South African Competition Law - The role of non-competition factors in enforcing unilateral conduct: Forging ahead or falling behind?

John Oxenham, Michael-James Currie & Stephany Torres*

Prepared for:

CRESSE, 14th International Conference on Advances in the Analysis of Competition Policy and Regulation

July 2019

* John Oxenham (Nortons Inc. and Primerio), Michael-James Currie (Nortons Inc), Stephany Torres (consultant- Primerio). The views expressed in this paper are the authors own.

"Steer the global competition discourse in a direction that takes account of the developmental outcomes competition law can deliver to markets in emerging economies. Not for the benefit of the law itself but for the growth of Africa's economies, including South African firms that seek to invest and grow in the region" – Tembinkosi Bonakele[2]

"These are ground breaking developments in competition policy, not only in South Africa, but also internationally." – Ebrahim Patel[3]

Introduction

Enforcement of antitrust across various African agencies has generally lagged behind the United States and Europe. This is changing dramatically. More African countries now have domestic competition law legislation in effect and a number of other African countries are in the process of drafting competition laws. Furthermore, there are now three significant trading blocs which have supra-national competition law regimes.[4]

South Africa undoubtedly remains the leading competition law enforcement jurisdiction across the African continent. The South African competition agencies have been instrumental in evolving competition law and policy across the continent - most notably with regard to the role of public interest in merger control.[5]

In relation to unilateral conduct, there is increasing debate internationally as to whether dominance cases should rather be more consumer welfare focussed as opposed to merely assessing an impact on competitive effects and whether there should be more or less regulation in relation to unilateral conduct.[6]

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2 South African Competition Commissioner

3 Minister of the Department of Economic Development of South Africa

4 These include COMESA (The Common Market for Eastern and Southern Africa), EAC (The East African Community) and ECOWAS (The Economic Community of West African States).

5 See for example the merger control regimes of Namibia, Botswana, Kenya, Tanzania, Swaziland, Zambia and more recently Nigeria which all expressly cater for public interest considerations in merger control. This is unsurprising given that countries in Africa are generally characterised by similar socio-economic considerations as well as market structures (such as high levels of concentration in multiple sectors). The South African Competition Commissioner is currently (and has been for a number of years) the chair of the African Competition Forum which is responsible for a number of advocacy initiatives across the continent including changes to legislation and policy initiatives.

6 Lina Khan for instance says the following "*We have developed and popularized the "mew Brandeis" school of antitrust regulation…The new Brandeis movement isn't just about antitrust… Rather it is about values. Laws reflect values. Anti-trust laws used to reflect one set of values, and then there was a change in values that lead to this very different place". If she and her contemporaries have their way, law- along with the economy and society at large - many be about to reach another dramatic turning point*" see

South Africa is not, however, slavishly adhering to the international trends but is rather forging a unique approach in addressing perceived negative effects flowing from high levels of concentration. In this regard, the South African Competition Amendment Act ("Amendment Act") was recently signed into law.[7] The Amendment Act introduces and enhances a myriad of non-competition considerations in both merger control and unilateral conduct assessments which focuses neither on traditional competition in the market nor effects on consumer welfare but rather the ability of small, medium businesses and firms owned by historically disadvantaged persons ("HDP") to participate in the relevant market.

Accordingly, non-competition factors will now play an increasingly prominent role not only in merger control but also for purposes of assessing abuse of dominance cases in South Africa (and in due course across Africa).

In this paper we argue that the novel approach of elevating public interest criteria in the context of abuse of dominance cases lacks a proper appreciation of economic evidence and theory. Furthermore, it reduces the objective standard and role of evidence required in order to evaluate and potentially defend dominance cases.

We discuss the above risks in assessing the recently published draft regulations which cover both price discrimination and the buyer power prohibitions (the "Draft Regulations") in South Africa.

The policy debate

The Amendment Act has its primary objective the promotion of economic inclusiveness and

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Financial Times Weekend 30 March 2019, page 3. https://www.ft.com/content/7945c568-4fe7-11e9-9c76-bf4a0ce37d49 (accessed 3 March 2019). See also MN Volmar & KO Helmdach, "Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation" where they conclude that "*Competition policy currently seems to be shifting from a laissez-faire doctrine to a more proactive and consumer focused enforcement*" https://www.tandfonline.com/doi/full/10.1080/17441056.2018.1538033 accessed 2 March 2019. See also Kevin Yeh, "Hipster Antitrust: A Brief Primer", American Bar Association, where he neatly sums up the Chicago school of economic thought, "*which holds that consumer welfare should be the standard by which competition policy is measured. This standard largely prizes lower prices, increased production, higher quality, and greater efficiency as the metrics for judging competition*."… *Hipster antitrust calls for changes to the law that would give regulators more leeway to combat transactions or behaviors that traditionally escape scrutiny… ver the last several years, however, there has been something of a backlash. Discrete parts of the antitrust bar, consumer advocates, politicians, and other interested entities have called for antitrust to focus more on the absolute size of firms, market structure over effects, protection of smaller businesses, distribution of wealth and political power, and employment. This change has been driven in large part by complaints about the increased concentration of firms in a number of industries, stagnant wages, and the seeming inability of current antitrust law to contain the growth of technology companies that are undoubtedly dominant and increasingly powerful, such as Google, Facebook, and Amazon*." https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/antitrust/hipster-antitrust-brief-primer/ (accessed 3 March 2019). See also JM de la Calle, "Hipster Antitrust", Competition policy International, "*Those friendly towards Hipster Antitrust have been strongly criticized by the more radical schools in economics, who consider this a populist trend detracting from the credibility of analysis criteria. This apart from the fact, in their opinion, that there is no real evidence to show that corporate size is a bad thing per se and, on the contrary, argue for the undeniable effects brought by the maximization of economic production for the efficiency of markets*." https://www.competitionpolicyinternational.com/hipster-antitrust-2/ (accessed 1 March 2019).

7 The Amendment Act was signed into law in February 2019 but the effective date is not yet been determined. It appears likely that the Amendment Act will only be brought into effect once the various Regulations and Guidelines are published which are intended to provide further clarity to the scope of a number of the contentious provisions in the Amendment Act which are discussed in this paper.

participation by Small, Medium and Micro-sized Enterprises (SMMEs) and businesses owned or controlled by HDPs.

South African president, Cyril Ramaphosa, addressed Parliament in early 2019 saying that the highly concentrated nature of the South African economy had stifled growth and enterprise and had, to a large extent, kept many young South African entrepreneurs and small enterprises out of the economy or confined them to the margins.[8]

Ramaphosa indicated that the amendment to the Competition Act would give the competition authorities the ability to address this problem and open up new opportunities for many South Africans to enter various sectors of the economy and compete on an equal footing. [9]

Further, Minister Patel envisages utilising the competition process to address not only competition issues but facilitate increased transformation within the industry and to promote a number of additional socio-economic objectives (i.e. to bring industrial policies within the remit of the competition agencies). In this regard, Minister Patel was quoted saying that "*the new Competition Amendment Act is aimed at levelling the playing fields of economic transformation between small businesses and established conglomerates*". [10]

Although the amendments recognise that concentration in of itself is not in all circumstances to be construed as an *a priori* negative, the lack of a clear and objective set of criteria together with a deviation from traditional pure competition tests may in fact stifle innovation, growth, and an appetite for commercial expansion, thereby counteracting the express goals listed in the preamble to the Amendment Act. Firms that are currently sitting at a market share of around 30% (set out in Section 7 of the Competition Act) for instance may not be incentivised to obtain any greater accretive share for fear of being construed as holding a dominant market position, once the 35% threshold is crossed.

The objectives to facilitate a spread of ownership are not novel objectives of the post-Apartheid government and a number of pieces of legislation and policies have been introduced in order to facilitate the entry of small, previously disadvantaged players into the market through agencies generally better equipped to deal with this. These policies, in general, have arguably not resulted in the benefits originally envisaged by government. There may be a number of reasons for this,

[8] Business Day, 7 February 2019, Bekezela Phakathi.
[9] Business Day, 7 February 2019, Bekezela Phakathi.
[10] Business Day, 7 February 2019, Bekezela Phakathi.

but the new Amendments do not seek to address the previous failures or identify why various other initiatives and pieces of legislation such as the Black Economic Empowerment (BEE) legislation has not worked (to the extent envisaged by Government). Furthermore, the Tribunal had neatly summed up this potential conflict, in an *obiter* comment, neatly in the following extract in the *Distillers* case[11] (albeit in the context of mergers):

> "*Furthermore, ordering divestitures requires that there be a suitable third party who could effectively take up the divested business and impose a competitive constraint on the dominant entity. It seems inevitable that based on the proposed Amendments the competition authorities will be placed in the invidious position of considering a divestiture to an entity which may not yet have proven any successful track record. The Amendments do not provide guidance for this and although the competition authorities have the necessary skills and resources to assess whether conduct has an anti-competitive effect on the market, it is less clear whether the authorities have the necessary skills to properly identify a suitable third party acquirer of a divested business."*

In addition and importantly, promoting competition within the market ultimately achieves public interest objectives. Likewise, we argue that anything which undermines competition in the market will have a negative impact on the public interest considerations.

As other commentators have noted: "*competition drives a more efficient allocation of resources, resulting in lower prices and better quality products for customers. Lower prices typically result in an expansion of output. Output expansion, combined with the effect of lower prices in respect of one good or service frees up resources to be spent in other areas of the economy. The result is likely to be higher output and, most importantly for emerging economies, employment*".[12]

While it is true that ordinarily, a decrease in concentration and market power should result in an increase in employment we have not seen a comprehensive assessment of the negative costs associated with pursuing public interest objectives. Any weakening of a pure competition test must imply some costs in terms of lost efficiency, or less competitive outcome, which is justified based on a party's perspective of a particular public interest factor. That loss in efficiency and less competitive outcome is very likely to have negative consequences for consumers, growth, and

[11] Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd 08/LM/Feb02

[12] John Oxenham and Patrick Smith, "What is competition good for – weighing the wider benefits of competition and the costs of pursuing non-competition objectives" http://www.compcom.co.za/wp-content/uploads/2014/09/140822-What-is-competition-good-for-FINAL.pdf (accessed 3 March 2019).

employment. Accordingly, the pursuit of *"public-interest factors"* might have some component of a loss to the public interest itself. We have not seen that loss in efficiency (and resultant harm to the public interest, as comprehensively understood) meaningfully acknowledged in the proposed Amendments.

A further risk to the broad and open ended role which public interest considerations are likely to play in competition law matters is that it potentially exposes firms to frivolous and vexatious litigation by third parties – a risk which is amplified by the low thresholds for establishing dominance, the introduction of a reverse onus and the risk of administrative penalties for first time offenders - which we discuss further below.

Inclusion of non-competition factors in abuse of dominance conduct

It should be noted that unlike many other jurisdictions, the dominance thresholds in South Africa are particularly low. A firm with a market share above 45% is presumed dominant. While a firm with a market share between 35-45% is rebuttably presumed dominant (the onus resting on the respondent to demonstrate that it is not dominant). Finally, a firm with a market share of below 35% may still be regarded *"dominant"* if the firm has market power.[13]

The low thresholds, coupled with the *"reverse onus"* (discussed below in the context of price discrimination and buyer power prohibitions) emphasise the risk that the amendments discussed below are overly broad and devoid of adequate economic theory or evidence which may ultimately hinder pro-competitive conduct and/or lead to the untenable situation that firms simply do not know what the standards or benchmarks are, from a practical point of view, to ensure compliance with the law.

Furthermore, there appears to be little relationship between any prohibitions which are not predicated on a pure competition law test as the abuse of market power is not a relevant factor to take into account. In other words, as we explore the prohibitions below, one should question why these prohibitions apply <u>only</u> to dominant entities and not to all firms in the relevant market?

The primary purpose for prescribing dominance thresholds based on market shares is that it serves an important (although contentious) screening process for purposes of determining when a firm is likely to have *"market power".* The assumption being that, the higher a firm's market shares the more likely it is that the firm in question has market power. Market power in short refers

[13] See section 7 of the Competition Act, 89 of 1998.

to the ability of a firm to set prices above a competitive level for a sustained period of time. Consequently, assessing a firms' *"market power"* is crucial for purposes of determining whether a firm's conduct is anti-competitive or harmful to consumers.

Turning to the Draft Regulations, if anti-competitive effects or consumer welfare are <u>not</u> factors taken into account when assessing the conduct against the price discrimination or buy power provisions from a public interest perspective, then there is, in our view, no rationale link between *"dominant firms"* and the prohibited conduct itself.

<u>Price discrimination</u>

Simply put, price discrimination allows firms to charge different customers a price relevant to what those customers are prepared to pay. In other words, it enables firms to ensure that customer utility is maximized. If firms are obliged (or consider themselves required) to set prices at a uniform price, it is unlikely that the firm will adopt the *"lowest price point*" at which to sell its products but rather an average or the highest price point. This means that while customers who were prepared to pay more for a product at a certain price point may enjoy some discount, those customers who were only prepared to pay for the product at the lowest price point will either have to cough up more or will not buy the product altogether. Intuitively this results in a decrease in consumer welfare.

Accordingly, while price discrimination can lead to anti-competitive effects, price discrimination ordinarily enhances consumer welfare.

The Amendment Act introduces a dual assessment for price discrimination in terms of which a firm can be found guilty of price discrimination either where its pricing has the effect of substantially lessening competition or where its pricing "*<u>impede[s] the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to participate effectively</u>*." It has further been made clear, by way of the Draft Regulations, that, under the second assessment, there is no need for a complainant to show any anti-competitive or consumer harm (a complainant only needs to demonstrate a hindrance to being able to participate effectively in the market). "Participate effectively" is defined as the "*ability of or the opportunity for firms to sustain themselves in the market*".

It is also an offence for a firm to avoid or refuse selling goods or services to a purchaser who is a small or medium business or controlled or owned by historically disadvantaged persons in order to circumvent the operation of section 9.

Once a *prima facie* case has been made out by a complainant, the onus rests on the dominant entity (as 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 effectively in the market (and that it has not avoided or refused selling to a particular purchaser). In this regard, it is stated that ""*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*".

The Amendment Act expressly precludes a dominant entity relying on *"different quantities"* alone as a defense if there is a *prima facie* case of price discrimination which impedes the ability of small, medium or HDI owned firms to *"participate effectively"* in the market. In other words, the Amendment Act is aimed at protecting businesses that are unable to obtain the same prices as larger customers due only to their limited size.[14]

The Draft Regulations published in terms of section 9(4) set out the relevant factors and benchmarks for determining whether the practice set out in subsection (1)(a)(ii) impedes the ability of a small and medium business or a firm owned or controlled by a historically disadvantaged person, to *"participate effectively".*

The Draft Regulations set out further factors which ought to be taken into account when assessing the impact that the price discrimination has on customers. The Draft Regulations recognize that there must be a causal connection between the price discrimination and the complainant's inability to participate effectively in the market. Although that is a rather self-evident requirement we are

[14] Dominant entities are still permitted to justify any differential pricing on the basis that:
there are reasonable allowances for cost of manufacture, distribution, sale, promotion or delivery arising from:

i. serving customers in different locations;
ii. serving customers using different methods of supply;
iii. offering different quantities (subject to the exception discussed below).
iv. it constitutes an act of good faith to meet the price of a competitor; or
v. the difference in price is in response to changing market conditions such:
   - response to the deterioration of perishable goods;
   - any action in response to the obsolescence of goods;
   - a sale pursuant to a liquidation or sequestration procedure; or
   - a sale in good faith in discontinuance of business in the goods or services concerned.

of the view that it adds little guidance from a practical point of view as to how differential pricing may impact a small business to *"participate effectively".*

The Draft Regulations do, however, attempt to provide further context in relation to the application of the prohibition against price discrimination. In this regard, the price discrimination provisions, and in particular their applicability to small, medium or HDI owned firms, are not intended to apply to a particular individual firm but rather to a designated class.

Furthermore, the Draft Regulations expressly confirm that the price discrimination provisions are not intended to protect a particular firm regardless of their business acumen or efficiency. In other words, a small business that is unable to participate effectively due to its own inefficiencies will not be protected from the price discrimination provisions.

It is worth emphasizing, however, 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 Amendment Act creates a rebuttable presumption of harm.

The drastic shift in onus from the complainant to the respondent firm to show that differential pricing (as contemplated in sections 9(1)(b) and 9(1)(c)) "*is not likely to have the effect of preventing or lessening competition*" is extremely onerous. This is particularly so, when no evidence of harm to competition is required to be shown. This contrasts significantly with the position in the United States on price discrimination under the Robinson-Patman Act, 1936 which requires harm to competition and not to particular consumers of competitors before an adverse finding will be made.[15]

Furthermore, a reverse-onus on a respondent which is effectively required to prove a negative is highly prejudicial. Particularly as a respondent is unlikely to be well placed to assess whether the prices at which it supplies a particular group of small or HDI owned firms will impede the ability of these firms to participate effectively in the market. It would, therefore, have been more sensible that the onus rests on the complainant.

Accepting that harm to consumers, as opposed to harm to competition, is a standard which is more commonly used, the views of the Organization for Economic Cooperation and Development

[15] See *Brown & Williamson Tobacco Corp*., 509 U.S. 209 (*1993*) (primary-line discrimination) and *Volvo Trucks North America, Inc. V. Reeder-Simco Gmc, Inc*., 546 U.S. 164 (2006) (secondary line discrimination).

("OECD") in relation to price discrimination are, we submit, more suitable. In this regard, the OECD states that, with respect to price discrimination, "*it is the effect on consumers, and not the fairness of the discrimination, that determines the acceptability of the discrimination.*"[16] The amendments to section 9 suggest a departure from this principle.

Accordingly, in light of:

- the low market share threshold applicable to *"dominant"* entities;
- the uncertainty regarding the threshold that must be met in order to sustain a case of prohibited price discrimination;
- the evidentiary burden on a respondent to essentially prove a negative in relation to section 9(3); and
- the threat of an administrative penalty for a first-time offence (potentially on both the South African business and its parent),

the price discrimination provisions pose a material risk to companies in South Africa who have a market share above 35%.

Invariably, most firms engage in some form of price discrimination and furthermore most firms typically sell products/services to small, medium enterprises or firms owned by HDIs. Pro-competitive efficiencies (even those which enhance total consumer welfare) may not be a sufficient defence to an allegation that the pricing differentiation impedes the ability of these firms to participate effectively in the market.

<u>Buyer Power</u>

"Buyer Power" is potentially a misnomer in terms of what is traditionally considered buyer power. The Amendment Act does not in fact refer to *"buyer power"* specifically but rather prohibits all *"dominant entities"* which procure goods or services from small or medium businesses or firms owned by HDPs. This in and of itself is a significant departure from international best practice. Presumably the competition theories of harm which may conceptually arise from "buyer power" necessitate that the respondent in fact has buyer power. If there is, for instance, availability of

[16] See Org. of Econ. Coop. & Dev., Executive Summary of the Roundtable on Price Discrimination, DAF/COMP/M(2016)2/AN N5, (February, 9, 2018), *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2016)2/ANN5&docLanguage=En.

substitute customers then ordinarily the respondent would not (at least not *per se*) possess buyer power.

In terms of the Draft Regulations, a dominant firm, in a sector designated by the Minister[17], is prohibited from imposing unfair prices or trading conditions on *"a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons…".* It is also an offence for the dominant firm to refuse or avoid purchasing from such a supplier.

This includes discounts, rebates, commissions, allowances and credit terms which firms are expressly precluded from contracting out of.

A price/condition will be unfair if it is inferior relative to other suppliers and there is no reasonable rationale for the difference, or where it impedes the ability of a firm to sustainably operate and grow its business. A designated supplier may not be prejudiced based on its size and accordingly volume based differences are not justifiable as a standalone defense.

With regard to '*trading conditions'*, the Draft Regulations set out various examples of terms which are impermissible *vis-à-vis* designated suppliers. These include, *inter alia*, terms which unreasonably transfer risk/costs to the suppliers, are one sided or bear no relation to the objective of the supply agreement and include unfair payment terms.[18]

Furthermore, the prohibition against *"buyer power"* in terms of section 8(4) of the Competition Act applies only to small, medium or HDI owned firms and is not a blanket prohibition. A traditional buyer power case could, however, still be brought in terms of the catch-all prohibition against

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[17] The following have been identified in the Draft Regulations as potential sectors based on international jurisdictions:

- The food and grocery wholesale and retail supply chain (identified in the EU and where large numbers of SMEs exist upstream);
- The apparel retail supply chain (where upstream supply has become increasingly fragmented domestically);
- Online trading platforms (identified increasingly in global debates on competition law in respect of large tech companies);
- The construction supply chain (where sub -contracting relationships with smaller firms are common);
- The financial and insurance supply chain (for instance, in relation to small motor vehicle repair shops or intermediaries) ; and
- The private healthcare supply chain (for instance, in relation to the supply of consumables and even categories of healthcare providers themselves).

[18] Examples of unfair trading terms include:

- Trading without a contract, which imposes uncertainty and risk on the supplier, whilst at the same time denying them standard contractual rights and protections;
- Imposing costs or risks onto the supplier that are not spelt out in a clear and unambiguous manner or quantified within the supply contract;
- Unilateral changes in the supply terms that are detrimental to the supplier;
- Retrospectively changing supply terms of a material nature to the detriment of the supplier;
- Excessively long payment terms;
- An unreasonable transfer of the buyer's costs of promotion and marketing onto the supplier; and
- Transfer of the buyer's risks of wastage or shrinkage onto the supplier where it is not due to the supplier's negligence or fault

abuse of dominance conduct, namely section 8(c) of the Competition Act - which is subject to a rule of reason analysis.

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 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.

It is unfortunate that the Draft Regulations were published after the Amendment Act itself had already been passed by Parliament. At the time of promulgating the Bill (which is the procedural precursor to the passing of an Act), assurances were given that regulations would provide clarity and objectivity in relation to the price discrimination provisions. The Draft Regulations have not, however, addressed the concerns raised by many commentators during the promulgation of the Bill. Instead, the Draft Regulations are now ostensibly being justified on the basis that Parliament has approved the Amendment Act and are, therefore, in keeping with the objectives of the Amendment Act. *This "circular logic"* is a process flaw in the promulgation process. Regardless, it is unlikely that there will be material amendments to the Draft Regulations.

<u>Market Inquiries</u>

Under the current regime, the South African Competition Commission is empowered to conduct market inquiries and, at the conclusion of the market inquiry, present a report together with <u>recommendations</u> to Parliament.

The Amendment Act, however, confers the Competition Commission with broad 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. The only limitation of this power is that divestiture orders must be confirmed by the Tribunal. The Competition Commission cannot impose administrative penalties and parties which are materially affected by any decision taken by the Competition Commission have a right to appeal such a decision to the Tribunal or Competition Appeal Court.

This is a drastic increase in the powers available to the Competition Commission, particularly in light of the fact that the Competition Commission may impose remedies in relation to any feature of the market which impedes, restricts or distorts competition in the market. In this regard, the Competition Commission must consider features of the market which have an "*adverse effect on* *effect on competition on small and medium businesses, or firms controlled or owned by historically disadvantaged persons*".[19]

Importantly, *"Adverse effect"* is not defined although presumably this has a similar meaning to *"participate effectively*" in the market, as discussed in the price discrimination and buyer power sections above.

The *"adverse effects"* is also the threshold to be used when assessing whether there is an impediment, restriction or distortion of competition in the market, a lower threshold than the traditional *"substantial lessening of competition"* (SLC) test.

The departure from a SLC test to an adverse effects-based test, which takes public interest 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.

The Competition Commission can, therefore, potentially circumvent the prosecutorial standards relating to competition law enforcement altogether by initiating a market inquiry as opposed to bringing, say, an abuse of dominance case before the Tribunal.

Conclusion

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 designed to cater for these very goals, as opposed to the highly technical, and admittedly narrow, province of competition law.

In our view, any weakening of the pure economic competition test 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 Amendment Act's overt pursuit of additional and now elevated *"public-interest factors"* will, we submit, negatively impact the public interest itself.[20]

The increased role of public-interest considerations effectively confers on the competition agencies the responsibility of determining the relevant ambit, scope and enforcement of socio-

[19] See section 26 of the Amendment Act.
[20] 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.

economic objectives. These are broad, subjective and may be vastly different depending on whether one is assessing these non-competition objectives in the short or long term.

Further, as we have witnessed in the enforcement of merger control in South Africa, the elevation of public interest factors has now resulted in a more subjective standard. 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*".[21]

It appears likely that the elevation of the public interest component in the assessment of abuse of dominance cases will impede the ability of firms to ensure compliance with the Amendment Act.

Finally, despite the attempt of the Draft Regulations to provide much needed clarity to what are ultimately very subjective thresholds, it is unclear whether the traditional approach and models of economic assessment in abuse of dominance cases will remain unscathed.

[21] J Oxenham, M Currie and A Stargard - Changing Africa's Leading Competition Law Regime: A Populist Departure from International Best Practices. Oxford University Press 2019.