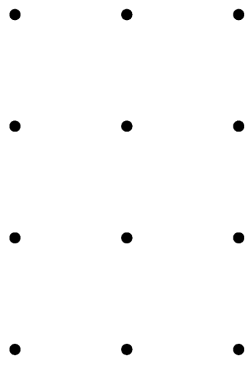




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Key Developments in Competition Law in South Africa

March 2022

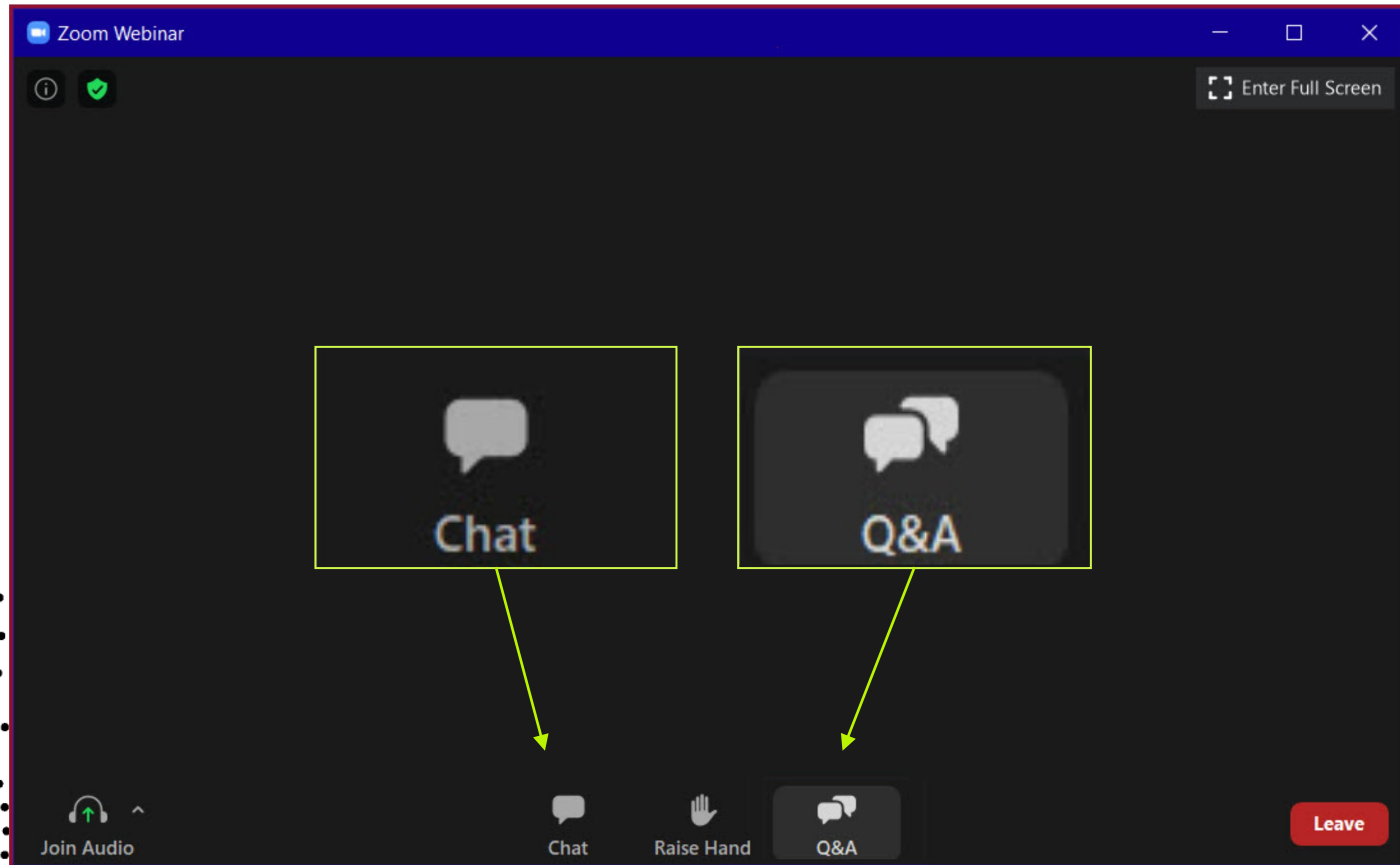
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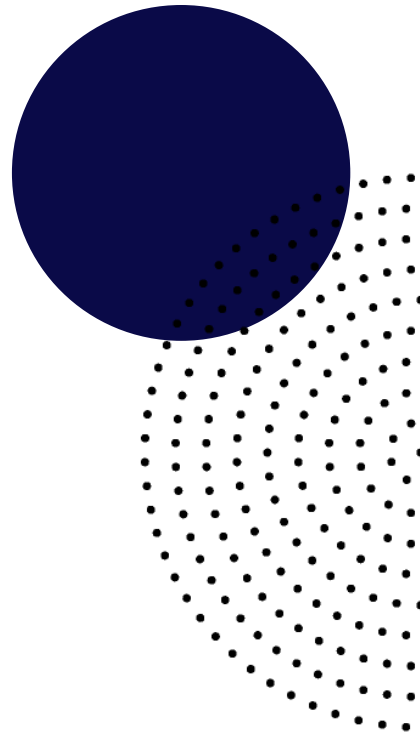
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ABOUT THE PRESENTER

Michael-James Currie

Primerio International

Michael-James Currie is a Director of Primerio and co-founder of the Primerio South African practice. His regulatory and commercial law practice is pan-African and he has practiced across several countries and regional blocs including Botswana, Egypt, Kenya, Mauritius, Namibia, Nigeria, South Africa, Eswatini, Tanzania, COMESA and CEMAC, for the better part of a decade. Mike has consistently been recognised as a “Best Lawyer in South Africa” and also serves as the “Global Law Expert for Competition Law in Nigeria.” In addition to his practice areas, Mike is a regular speaker and author who has published several joint articles, papers and opinion pieces. As an active member of the American Bar Association and the International Bar Association, Mike’s practice also includes a substantial amount of regulatory work – particularly in promoting competition law and best practice across Africa.

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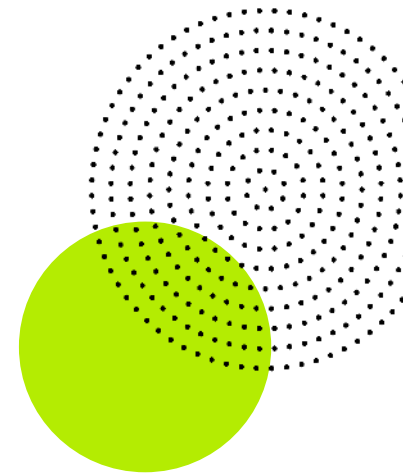


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CPD INDEX

1. Competition Law: A New Landscape
2. Importance of Compliance
 - Risks of non-compliance
 - Key risk areas
3. Essentials for the Executive
 - Merger control
 - Market inquiries
 - Digital markets
4. Abuse of Dominance Provisions
5. Investigative Tools: Dawn Raids
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1. Competition Law: A New Landscape



1. Competition Law: A New Landscape

The Importance of Compliance



Competition Law: A new landscape

Key risk areas:

- Horizontal Restrictive Practices: s4(1)(a)
- Cartel Conduct: s4(1)(b)
- Price Fixing
- Market Division

Risks of non-compliance

- Penalties and recidivism
- Reputational and civil
- Criminal
- Investigations

1. Competition Law: Snapshot of How we Got Here

Background and Intro



Policy Objectives

To bring the provisions of the competition act in line with its pre-amble to:

- address high levels of economic concentration where such market structure impacts negatively on economic inclusion;
- Facilitate transformation and to address factors which impede the ability of SMEs to participate in markets



Fighting Dominance

The Competition Commission has found it difficult to prosecute cases of Excessive Pricing (and abuse of dominance in General)

As a result of these losses, Patel vowed to change to Act to ease the evidentiary burden



Minister Ebrahim Patel

(Competition Commission Annul Report):

- “focus was on revamping and strengthening the Competition Act so as to place greater focus on economic transformation and inclusivity. The main objective of these amendments is to open up the economy to small and medium enterprises and to Black South Africans.”



Role of SACC in Africa

African Competition Forum (AFC)

- Chaired by SACC
- South African initiatives and policies filter through to rest of Africa.

The new Competition Bill is set to shake up South African business in a big way

Boost Competition Act to address concentration, stimulate transformation – Ramaphosa

Competition Amendment Act changes begin

NETWORK / 22 JULY 2019, 5:30PM / NETWORK REPORTER



Ebrahim Patel says bill will help smaller firms by taking on predatory pricing

Opinion

The war on excessive prices

Can the CompCom ever win?

1. Competition Law: News this week

Competition Commission warns airlines against inflating prices

Wednesday 16 March 2022 - 9:04am



🕒 17 Mar

Competition Commission threatens to implement measures to break up big firms

fin24 Khulekani Magubane

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South Africa: Competition Watchdog Wants WhatsApp, Facebook's Meta To Pay Up for 'Abuse'



1. Competition Law: Amendment Act

Overview of Amendments

Market Inquiries

- Lower Threshold
- Market Investigation
- Structural Remedies

Merger Control

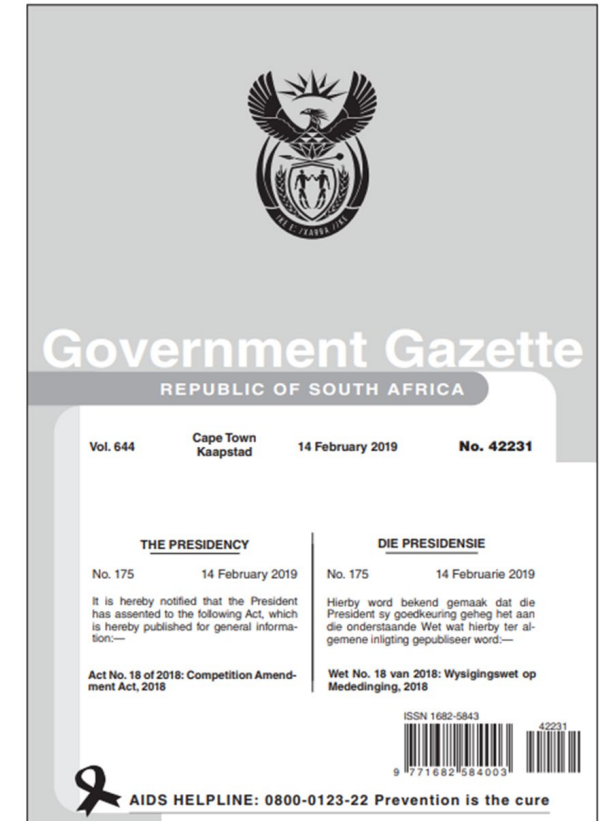
- Elevated Status of Public Interest
- National Security

Enforcement

- Abuse of Dominance
- Excessive Pricing
- Margin Squeeze
- Price Discrimination
- Buying Power
- Other

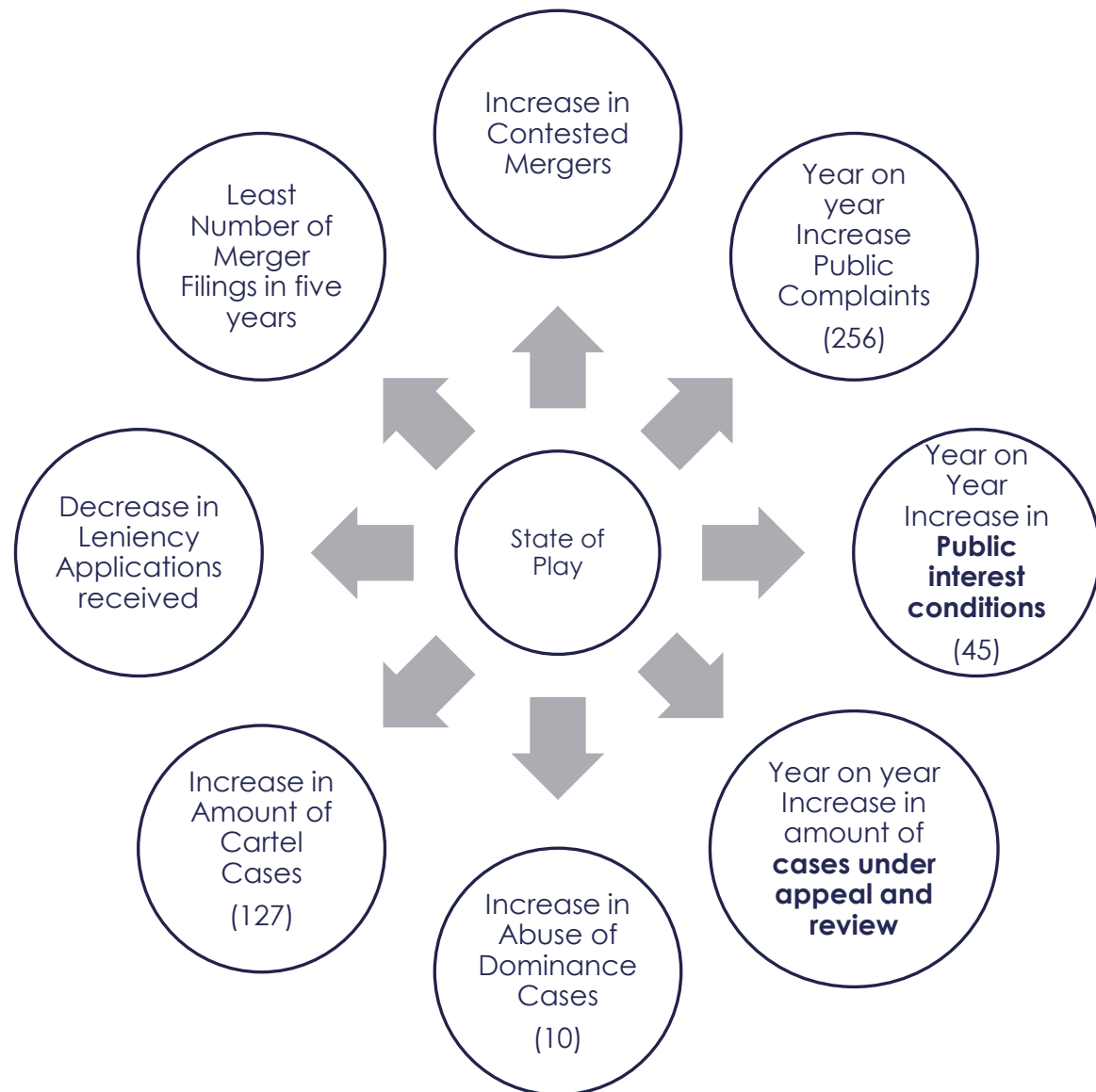
Ministerial Intervention

- Appointment of Tribunal Members
- Right of Appeal in Merger Control
- Right of Appeal in Market Inquiries
- Access to Information



1. Competition Law: A New Landscape (continued)

Key enforcement initiatives in 2020/21

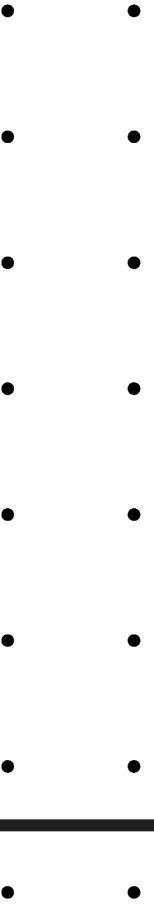


2. Importance of Compliance



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2. Importance of Compliance

Administrative Penalties and Prosecution



First-Time Offenders

The amendments provide for the imposition of administrative penalties for all contraventions of the Act, even offences in respect of non-specific contraventions-

- for example, in terms of the proposed amendments, an administrative penalty may be imposed for all prohibited practice offences.
- Previously, only cartel conduct, resale price maintenance and certain abuse of dominance conduct resulted in an administrative penalty for a first time offence.



Repeat Offenders

The amendment also proposes to increase the maximum administrative penalty to 25% of a firm's annual turnover, if a firm's anti-competitive conduct is substantially a repeat by the same firm of conduct previously found to be a prohibited practice.



Parental Liability

In addition, the administrative penalty may be increased by the turnover of any firm that controls the firm that is found to have engaged in a prohibited practice and to make the controlling firm jointly and severally liable for the penalty.



Criminal Prosecution

In terms of the prior amendments to the Competition Act (1 May 2016) Directors and "persons with management" authority can be held criminally liable if they are found to have "knowingly acquiesced" in cartel conduct.



Civil and Class Action Litigation

Civil Damages litigation by individual or class of customers or consumers

- Bread Cartel class Action
- SAA civil damages Comair and Nationwide



Table 12: Total administrative penalties levied over the last ten years

YEAR	ADMINISTRATIVE PENALTY
2018/19	R333 million
2017/18	R354 billion
2016/17	R1.628 billion
2015/16	R338 million
2014/15	R191 million
2013/14	R1.7 billion
2012/13	R225 million
2011/12	R584 million
2010/11	R794 million
2009/10	R487 million
2008/09	R331 million

2. Importance of Compliance (continued)

Criminalisation of Cartel Conduct



2. Importance of Compliance (continued)

Criminalisation of Cartel Conduct (continued)

- On 1 May 2016 section 73A of the Competition Act came into operation.
- Section 73A introduces **criminal liability** for **directors** or those **individuals holding management authority** in respect of companies which engage in **cartel conduct**.
- **If such person:**
 - **Caused the firm to engage in a prohibited practice** in terms of section 4(1)(b); **or**
 - **Knowingly acquiesced in the firm engaging in a prohibited practice** in terms of section 4(1)(b).
- “*Knowingly acquiesced*” means having acquiesced while having actual knowledge of the relevant conduct by the firm.
- There is currently no definition in the Act of what would constitute “*management authority*.”

2. Importance of Compliance (continued)

Criminalisation of Cartel Conduct (continued)

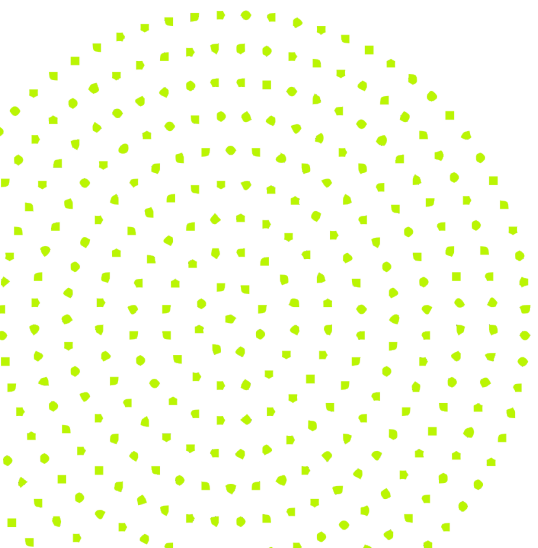
Section 73A also provides the following:

- 3) Subject to subsection (4), a person may be prosecuted for an offence in terms of this section only if—
 - a) the relevant *firm* has acknowledged, in a consent order contemplated in section 49D, that it engaged in a *prohibited practice* in terms of section 4(1)(b); **or**
 - b) the Competition Tribunal or Competition Appeal Court has made a finding that the relevant *firm* engaged in a *prohibited practice* in terms of section 4(1)(b).
- 4) The Competition Commission –
 - a) may not seek or request the prosecution of a person for an offence in terms of this section if the Competition Commission has certified that the person is deserving of leniency in the circumstances; and
 - b) may make submissions to the National Prosecuting Authority in support of leniency for a person prosecuted for an offence in terms of this section, if the Competition Commission has certified that the person is deserving of leniency in the circumstances.

2. Importance of Compliance (continued)

Criminalisation of Cartel Conduct (continued)

- A person convicted of an offence in terms of section 73A is liable to pay a fine not exceeding **R500 000** or **imprisonment for a period not exceeding 10 years**, or to pay **both** a fine or such imprisonment



2. Importance of Compliance (continued)

The National Prosecuting Authority

- The introduction of criminal liability adds a new dimension to competition law enforcement, namely the jurisdiction of the **National Prosecution Authority (“NPA”)** and criminal courts in the enforcement of criminal sanctions against individuals.
- Section 179(2) of the Constitution provides for the establishment of a single National Prosecuting Authority, with sole authority to institute criminal proceedings on behalf of the State.
- The exact process which has to be followed when intertwining the two administrative bodies, namely the NPA and Competition Commission, has yet to be established.
- This is of a particular concern when dealing with the Competition Commission’s Corporate Leniency Policy (“**CLP**”).

2. Importance of Compliance (continued)

Criminalisation and the CLP in South Africa

- The Corporate Leniency Policy (“**CLP**”) outlines a process through which the South African Commission will grant a self-confessing cartel member, who is first to approach the South African Commission, immunity for its participation in cartel activity upon the cartel member fulfilling specific requirements and conditions set out under the CLP.
- The CLP is a compliance mechanism devised to “*encourage cartel participants to disclose to the Commission cartel activity, to discourage or prevent the formation of cartels and to eradicate this harmful conduct.*”
- The CLP applies to a firm, which includes a person, partnership or trust. A person, in this instance, refers to both a natural and juristic person.
- The CLP, however, expressly provides that “*the immunity granted pursuant to the CLP does not protect the applicant from criminal or civil liability resulting from its participation in a cartel infringing the Act.*”

2. Importance of Compliance (continued)

Criminalisation and the CLP in South Africa (continued)

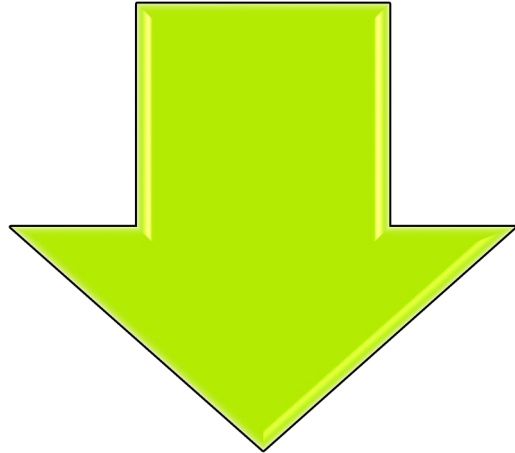
- The criminalisation of cartel conduct may therefore affect the efficiency of the CLP.
- Corporates may be more hesitant to make use of the CLP as although section 73A(4)(b) permits the Competition Commission to make submissions to the NPA supporting leniency for someone prosecuted in terms of the section, the extent to which the NPA will ultimately accept any submissions or recommendations from the South African Commission is not clear.
- Due to the fact that no clarity has, to date, been provided on the interplay between the NPA and the South African Commission, corporates who are considering making use of the CLP have to consider the risk that their directors or managers involved in the cartel conduct may face prosecution by the NPA.

3. Background to Key Provisions of the Act

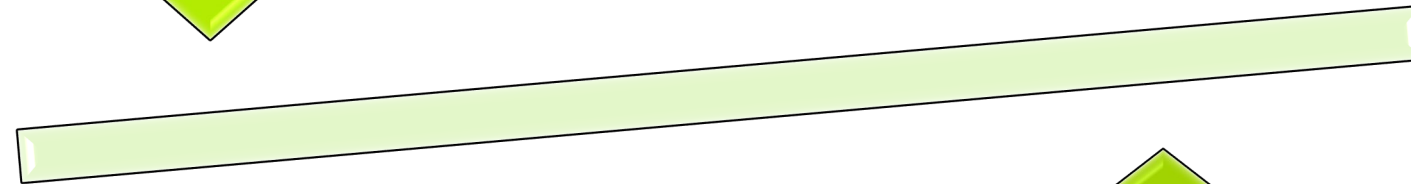


3. Background to Key Provisions of the Act

Horizontal Restrictive Practices: s4(1)(a)



An agreement, understanding 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 it has the effect of substantially preventing or lessening competition in market



Unless a party can prove that any technological, efficiency or other pro-competitive, gain resulting for it outweighs that effect

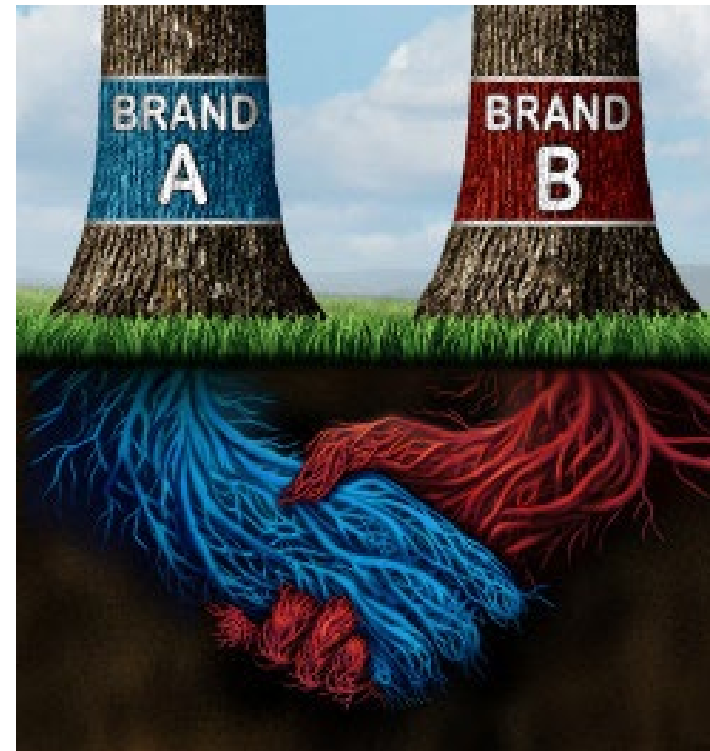


3. Background to Key Provision of Act (continued)

Cartel Conduct: Section 4(1)(b)

- An agreement understanding 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 it involves the following restrictive horizontal practices:

- Price- Fixing
- Market Division
- Collusive Tendering
- *Per se* contraventions



3. Background to Key Provision of Act (continued)

Price Fixing

- Directly or indirectly fixing a purchase or selling price or any other trading condition.
- Direct Price Fixing
- Indirect Price Fixing
- Benchmark Prices
- Rebates
- Discounts
- Price Formulae
- Other trading conditions – relates to the price-quality-quantity nexus.



3. Background to Key Provision of Act (continued)

Market Division

Dividing markets by allocating:

- Customers
- Suppliers
- Territories
- Specific Types of Goods or Services

Market Division does not require reciprocity



3. Background to Key Provision of Act (continued)

What constitutes Cartel Conduct

Cartel conduct does include:

- Gentleman's agreement
- Written Contract
- Oral Agreement

But also includes:

- A meeting of the minds
- Concerted practice – co-operative or co-ordinated conduct between firms achieved through direct or indirect conduct that replaces their independent action but does not amount to an agreement.

3. Background to Key Provision of Act (continued)

Cartel Conduct in a Digital Era

- Modern technology has facilitated constant communication.
- Individuals, in competing businesses, often know one another on a personal level. These personal relationships can facilitate cartel conduct under the guise of social interactions.
- In recent dawn raids, the Commission has seized the following electronic evidence, from both business and personal devices:



WhatsApp



3. Background to Key Provision of Act (continued)

Cartel Conduct in a Digital Era (continued)

- Through modern technology such as complex pricing algorithms and automated pricing bots, prices can be automatically calculated based on instantaneous assessments of supply and demand and a seller's own instructions, such as specific profit or price targets.
- This kind of data-drive price co-ordination, has been raised by most regulators as a future concern.
- In a recent paper by the OECD, it was stated that, "*finding ways to prevent collusion between self-learning algorithms might be one of the biggest challenges that competition law enforcers have ever faced.*"

3. Background to Key Provision of Act (continued)

Information Exchange: Draft Guidelines

- The South African Competition Commission is often interested in theories of exchange of competitively sensitive information.
- 14 July 2017 - the Commission published draft guidelines on the exchange of information between competitors.
- Information exchange can be between competitors directly or through third parties such as:
 - Trade Associations
 - An Accounting Firm
 - A Private Company that collects a firms' data, processes it, and disseminates it among firms.

3. Background to Key Provision of Act (continued)

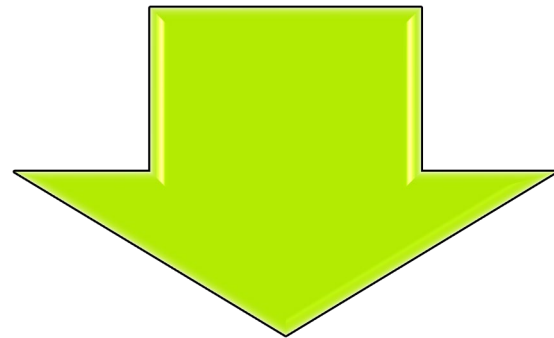
Information Exchange: Draft Guidelines (continued)

- The draft guidelines acknowledge that the sharing of information among competitors can be beneficial and pro-competitive.
 - Improvement of investment decisions
 - Facilitating the entry into an industry
 - Precise knowledge of market demand
 - Lower research costs
 - Provision of organisational learning

3. Background to Key Provision of Act (continued)

Vertical Restrictive Practices

- Section 5 applies to agreements between parties in a vertical relationship such as customers and suppliers.
- Section 5(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

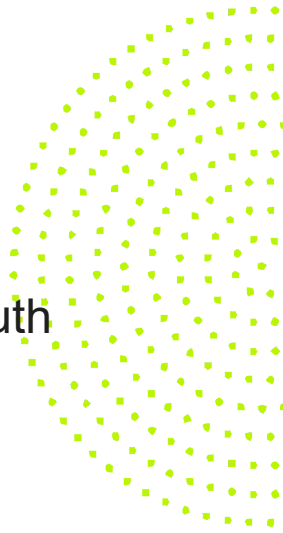
Unless, a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.



3. Background to Key Provision of Act (continued)

Vertical Restrictive Practices (continued)

- Section 5(1) requires a rather nuanced analysis, in the sense that the anti-competitive effect of any arrangement between a supplier and its customer must be evaluated against the pro-competitive/efficiency benefits of the relevant conduct.
- In order for there to be a substantial anti-competitive effect for the purposes of section 5(1), the South African Competition Authorities generally require that at least one of the parties involved must be dominant.
- In this regard, in the matter of *National Association of Pharmaceutical Wholesalers and Others v Glaxo Welcome (Proprietary) Limited and Others*, the Competition Tribunal found that, in general, in order to sustain an allegation of likely foreclosure in the context of section 5, “we have to be persuaded that [the Respondent] is dominant in the relevant market.”
- On this basis, the competition analysis in terms of section 5(1) is materially similar to the analysis in terms of section 8 of the Competition Act dealing with abuses of dominance, which is discussed in more detail below.



3. Background to Key Provision of Act (continued)

Resale Price Maintenance

- Section 5(2) of the Competition Act prohibits resale price maintenance.
- This does not, however, preclude recommending a resale price, provided it is not binding as section 5(3) provides that a supplier or producer may recommend a minimum resale price to the reseller of a good or service, provided that the supplier or producer makes it clear to the reseller that the recommendation is not binding on the reseller.
- Furthermore, if the product has its price stated on it, the words “recommended price” must appear next to the stated price.
- It is important to note that, except where the supplier or producer complies with section 5(3) (i.e. it makes it clear to the reseller that the recommendation is not binding and, where a price is stated on the product, the words “*recommended price*” appear next to the stated price), minimum resale price maintenance is *per se* prohibited, in the sense that this contravention of the Competition Act does not permit any justification.
- In other words, in the case of a *per se* infringement, no showing of anti-competitive harm is required, nor may the transgressors invoke any efficiencies or pro-competitive defences to their horizontal practice.

4. Abuse of Dominance Provisions



4. Abuse of Dominance Provisions

Abuse of Dominance

The abuse of dominance provisions only apply to dominant firms

45%



Irrebuttable
Dominant

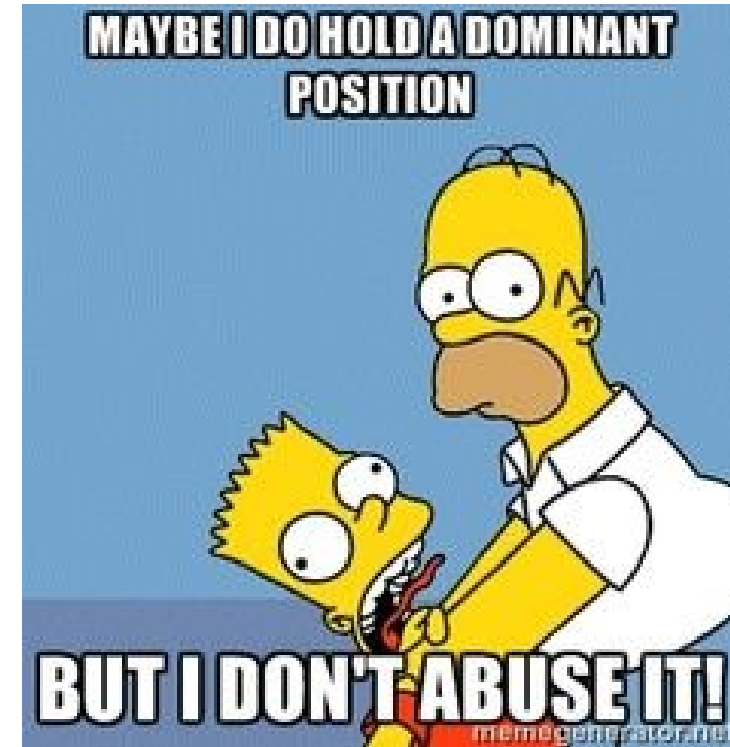
35%



Rebuttably Presumed
to be Dominant

MARKET POWER - a firm has market power if it has the power to control prices, to exclude competition or to behave independently of its competitors, customers or suppliers

- Note: The recent price gouging cases have lowered the dominance standard (Babelegi was found to be dominant with a 5% market share).



4. Abuse of Dominance Provisions (continued)

Abuse of Dominance (continued)

Section 8 of the Competition Act

“It is prohibited for a dominant firm to

(a) charge an excessive price to the detriment of consumers;

(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;

(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or

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4. Abuse of Dominance Provisions (continued)

Abuse of Dominance (continued)

(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:

- (i) **requiring or inducing a supplier or customer to not deal with a competitor;***
- (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;*
- (iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;*
- (iv) selling goods or services below their marginal or average variable cost; or*
- (v) buying-up a scarce supply of intermediate goods or resources required by a competitor.” [our emphasis]*

4. Abuse of Dominance Provisions (continued)

Abuse of Dominance: Excessive Pricing



Competition Assessment

Revised Assessment of “Excessive Price”

- Instead of considering the “economic value” of a product, and whether the price is “reasonably related” to such economic value, the Act has codified the ordinary criteria which forms part of the economic assessment into excessive pricing. These include:
 - price-cost margin;
 - internal rate of return;
 - return on capital invested or profit history;
 - the respondent’s prices for the goods or services;
 - comparative prices and profits;
 - duration of that level of pricing;
 - the market characteristics.

Sasol Polymers Case

- Important catalyst for amendments



Reverse Onus

Prima Facie Case

The amendment introduces a “reverse onus”, in terms of which a *prima facie* case of excessive pricing has to be shown to be “reasonable” by a respondent.

- “8(2) *If there is a prima facie case of abuse of dominance because the dominant firm charged an excessive price or required a supplier to sell at a price which impedes the ability of the supplier to participate effectively, the dominant firm must show that the price was reasonable.*”

When does the Onus Shift?

- Prima facie means that the case is proven in all the necessary respects, unless there is evidence to the contrary.

4. Abuse of Dominance Provisions (continued)

Price Discrimination (Section 9)

1. Amendment Act now provides for two standalone tests:

- Traditional “Substantial Lessening of Competition”; **and**
- “Public Interest” Test.

2. Public Interest Test

- Pricing differentials should not “*impede the ability of SMH’s to participate effectively in the market*”.

3. Pricing differentials may be justified if:

(2)(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;

(b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor;

But, subsection (2)(a)(iii) is not applicable if there is a *prima facie* case of impeding the ability of small SMH’s to participate in the market.

The Onus rests on dominant entity to rebut this allegation.

HOWEVER: a *prima facie* case of impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively through price discrimination MAY NOT be justified on the basis that the difference in cost is attributable to quantities sold]

4. Abuse of Dominance Provisions (continued)

Price Discrimination

- ✓ Pricing differentials may be justified if:

(2)(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;

(b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor;

But, subsection (2)(a)(iii) is not applicable if there is a *prima facie* case of impeding the ability of small SMH's to participate in the market.

The Onus rests on dominant entity to rebut this allegation.

- ✓ HOWEVER: a *prima facie* case of impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively through price discrimination MAY NOT be justified on the basis that the difference in cost is attributable to quantities sold]

4. Abuse of Dominance Provisions (continued)

Price Discrimination (continued)

- ✓ Purpose of the Regulations: Give effect to section 9(1)(a)(ii) of the Act and provide benchmarks for determining application of section 9(1)(a)(ii) to firms owned & controlled by historically disadvantaged persons
- ✓ **Consumer welfare or pro-competitive effects are not relevant** for the assessment of whether price discrimination impedes effective participation of SMH's in the market;
- ✓ The Commission will consider the price differentiation relative to other purchasers not only in the same market but also adjacent markets;
- ✓ **The Commission will only consider whether the price differential would enable the purchaser to participate more effectively (if the differentiation is removed) and will not consider other factors or a lack of efficiency as relevant factors;**
- ✓ In considering the significance of the “input” in the downstream cost structure, the Commission will take into account:
 - the portion of the input *vis-à-vis* the total variable costs of the final product; and
 - whether the final price is a key driver for consumer demand

4. Abuse of Dominance Provisions (continued)

Buyer Power

- ✓ Prohibited for a dominant firm in a designated sector from imposing on SMH's unfair prices or trading conditions
- ✓ Designated sectors:
 - Agro-processing
 - Grocery retail
 - Online intermediation services
- ✓ Factors and benchmarks in determining unfair conditions:
 - Trading conditions which unreasonably transfer risks/costs onto a firm in the designated class of suppliers
 - Where trading conditions are one-sided, onerous or not proportionate to the objective of the clause; or
 - The trading condition bears no reasonable relation to the objective of the supply agreement

5. Investigative Tools: Dawn Raids



5. Investigative Tools: Dawn Raids

Dawn Raids

- Most companies are unprepared for a dawn raid, given that they do not have the requisite training and policies in place for a dawn raid. It is important for companies to ensure that its employees are prepared for a possible dawn raid at their offices.

The South African Commission has conducted dawn raids in the following markets:

- **Cargo shipping**
- **Packaging paper products**
- **Advertisement placement agencies**
- **Furniture removal services** (following the first one conducted in 2010)
- **Automotive glass fitment**
- **Liquefied Petroleum Gas (LPG)**



5. Investigative Tools: Dawn Raids

Dawn Raids as an Investigative Tool

- Until recently, the South African Commission relied on various investigative tools to gather evidence of collusion, such as summonses and information requests.
- According to one of the South African Commission's employees, following the criminalisation of cartel conduct from 1 May 2016 onwards, dawn raids have become even more important as a tool to secure evidence of collusion:*

*“The Commission has begun to utilise dawn raids as one of its most effective tools to secure evidence of collusion. Dawn raids provide the Commission with a rare once-off opportunity to secure all relevant evidence of collusion without relying on what is provided, on request, by the party being investigated. **Dawn raids are therefore important because they deny the firms under investigation an opportunity to manage the kind of information they wish to disclose to the Commission.**” [our emphasis]*

*See “*Significance of Dawn Raids – A sharp investigation tool often used these days*” published in *Competition News (June 2016)* – Mr Katlego Monareng, Competition Commission

5. Investigative Tools: Dawn Raids

Dawn Raids as an Investigative Tool (continued)

- Companies of **any size** in **any sector** are at risk
- **Industry associations** are also at risk of being raided
- Protection of **privileged documents**
- **Media** relations
- **Internal investigations** after the raid
- Be aware of the “race” to be first through the door in respect of obtaining **leniency**



5. Investigative Tools: Dawn Raids

Dawn Raids (continued)

Do you have a **dawn raid checklist** in place which will assist if the investigators arrive at any of (insert)'s premises in order to manage (insert)'s employees and check the Competition Commission's search warrant?



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Essentials for the Executive: Merger Control

Key focus areas

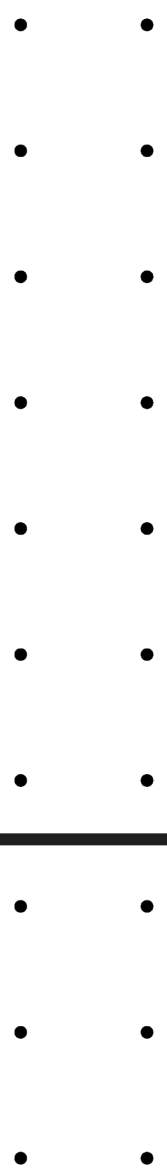
- Merger control
- Market Inquiries
- Digital markets

START

Increased role of public interest

- Minister Patel
- Amendment Act

6. Merger Control



6. Merger Control

The Increased Role of Public Interest

- ❑ Policy objectives: To bring the provisions of the Competition Act in line with its Preamble
- ❑ Minister Patel
 - ✓ “focus was on revamping and strengthening the Competition Act so as to place **greater focus on economic transformation and inclusivity**. The main objective of these amendments is to open up the economy to small and medium enterprises and to Black South Africans.”
- ❑ Additional public interest considerations
 - ✓ *“(c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to [become competitive] effectively enter into, participate in and expand within the market”;* and
 - ✓ *“(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”*
- ❑ The Amendment Act

6. Merger Control

Merger Control

Merger control-executing successful deals requires a merger regime built on sound fundamentals

- Essential elements to a sound regulatory regime
 - Certainty- the standard against which a transaction is considered
 - Timing – ensuring a deal is closed within a period (buyer and seller certainty)
 - Costs – transaction costs
- Features of South African and regional merger control
 - Merger review is subject to a standard which continues to evolve
 - Mergers can be heavily opposed by third parties, including government departments, trade unions, competitors, customers and suppliers.
 - Opposed mergers in South Africa can be protracted, lengthy, have extensive discovery and some decisions may be taken on appeal
 - Non- competition conditions imposed on transactions without any nexus are hugely costly

6. Merger Control

Merger Control (continued)

- Is South Africa in fact a hostile merger control regime?
 - What is the standard against which a deal is considered?
 - Ministry led intervention – direct and indirect at crescendo
 - Deal structuring never been more sensitive

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Scrapping the Burger King South Africa deal over BEE will hurt future investments: industry

Staff Writer 7 June 2021

07 Jun

Burger King: Making a meal of public interest in M&A transactions – don't upsize your deal just yet

City Press Robert Wilson and Shawn Van Der Meulen

SHARE



02 Jun

'No choice' but to block Burger King takeover, says competition watchdog

fin24



ECP Africa, Burger King, & Grand Foods merger prohibited - CompCom

Siyabulela Makunga | 02 June 2021

This would lead to significant reduction in shareholding of black persons in the target firm

BUSINESS NEWS

Is it really in 'public interest' to tell black owners they can't sell to non-blacks?

It is the first time in 20 years that a merger may be prohibited on the grounds of 'public interest' only.

BUSINESS

Blocking deals like Burger King sale potentially starves black businesses of realising shareholder value: Busa

08 June 2021 - 14:47
BY TIMESLIVE

Merger control- 2019 amendments to public interest test and culmination of the 10-year plan

Significant **PATEL DRIVEN** Amendments In Light Of Case Law

A merger may be prohibited, or conditions attached to it, where there are negative public interest outcomes from the contemplated merger.

- Amendment to section 12(A)(3)(c):
 - *The ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, **to effectively enter into, participate in and expand within the market.***
- Addition of section 12(A)(3)(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.***
- These amendments specifically created public interest grounds in merger control that deal with ownership, control and the support of small and medium businesses and firms owned or controlled by historically disadvantaged persons as well as ownership in firms by workers in those firms.

Enforcement of Conditions

- ***The Competition Commission may make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) and (c).***
- The above addition has also been added to section 16, providing the Competition Tribunal with the same power.
- The amendment means that the Commission and Tribunal may both make an appropriate order regarding any condition imposed upon the merger, including those relating to **employment, small and medium businesses and firms owned or controlled by historically disadvantaged persons.**
- This amendment is very broad

Cross Shareholdings

Additional assessments: S12A(2)(i)-(k)

- The extent of ownership by a party to the merger in another firm or other firms in related markets*
- 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*
- Any other mergers engaged in by a party to a merger for such period as may be stipulated by the Competition Commission.*

Consideration must therefore be given to:

1. Cross-Ownerships and Cross-Directorships of the merging parties and the merger entity; and
2. Previous mergers engaged in by one or more of the parties to the merger.

Merger control- The first ever prohibition on public interest grounds “Burger King” transaction- an overreach?

Prohibited Intermediate Merger

- ECP Africa, a private equity fund proposed acquisition of “Burger King” and Grand Foods Meat Plant (Pty) Ltd from Grand Parade Investments.
 - **No impact on pure competition factors!**
- The Commission found that the merger would lead to a significant reduction in the shareholding of historically disadvantaged persons in the target firm, from more than 68% to 0% as a result of the merger.
 - substantial negative effect on the promotion of greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons in firms in the market as contemplated in section 12A(3)(e) of the Competition Act.
 - cannot be justified on substantial public interest grounds.
 - concluded that the proposed transaction raised significant public interest concerns in that it has a substantial negative effect on the promotion of a greater spread of ownership, in particular the levels of ownership by historically disadvantaged persons and workers in firms in the market.

Commission Comments

- "The impact of the merger is that it will take BEE ownership from 68% to 0%. We engaged merging parties on how they will address this, unfortunately we did not get satisfactory responses," "We really had **no choice** but to block this."
- "We **just enforce the law**. The debate is to happen in Parliament if you think the law is not what it should be".
- "This Parliament gave us the law with all sorts of transformation objectives, including BEE. And I would be fired from my job if I do not implement it. **That is what the law says I must do**".
- "The debate was when the law was formulated about whether it should have transformation objectives. And if you lost the debate there, you can't revisit it at an implementation stage".

6. Merger Control

Merger Control – strategy (continued)

Assessment :

- A preliminary consideration of the five factors in terms of Section 12A(2) and adequately addressing these are essential in the market and competition report.
- It is, however, vital to realise that **conditions should still be merger specific** and while ownership levels are at the centre of the Commission and Patel's policy, the Act still permits and requires a holistic approach to merger assessments.
- This means that pro-competitive effects can still trump adverse Public Interest effects (the onus is now higher on the merging parties).

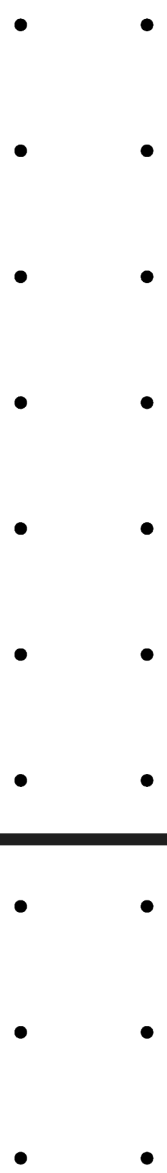
6. Merger Control

Merger Control – Strategy (continued)

At preliminary stages

- There is little doubt that from a deal perspective and DD process, parties will need to take into account the Public Interest issues proactively and as part of their commercial evaluation of a proposed transaction.
- **Proactively dealing with Public Interest issues** upfront will usually be case specific but is advisable.
 - demonstrates to the Commission that the parties have at least considered the issues and been proactive in coming up with solutions.
 - There is always a balancing act in relation to how much one is willing to put forward.
- Parties should, at the very least, **internally understand the extent and scope of Public Interest issues**.
 - employment may be more easily measurable and quantifiable
 - waiting to deal with other significant Public Interest issues at the 11th hour particularly if these haven't been ironed out internally creates significant tension
 - Creates pressure on the parties and fulfilment of suspensive conditions.

7. Market Inquiries



7. Essentials for the Executive: Market Inquiries

Market Inquiries

Section 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 [(4)] (7)—

(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.'



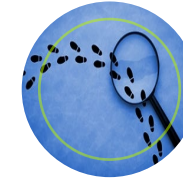
General

Lower Threshold

- “Market concentration that has any adverse effect” is lower than the standard or accepted “substantial preventing or lessening of competition that is not outweighed by pro-competitive effects”

SME and HDI

- The Commission must take reasonable steps to promote participation of SME who have material interest in inquiry and who are not properly represented.



Commission's Powers

Investigation

- Investigation may include “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”
- The Competition Commission can use its market study powers to investigate, report on, and remediate what it deems to be structural obstacles in an industry, specifically market concentration that cannot be explained by economies of scale, state support, and or barriers to entry to create/promote participation by historically disadvantaged businesses in these sectors.

Structural Remedies

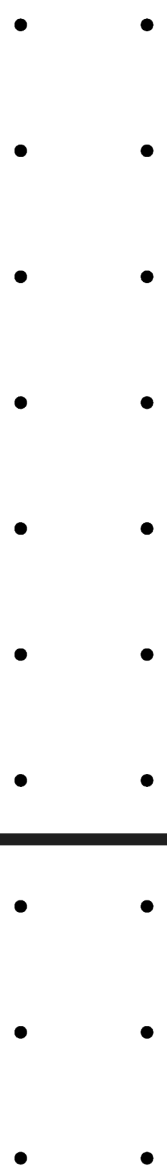
- The Commission will have the power to remedy structural features identified as having an adverse effect on competition in a market, including the use of divestiture orders
- These proposed amendments are aimed at enhancing the market inquiry process and ensuring that its outcomes include measures to address concentration and the transformation of ownership.

Findings and Recommendations

- The Commission's potential findings and actions following a market inquiry will be binding, unless challenged in the Tribunal.



8. Digital Markets



8. Digital Markets

Digital Markets

- ✓ Included in “online intermediation platforms” are:
 - commerce marketplaces;
 - online classifieds;
 - delivery apps; and
 - app stores.
- ✓ Terms of reference: The themes of the OMI are set to include
 - Factors that may hinder competition between platforms;
 - Factors that may hinder competition between businesses on the platforms;
 - Participation of small businesses and HDP’s; and
 - The potential for unfair treatment on the platforms
- ✓ The SACC is following international trends in the regulation of the digital economy – However a clear indication of SA continuing the trend to give effect to public interest considerations in competition regulation. Online markets are becoming increasingly important for economic growth in SA and elsewhere in the world.
- ✓ **Small Merger Guidelines**



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