

# National and International Developments

## Changing South Africa's Competition Law Regime: A Populist Departure from International Best Practices<sup>†</sup>

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### I. Introduction

South Africa has one of the most prodigious histories of antitrust enforcement on the African continent. Its *Competition Act*,<sup>1</sup> implemented in 1999 with a robust institutional enforcement system of Competition Commission and appellate Tribunal, bounded further by the courts' judicial review, was originally amended three times in quick succession between 1999 and 2001 – yet, in a testament to its effectiveness and success, it has largely remained unchanged in the two decades since then.<sup>2</sup> Rightfully so, some observers say, as South African antitrust enforcement has served the country's economy well: the Act represents one of the most effective pieces of competition legislation on the continent, and the resulting enforcement scheme and adjudicative structures that emerged over the past 20 years or so have served both pro-competition and societal goals underlying the original Act. South Africa has thus evolved from a relative competition-law neophyte to being routinely cited at legal conferences in the USA and in Europe as an acclaimed success story in the international world of an ever-increasing number of competition-law jurisdictions.

In light of this remarkable achievement, the latest legislative developments of seeking to amend the *Competition Act* in rather novel and unorthodox ways may therefore strike global observers as a violation of the adage that one mustn't fix what isn't broken. Yet, with the strong support of, and indeed pressure from, the executive branch, the so-called Competition Amendment Bill (the 'Bill') has been passed before the National Assembly and is expected to become law in early 2019 (if not earlier).<sup>3</sup> The Bill tabled before Parliament in July 2018 is a lightly altered version from the first draft, published for public

### Key Points

- The Amendment Bill alters key provisions of the South African Competition Act focusing specifically on the redistribution of wealth and transformation of ownership in lieu of pursuing traditional antitrust goals.
- The Bill provides for greater ministerial intervention at the initial stage of a merger (based on national security), during the merger investigation (based on public-interest grounds) and broadens the right of appeals to parties outside the merger control review.
- The Bill lowers the standard that the South African Competition Commission must meet to prosecute cases and foreshadows a risk of increased third-party interventionism more generally.
- The departure from a traditional substantial lessening of competition (SLC) test to an adverse effects-based test, which takes public interests considerations into account, is likely to result in the injection of greater subjectivity into the decision-making process and parties' increased difficulty in self-assessment of conduct particularly in relation to dominant firms.

comment in December 2017. A number of the changes proposed, and relevant here, remain unchanged in substance. Furthermore, the current draft Bill includes an important 'national security interest' provision which will have a direct impact on the process and assessment of mergers involving foreign acquiring firms – an element not included in the first draft of the Bill.

The Bill in its current form is unlikely to be materially amended prior to its being brought into effect. Accordingly, it is an opportune juncture to address the

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1 Act No. 89 of 1998.

2 Although the Act has previously been amended most notably to provide formal powers to the Competition Commission to conduct market inquiries and the introduction of criminal liability for cartel conduct.

3 The Bill still requires the approval of the National Council of Provinces and thereafter the President's signature, both of which are mere formalities following the National Assembly's approval of the Bill.

impetus behind the proposed changes, outline the main criticisms, and proceed to focus on what we view as the key pragmatic issues for European and other global firms engaged in South African commerce or otherwise falling within the reach of the Bill's jurisdiction.

## II. Debatable grounds for change: legislative course corrections based on industrial policy

The underlying reasons for the changes are rather straightforwardly conceded by the current, and arguably presently fluctuating, administration: the Bill is ostensibly designed not to enhance competition in the traditional antitrust sense, but rather to address so-called market concentration and perceived unequal ownership patterns in the South African economy.

This must be the headline under which to subsume all further commentary or evaluation: The Bill pursues a redistributive goal rather than aim at enhanced competitiveness. Of note, the Minister for Economic Development who is responsible for the proposal, Ebrahim Patel, has remarked that the current law had been focused primarily on the conduct of market participants instead of market design and structure. He conceded that, while addressing the latter fundamentally constitutes industrial policy, the intended so-called changes in 'market structure' could likewise be attained via competition legislation – which is precisely what the administration has now accomplished in the form of the current Bill.<sup>4</sup> Despite the criticism levelled against the Bill from diverse quarters of the national economic landscape, the extent and scope of ministerial intervention catered for in the Bill should not be ignored.

Setting aside this rather explicit goal of using competition legislation to effectuate redistributive economic policy, with a significant political public-interest mandate placed on the competition authorities,<sup>5</sup> we also see a second theory emerging: it posits that another driving force behind

the Bill may well be the recent history of failure of the country's Competition Commission (SACC). The SACC has failed to attain victories in several dominance cases and investigations, nor reaped the expected enforcement fruit of certain of its broad and far-reaching market enquiries that it conducted. Put plainly, the Bill as drafted seeks to reverse the SACC's bad fortunes, and will help make the Commission's task of winning in court easier. Conversely, it will burden parties that currently possess above or close to the inarguably low 35 per cent presumptive dominance threshold, likely prompting them to consider settling Commission complaints more willingly than they otherwise would have under the legislative *status quo*.

The Bill also does away with the so-called 'yellow-card' principle – effectively the Bill contemplates that all contraventions of the Act be subjected to an administrative penalty. Currently, the Act only penalises the most egregious forms of anticompetitive conduct, such as hardcore cartel conduct, minimum resale price maintenance and certain abuse of dominance conduct including excessive pricing, predation and discriminatory pricing.

## III. Widespread critique: deviating from international competition norms

As noted, the Bill's passage required a public comment period, soliciting input to be considered by Parliament. The commentary's focal points have crystallised into the following key areas of critique:<sup>6</sup>

Procedurally, the Bill is Ministry-driven – and thus seen as politicised – which has been met with criticism.<sup>7</sup> In addition, commentators have expressed concerns over the anticipated technical hurdles for putting in place the novel enforcement mechanisms contemplated by the Bill. This is particularly worrisome, as the existing resources of the SACC and Tribunal are commonly deemed already over-burdened and 'under-resourced' agencies, even prior to the amendment's extra burdens.<sup>8</sup>

4 See remarks of Ebrahim Patel, at the 11th Annual Competition Conference, Competition Commission and Competition Tribunal, Gordon Institute of Business Science, 31 August 2017.

5 For a collection of articles on the topic of the public-interest element in African competition enforcement, see <https://africanantitrust.com/category/public-interest/>

6 We note that, beyond the majority of critical reception by the academic and international communities, the Bill also generated positive reactions, particularly from supporters of the immediate past and present administration. These commentators have called for further reinforcement of the otherwise rather critically received 'de-concentration' components of the Bill. See, e.g., comment submitted by Organised Labour at Nedlac ('We also support the use of instruments to address high levels of economic concentration where these are not justifiable and to enable authorities to take firm measures to deconcentrate the economy, in line with trade unions' call for a more inclusive economy....'). The African

National Congress (ANC), the ruling party, has also publicly announced its support, stating that 'This important Bill addresses the principles outlined in the 54th ANC Conference Resolutions in relation to economic concentration, which noted that the high level of concentration of ownership in many sectors of our economy is dysfunctional to growth, entry of black South Africans in the economy and effective competition, and that the penalties for uncompetitive behaviour must be increased'.

7 See, for example, <https://www.businesslive.co.za/bd/opinion/2018-08-06-how-sas-competition-bill-is-a-threat-to-investment/> (accessed 29 September 2018); <https://www.businesslive.co.za/bd/opinion/editorials/2018-08-01-editorial-competition-amendment-bill-will-add-to-uncertainty/> (accessed 29 September 2018); <https://www.fin24.com/Economy/busa-calls-for-investor-certainty-as-competition-amendment-bill-heads-to-parliament-20180720> (accessed 29 September 2018).

8 *Id.*

In relation to international transactions, the Bill essentially provides the executive with 'three bites at the cherry'. Firstly, the executive can decide whether a proposed merger should be permitted based on national security concerns. Secondly, the executive can intervene as an interested party based on public-interest concerns (and potentially competition concerns); and thirdly, the executive can take the Competition Tribunal's decision on appeal. Alternatively, the executive is provided with specific powers to access confidential information and may require the Competition Commission to conduct a market inquiry into a particular sector.

The Minister also has the right to appoint part-time panel members to the Tribunal on ad-hoc basis. Never before has competition legislation provided the executive with such far reaching powers to effectively be 'judge, jury and executioner' – or at least be able materially to influence the decision-making of each.

On the Bill's substance, the perceived majority consensus is that the amendments prompt 'serious concerns' with potentially harmful 'unintended consequences'.<sup>9</sup>

Legislation should be drafted in such a manner that it enables all firms to self-assess their conduct and ensure compliance with the law as written. The Bill may have a dampening effect on pro-competitive conduct as the burden – particularly in relation to firms with market shares of above 35 per cent (which are presumed to be dominant in South Africa) – falls on a respondent to demonstrate that its conduct does not result in adverse effects on competition and/or small, medium firms of firms owned by historically disadvantaged persons.

Public-interest considerations have been a prominent feature of South African merger control for over a

decade – and most particularly since the seminal case of *Walmart/Massmart*<sup>10</sup> in 2012. Despite having the theoretical benefit of a record of mergers being approved subject to public interest-related conditions, there exists no greater practical certainty as to how the competition authorities will balance public-interest considerations with pure competition objectives. This is probably so because one cannot with any degree of predictability or certainty quantify something which is so inherently subjective as what may or may not lie in the ever-changing 'public interest'. As commented on by a South African bank's Chief Strategist and Economist:

*'There is a public interest in a more competitive and efficient market for goods and services and for labour. There is only a private interest in avoiding particular retrenchments. Competition policy misuses the public interest in its focus on employment. The public interest is in employment growth and a more productive labour force to which mergers and acquisitions can make a very important contribution.'*<sup>11</sup>

Considering each proposed amendment contemplated in the Bill in an isolated manner may not prompt an immediate startling reaction from an international audience. Why would it? Public interest or other 'populist' considerations in merger control are decidedly not a novel concept, nor one limited only to this country. Indeed, they were considered in other jurisdictions, many with highly developed antitrust regimes that have evolved over a century, such as the USA, yet were almost always roundly rejected.<sup>12</sup>

In order to appreciate the potential impact the Bill may have – such as the violation of the separation of powers

9 See for example, Business Day article titled 'Ebrahim Patel's potentially ruinous power grab' published by Ann Crotty, 26 July 2018 ('The proposed changes to the Competition Act look horribly like a power grab by one of the most astute politicians in the ANC today. If it comes into effect in its current form it will put an end to a competition regime that has been one of the few highlights of the post-1994 government... The bill is a breathtaking attempt by economic development minister Ebrahim Patel to place himself at the very centre of competition policy and implementation in SA. Key proposals in the bill deal not just with who decides on cross-border mergers, but essentially transform the minister into the Competition Czar... This [the amendments] will hollow out our competition authorities, whose reasonably certain processes will be replaced by ad-hoc lobbying of the minister.')

10 110CAC/Jul11, 111/CAC/Jun 11.

11 See at <http://politicsweb.co.za/opinion/the-compcom-and-the-labour-market>, comments by Brian Kantor Chief Strategist and Economist, Investec Wealth and Investment.

12 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *Antitrust Law* ¶ 110 (3d ed. 2006) ('The biggest advantages conferred by the use of relatively traditional microeconomics as the guiding principle for antitrust are two: coherence and welfare.... [P]opulist goals should be given little or no independent weight in formulating antitrust rules and presumptions. As far as antitrust is concerned, they are substantially served by a pro-competitive policy framed in economic terms.... [I]njection of populist goals, by broadening the proscriptions of business conduct, would multiply legal uncertainties and threaten inefficiencies not easily

recognised or proved.... [In spite of imperfections,] economics gives a focus to antitrust interpretation and is critical to any formulation of rational rules.');

William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 35 ('Both [the Chicago and Harvard schools of thought] generally embrace an economic efficiency orientation that emphasises reliance on economic theory in the formulation of antitrust rules. Although Chicago School and Harvard School scholars do not define efficiency identically, the two schools discourage consideration of non-efficiency objectives such as the dispersion of political power and the preservation of opportunities for smaller enterprises to compete.');

Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 798 (1987) ('Antitrust law is a pro-competition policy. The economic goal of such a policy is to promote consumer welfare ... [The] legislative history of the Sherman Act and other antitrust laws also suggests 'populist' goals—social and political reasons for limiting business size and preserving large numbers of small businesses and business opportunities. However, economics-based antitrust law serves those goals to a substantial extent by preventing agreements, mergers, and monopolising conduct that tend to eliminate or reduce competition without yielding economic benefits.... [T] here is no reasonable basis for presuming that courts must give priority or even weight to populist goals where the pursuit of such goals might injure consumer welfare by interfering with competitive pricing, efficiency, or innovation. Indeed, even where there is no such apparent conflict, it is questionable whether populist goals are appropriate factors to consider

principle, the watering down (or altogether departure) from objective and internationally accepted standards and the increased risk of interventionist measures designed purely to frustrate competitors – it is important to consider some of the primary amendments in totality.

We discuss these further under the following themes.

## IV. Merger control

### A. Elevated public-interest standard

The Bill expressly elevates public-interest criteria (including ownership levels and ability of small or medium business to compete in the market) to the same relevance as traditional competition elements. Other than simply listing factors to take into account, the Bill does not provide any guidance on how the agencies should go about quantifying any public-interest considerations. Furthermore, there is no guidance as to how the agencies should go about assessing transactions where the competition and public-interest considerations are of ‘equal’ weight, but point in opposite directions, nor how to balance short-term adverse competitive effects with long-term positive public-interest effects. Absent any objective standard or quantifiable means by which to assess the impact of socio-economic effects, we submit that the Bill is likely to result in an unpredictable, subjective and litigious merger control regime.

If recent merger decisions by the Commission failed to spell out with sufficient clarity the grounds for and evaluation of public-interest commitments, the proposed Bill will only serve to hasten the gradual disappearance of procedural transparency and due process.<sup>13</sup>

### B. National Security interests

The introduction of the ‘National Security’ provision<sup>14</sup> contemplates that the President constitute a ‘Committee’ to be notified of, and approve or prohibit, any transaction

involving a foreign acquirer. The SACC may only proceed to investigate the merger following the Committee’s approval, which may take 60 days to obtain.

‘National security’ is not defined in the Bill, although the Committee is required to publish a list of markets or industries which would hopefully provide further guidance as to what type of transaction triggers the ‘national security’ provisions.

It is not uncommon for jurisdictions to include mechanisms in terms of which certain sensitive foreign-party transactions are considered and approved or vetoed based on a country’s legitimate geopolitical security interests.<sup>15</sup> It is submitted, however, that national security issues should be regulated by separate legislative instruments rather than through the distinct vehicle of competition legislation.

The national security clause, as currently drafted, will result in a lengthy review period,<sup>16</sup> adulterating the concept of pure competition-law based merger evaluation, and will further yield unpredictable outcomes and conflate the role and function of the SACC and the political executive. As part of its mandate, the Committee is entitled to consult with the SACC. It is unclear what assistance the SACC could be to the Committee in assessing matters of national security, and SACC Commissioner Bonakele conceded at a recent antitrust conference at New York University<sup>17</sup> that the potential for political interventionism had increased due to certain provisions in the Bill, including the newly-introduced national security clause.

## V. Abuse of dominance provisions

Abuse of dominance provisions are governed by section 8 and 9 of the Act. Section 8 sets out general prohibited conduct by dominant firms,<sup>18</sup> while section 9 deals exclusively with price discrimination. We turn to the latter first.

when formulating antitrust rules. The pursuit of these goals would broaden antitrust’s proscriptions to cover business conduct that has no significant anticompetitive effects, would increase vagueness in the law, and would discourage conduct that promotes efficiencies not easily recognised or proved.)’

13 See, for example, the Minister for Economic Development’s recent intervention in pursuit of public-interest commitments in *Soihl Hong Kong Holding Limited* and *Chevron South Africa (Pty) Ltd*, *BASF SE Germany* and *The Divestment Business of Bayer AG*, and in relation to imposing non-competition related BEE finance provisions in the *Construction settlements* cases.

14 See section 18A of the Bill.

15 See <https://www.vox.com/policy-and-politics/2018/3/13/17116288/qualcomm-broadcom-trump-cfius-treasury-deal> (accessed 29 September 2018).

16 In a revision from previous drafts, the Committee and SACC investigations can occur in parallel, although neither the SACC or Tribunal may make a decision in relation to a merger until the Committee has approved the proposed transaction.

17 See <https://africanantitrust.com/2018/10/31/emerging-antitrust-one-size-doesnt-fit-all/> (accessed 12 November 2018).

18 Some of the conduct such as excessive pricing and refusal to provide access to essential facilities is prohibited *per se*, other forms of conduct such as inducement not to deal, tying and bundling, predation and now margin squeeze create a rebuttable presumption that such conduct is anticompetitive. Finally, section 8(c) of the Act is a catch-all provision which is subject to a rule of reason defence.

## A. Price discrimination

Section 9 of the Act, which prohibits dominant firms from engaging in price discrimination, will be amended by watering down the threshold for breaching the price discrimination provisions by introducing a public interest criteria for purposes of assessing allegations of price discrimination, with the burden of proof notably placed on the respondent. The Bill states that when determining whether a respondent's conduct amounts to price discrimination, *'the dominant firm must show that its action does not impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to participate effectively'*. Quite crucially, it is not apparent – and will not be known by practitioners or companies, unless and until Guidelines are published or judicial precedent established on the issue – what is meant by the novel language of *'imped[ing] the ability'* to *'participate effectively'*.<sup>19</sup>

In terms of the Bill, the Minister is responsible for determining what small and medium businesses are.<sup>20</sup>

Accordingly, a firm could be found to have violated the price discrimination provisions based either on a pure competition test or a standalone public-interest test. Introducing two separate standards to assessing price discrimination cases will lead to greater uncertainty and likely have the unintended consequence of dampening pro-competitive and overall price-lowering commercial practices.

In relation to the latter, the Bill expressly states in section 8(4) that the Competition Commission *'must publish guidelines setting out the relevant factors and benchmarks for determining whether the practice set out in subsection (1)(d)(vii) impedes the ability of a firm which is not a dominant firm, particularly a small and medium business or a firm owned or controlled by a historically disadvantaged person, to participate effectively'*.

It is worth emphasising that the onus rests fully and exclusively on the respondent to demonstrate that its pricing strategy does not *'impede the ability'* of small businesses or firms owned by historically disadvantaged persons to *'participate'*. In other words, the Bill creates a rebuttable presumption of harm.

## B. Excessive pricing

A notable amendment to the excessive pricing provisions is that there is a reverse onus on a respondent to demonstrate that their pricing is reasonable if it appears that there is a *prima facie* case of excessive pricing.<sup>21</sup>

The Bill also seems to introduce a new standard against which to assess whether a price is excessive. In this regard, section 8(3) states that an excessive price should not be unreasonably higher than the *'competitive price'*, taking into account various factors set out in the Bill.<sup>22</sup>

In light of the excessive pricing clause being a prohibition *per se*, a reverse onus seems particularly burdensome on respondents – particularly absent any clear guidance as to what constitutes *'reasonableness'*.

## C. Buyer power vis-à-vis small and medium businesses

Section 8(4) of the Bill prohibits dominant firms from imposing unfair prices or trading conditions on a supplier that is a *'small or medium business or a firm controlled or owned by a historically disadvantaged person'* in any sector designated by the Minister.

It is also a contravention for a dominant entity to refuse or avoid purchasing from a supplier to circumvent the above obligations.

Furthermore, there is a *prima facie* case of unfair trading conditions being imposed, the onus falls on the respondent to show that any such terms are not in fact unfair.

Although this provision, like a number of the proposed amendments, requires the Minister to publish regulations which would assist in further clarifying the standards and benchmarks to be used in order to assess a respondents' conduct in terms of this provision, without first having sight of these regulations it is near impossible to assess how this provision will operate in practice.

The socio-economic focus and subjective nature of section 8(4) in our view will render it very difficult for this provision to be reconciled with the objective pure

19 The commentary to the Revised Amendment Bill suggests that the rationale for removing the *'substantiality'* requirement is that *small and medium businesses are 'often unable to show prohibited price discrimination because the effect on small businesses is not considered to be a 'substantial' prevention or lessening of competition. This means that at present, section 9 favours complainants that are large firms because they can more easily demonstrate a substantial effect.'*

20 Section 1 of the Bill.

21 Section 8(2) of the Bill.

22 These factors include, *inter alia*:

- the respondent's price-cost margin, internal rate of return, return on capital invested or profit history;
- the respondent's prices for the goods or service relevant comparator firm's prices and level of profits for the goods or services in a competitive market for those goods or services;
- the length of time the prices have been charged at that level; and
- the structural characteristics of the relevant market.

competition concerns which may arise from buyer power. Absent a clear and objective framework, this provision may significantly hinder ordinary pro-competitive effects and simply serve to justify inefficiencies at an upstream supplier level.

#### D. Margin squeeze

The Bill also expressly prohibits margin squeeze as form of abuse of conduct.<sup>23</sup> Margin squeeze is defined as occurring:

*‘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’*

Although the definition of ‘participate effectively’ remains unclear (as used throughout the Bill), the prohibition on margin squeeze is subject to a rule of reason defence and a respondent will be entitled to raise pro-competitive, technological or other efficiency arguments to justify any conduct allegedly amounting to a form of margin squeeze.

## VI. Ministerial intervention

### A. Independence of authorities

The Competition Act has historically required that the Commission be independent and perform its duties impartially without fear or favour.<sup>24</sup> Moreover, each ‘organ of state’ must assist the Commission to remain independent.<sup>25</sup> The now proposed increased role of ministerial intervention in the SACC’s day-to-day work is directly at odds with these principles (which are also enshrined in the Constitution of South Africa). In a recent decision by the South African Constitutional Court regarding the independence of the National Prosecuting Authority,<sup>26</sup> the Court stated that:

*‘[t]here is... a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts.’<sup>27</sup>*

The above principle of independence must apply with equal force to the competition authorities, as ‘[p]

artisanship can degrade the brand of the antitrust agencies, reduce their influence aboard, and discourage longer term investments that strengthen agency performance. Though difficult to quantify, these constitute a potentially serious, unnecessary drag on agency effectiveness’.<sup>28</sup>

### B. Appointing Tribunal panel members

In terms of the proposed amendments to section 26(2) of the Act, the Minister will be entitled to appoint part-time Tribunal panel members from time to time, after consultation with the Competition Tribunal’s Chairperson. The current amendments would allow the Minister to appoint any number of persons that meet the requirements of section 28 of the Act to be part-time members of the Tribunal, for an indefinite term (since the Minister may determine the period for this appointment and also re-appoint that member upon expiry of that member’s term of office).

In our view, the appointment of part-time panel members poses a material risk to the independence – both actual and perceived – of the Competition Tribunal. This risk is amplified in light of the extensive scope for ministerial intervention contemplated by way of the Revised Amendment Bill, which contravenes the conclusion drawn by the United Nations Conference on Trade and Development Round Table Discussions that:

*‘It is generally said that the appointment of competition officials by a minister is less conducive to independence than appointment procedures that provide for the participation of representatives of more than one government branch. In addition, it is assumed that competition officials whose terms are not renewable and cannot be removed from office except by legal procedure have less of an incentive to please those who appointed them.’<sup>29</sup>*

### C. Rights of appeal

The Bill provides for both the SACC and the Minister to have a right of appeal regarding the Tribunal’s merger decisions on public-interest grounds. The Competition Commission is tasked with assessing both competition and public-interest elements in the merger control assessment. While there remains much debate as to whether specialist bodies such as competition law

23 Section 8(d)(vi) of the Bill.

24 See section 20(1) of the Competition Act.

25 See section 20(3) of the Competition Act.

26 *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23 (13 August 2018).

27 Para 19.

28 W Kovacic ‘Policies and Partisanship in U.S. Federal Antitrust Enforcement’ (2014) *Antitrust Law Journal* Vol 79 at 704.

29 See United Nations Conference on Trade and Development, TD/B/COM.2/CLP/67 Round Table Discussion on Independence and accountability of competition authorities (14 May 2008) at para 21 available at [http://unctad.org/meetings/en/SessionalDocuments/CCPB\\_IGE2014\\_UNCTADNOTE\\_EMCF\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/CCPB_IGE2014_UNCTADNOTE_EMCF_en.pdf). (last accessed 28 August 2018).

agencies should assess industrial policy objectives at all, it is not uncommon to see the conflation occur in more nascent competition legislation.

No other jurisdiction, however, provides for both the competition agency and the Minister to have such broad powers to intervene in mergers on public-interest grounds. While the right of the executive to make representations is beyond reproach, allowing the Minister to take competition decisions on appeal solely based on public-interest grounds, however, undermines the independence of and confidence in the specialist adjudicative bodies' role and competence. It further risks an unjustified infringement of the separation of powers in favour of ensuring the executive has a second bite at the cherry.

#### D. Access to information

Access to the Commission's full file is – invariably surprisingly to foreign parties – not regularly given to parties, and the presumptively pro-competitive conditions imposed on otherwise permissible M&A transactions go well beyond the purview of antitrust law, instead exhibiting a dangerous interplay with the express policy goals of the Ministry for Economic Development. Clauses 26 and 27 of the Bill, in substituting the provisions of section 45, exacerbate the existing lack of transparency of competition proceedings to the parties and diminish parties' due process rights. In addition, the increased *mélange* of classic antitrust principles, now imbued with social policy objectives beyond any feasible economic measure, runs the risk of fundamentally rendering SACC investigations Kafkaesque, by making it more difficult for parties to understand, pragmatically speaking, what type of case or argument they are facing, or who the actual accuser is, be it a Competition Commission professional or a politician at the Ministry.

## VII. Enforcement and remedies

### A. Administrative penalties

The Bill envisages an administrative penalty, capped at 10 per cent of the firm's South African related turnover (and 25 per cent in the case of a repeat offence) for all abuse of dominance conduct, including price discrimination.<sup>30</sup>

30 In terms of the current position, only certain expressly identified forms of abuse of dominance conduct is subject to an administrative penalty for a first time offence (i.e. excessive pricing and other forms of identified exclusionary conduct such as predatory pricing or inducement not to deal with a competitor).

Furthermore, any conduct between parties' competitors or parties in a vertical relationship which amounts to a lessening of competition in the market is subject to an administrative penalty. Previously only the *per se* prohibitions attracted a penalty for a first-time offence (i.e., cartel conduct, market allocation, and minimum resale price maintenance).

### B. Removal of the 'Yellow Card' regime

Although the Tribunal retains discretion in determining what an appropriate penalty would be in the circumstances, the Bill has not taken the opportunity to provide guidance as to what type of conduct should attract a penalty for a first-time offence. We argue that a welcome safeguard would be to introduce an express 'characterisation test' whether a particular respondent could reasonably have foreseen that its conduct was anticompetitive and not outweighed by pro-competitive and efficiency enhancing justifications, yet engaged in the conduct regardless, and that the conduct in question was clearly distinct from normal competition on the merits.

Absent such clear guidance as to which conduct would automatically attract a penalty for a first-time offence, the removal of the yellow card regime may have a dampening effect on pro-competitive conduct and have unintended consequences, as firms may be overly cautious in competing to aggressively for fear of overstepping the mark – particularly of concern in light of the diluted competition tests in favour of more subjective public-interest mandates.

### C. Market inquiries

One of the most contentious aspects of the Bill relates to the SACC's powers *vis-à-vis* market inquiries. Under the current Act, the SACC is empowered to conduct market inquiries and at the conclusion of the market inquiry present a report together with recommendations to Parliament.

The Bill, however, confers onto the SACC the powers to impose a variety of remedial actions directly following the conclusion of a market inquiry in order to remedy any 'adverse effects' on competition.<sup>31</sup> The powers conferred onto the SACC are broad and the only limitation in this regard relates to divestiture orders which must be confirmed by the Tribunal.

31 'Adverse effects' is defined in section 43A of the Bill as any feature or combination of features in the market which impedes, restricts or distorts competition.

There are no similar safeguards in relation to other remedial decisions taken by the SACC although parties whose rights are materially affected by any decision taken by the SACC do have a right to appeal such a decision to the Tribunal or Competition Appeal Court.

The scope and nature of remedies the SACC may impose on market participants following a market inquiry are nearly identical to those of the Tribunal (bar any imposition of an administrative penalty) after a formal finding that, and by way of an example, a dominant respondent has engaged in abusive conduct. In the context of market inquiries, the SACC is both the investigatory and adjudicate body and assesses the conduct of market participants against a watered-down competition test which encompasses the public-interest criteria.

Accordingly, if the SACC does not at first succeed with an abuse of dominance case before the Tribunal, the market inquiry tool effectively affords the SACC a second bite at the apple. Of course, the SACC is at liberty to use market inquiries as a first port of call and circumvent the prosecutorial standards relating to an abuse of dominance case altogether.

## VIII. Our take – don't fix what's not broken

Antitrust statutes are fundamentally instruments for protecting and promoting economic competitiveness in otherwise free markets, with an open structure for existing competitors to prosper based on their acquired business acumen and ensuring that new entrants are able to emerge and innovate. The goal of maintaining competitive markets therefore protects 'competition, not competitors,' as the adage goes: competition laws protect the ultimate consumer, not the disappointed competitor. They are not, however, vehicles for promoting certain classes of competitors over others. Effectuating social economic change may be a valid and honourable goal, but has traditionally been – and should remain in the view of the authors – the domain of industrial and other policies specifically aimed at these very goals, as opposed to the highly technical, and admittedly narrow, province of competition law.

Deviating from the above principles exposes firms to greater intervention by third parties. As noted by the former Chairman of the Competition Tribunal, David Lewis:

*'As the Commission's investigatory prowess has improved, the utility of permissive intervention has decreased and its*

*dangers have increased concomitantly. The danger is not so much that interveners, particularly those who are competitors, will provide self-interested information and analyses, but rather that they will use intervention as a mechanism for delaying and obstructing transactions in which time is often extremely costly. Recent years have been marked by interventions that have not contributed*

*an iota of useful insight to the adjudicators, but have simply served to harass their competitors.'*<sup>32</sup>

Furthermore, harmonising the global patchwork of anti-trust laws should be an important goal for all competition enforcers worldwide, to ensure not only predictability and commonality of outcomes, but also transparency.

As commentators noted in relation to the Wal-Mart/Massmart merger, 'having these proceedings occur in a competition tribunal rather than a Minister's office made an important difference in the way the arguments were framed and presented, and increased the transparency of the process'.<sup>33</sup>

Fast-forward a few years later, however, and it is no longer a secret that the merging parties in the *Anheuser-Busch/SABMiller*<sup>34</sup> merger in 2016 had elected to rather engage Minister Patel directly in order to obtain merger approval than the specialist competition agencies. This strategy proved successful – particularly after the merging parties agreed to significant non-merger specific public interest-related commitments.

The Ministry-driven Amendment Bill is likely to incentivise merging parties to deal directly with the Minister, further calling into question the competency and role of the Competition Commission.

Chief among the Bill's contortions of competition law are:

- the ill-advised introduction or expansion of public-interest criteria in an emphasis on socio-economic concerns, dominating over pure competition issues – particularly without a clear, objective manner in which parties are to quantify positive or adverse effects;
- obscuring the role of the specialist competition agencies versus other branches of the executive, also calling into question due process principles, the separation of powers, and risking further politicisation by increasing the influence that non-competition law factors have over what should otherwise be a pure antitrust process;
- overemphasising concentration and high market shares at the expense of pro-competitive conduct;

<sup>32</sup> D Lewis, *Thieves at the Dinner Table*, 2012, 90.

<sup>33</sup> H First and E Fox 'Philadelphia National Bank, Globalization, and Public Interest' (2015) *Antitrust Law Journal* Vol 80 at 337.

<sup>34</sup> LM211Jan16.

- introducing an undefined 'fairness' standard, subjecting enterprises to a newly-injected element of subjectivity with little to no jurisprudential history, thereby greatly increasing business risk and legal uncertainty;
- effectively requiring firms to have insight into competitors' and/or sellers' pricing models and to guess which 'small or medium enterprises' may potentially be impeded as a result; and
- relying on disputed data sources underlying the Bill (e.g., statistics on the levels of concentration in various sectors of the South African economy), often seemingly based on unpublished studies.

## IX. Conclusion

The established South African competition-law framework has worked admirably well over the past twenty-plus years. It is widely recognised as a model to other African jurisdictions with younger antitrust regimes.

Enactment of the Bill in its current form is not likely to strengthen antitrust law enforcement in South Africa. If anything, it will make it more difficult for foreign as

well as domestic entities to engage in business activities (especially unilateral and contracting behaviour, but also in mergers and acquisitions) in South Africa. Certainty and predictability will diminish. The country's reputation as an African competition-law lodestar is at risk.

While the context of South Africa's economic and political climate cannot be ignored when assessing the suitability and timing of the introduction of the Bill, it appears that too much credence has been given to a populist agenda. The increased scope for ministerial intervention aimed at assessing foreign transactions under a separate merger control regime may send conflicting signals to global investors.

Finally, any further weakening of pure economic competition tests implies cost in terms of lost efficiency, or less competitive outcomes in the case of false positives in enforcement – ultimately resulting in negative consequences for consumers, growth, and employment. Accordingly, and ironically, the Bill's overt pursuit of additional and now elevated 'public-interest factors' will, we submit, negatively impact the public interest itself.<sup>35</sup>

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35 J Oxenham and P Smith, 'What is competition good for – weighing the wider benefits of competition and the costs of pursuing non-competition objectives' 2014.