the Commission's policy approach to any matter within its jurisdiction in terms of this Act. 79(2) A guideline referred to ~~in prepared~~ in terms of subsection (1) must be published in the Gazette ~~but~~; 79(3) Before the Competition Commission issues a guideline referred to in subsection (1), the Competition Commission must: (a) publish a notice in the Gazette: (i) stating that a draft guideline has been prepared; (ii) stating the place, which may include the Competition Commission's website, where a copy of the draft guideline may be obtained; and (iii) inviting interested parties to submit written representations on the draft guideline within a reasonable period; and (b) consider any representations which were submitted within the period specified in the notice. 79(4) A guideline referred to in subsection (1) is not binding, but any person interpreting or applying this Act must take it into account. ~~is not binding on the Competition Commission, the Competition Tribunal or the Competition Appeal Court in the exercise of their respective discretion, or their interpretation of this Act.~~	• The amendment retains the non-binding nature of guidelines but would appear to nevertheless affect the discretion of the decision-maker to the extent that guidelines "must be taken into account". Guidelines will thus do more than indicate the Commission's approach to enforcement but may affect adjudication.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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