



Comments on Competition Amendment Bill, 2017

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Introduction

1. The Competition Amendment Bill and accompanying Background Note and Explanatory Memorandum, published on 1 December 2017, represents an important and welcome step in strengthening the powers of the competition authorities, taking into account the high levels of concentration and racially skewed ownership and control of the economy. We comment on selected issues related to the Bill.
2. As recognised in the Background Note, creating a more inclusive economy where markets are truly open to wider participation, where competing firms invest in capabilities and improved products in a dynamic process of rivalry, requires a range of policies extending far beyond competition law. It is critical that government puts in place these policies to complement the work of the competition authorities. In the absence of such policies, there is a risk that competition law enforcement is viewed as the 'silver bullet', and unrealistic expectations will not be met such that the authorities may be perceived as failing in the eyes of the public.
3. The research that CCRED has done on barriers to the entry and growth of small firms further highlights the importance of a package of policy measures to open-up the South African economy, in which competition enforcement is one important part.²
4. The concerns in South Africa with high levels of concentration and market power reflect concerns internationally.³ However, South Africa is clearly in a more extreme and untenable position given the apartheid legacy. There are also reasons to believe that barriers to entry are higher and the supra-competitive returns that can be made in South Africa are greater than most other countries. This includes because of, *inter alia*, the small

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² See <https://www.competition.org.za/competition-and-barriers-to-entry/>

³ See Baker and Shapiro (2015); Stiglitz J. (2017) 'Towards a broader view of competition policy' in Bonakele, T, E. Fox and L. Mncube (eds), *Competition Policy for the New Era – Insights from the BRICS Countries*, OUP, 2017. Baker, J. and S. Salop (2015) 'Antitrust, Competition Policy, and Inequality', Working Paper 41, http://digitalcommons.wcl.american.edu/fac_works_papers/41 ; De Loecker, J. and J. Eeckhout (2017) 'The rise of market power and the macroeconomic implications', NBER Working Paper NO 23687.

size of the domestic market, the distance from other industrial economies from which imports can be sourced, and the skewed economic structure. This means that not only is anti-competitive conduct more likely, all else equal, than in many other upper middle-income countries but that the costs of such conduct are likely to be higher and longer lasting.

5. Other developing countries, such as those in ASEAN, as well as other countries on the African continent have embraced a framing of competition in terms of a process of rivalry, and of contraventions in terms of appreciably preventing, distorting, or restricting this process.⁴
6. As emphasised in the Background Note, we believe that it is important that the competition authorities take into account the history and structure of the South African economy in making decisions. In other words, it matters whether the firm in question has a market share of 50% or 80%, how long the position has been held, how high the entry barriers are, and whether the position is being sustained through ongoing investment and innovation to build local productive capabilities, or whether it is a legacy position which it is easy to protect. The logic of taking these considerations into account also follows directly from seeking a competition regime which aims to minimise the likelihood and costs of under-enforcement as well as of over-enforcement.
7. However, the case law indicates that, at least with regard to abuse of dominance, the extent and duration of dominance is not material nor is how the position of dominance was reached and is sustained. It may be argued that the assessment of effects will indirectly reflect these considerations. However, it is likely to be more difficult for a small local company to show effects than for a substantial (and possibly multinational) rival who has perhaps 20 to 30% of the market.

Comment on specific amendments

Abuse of dominance

Excessive pricing

8. The legal precedent to date on excessive pricing in South Africa has tended to raise more questions rather than providing certainty on the approach to be adopted. This is partially due to the complex nature of the cases that have been heard by the courts. The proposed amendments to shift the burden of proof to the respondent, remove the requirement to show detriment to consumers, and the call for the Commission to issue guidelines, are welcome steps to improve enforcement in this area. The removal of the requirement to show detriment to consumers is also important to address pricing by vertically integrated firms that are able to shift profits upstream, and where the customers affected are other businesses rather than end consumers. There are, however, some challenges that may arise.

⁴ Regional competition guidelines produced by ASEAN on competition policy emphasise the competitive process, and the pursuit of fair or effective competition to contribute to improvements in economic efficiency, welfare, growth and development (ASEAN, 2010). With respect to horizontal and vertical agreements the guidelines recommend prohibiting those that appreciably prevent, distort or restrict competition. It is recommended that agreements are evaluated in terms of object or effect, and that hard-core restrictions may be identified. Abuse of dominance is defined in terms of harm to the competition process.

- a. First, shifting the burden of proof to the respondent still requires that the complainant demonstrate a prima facie case and, with the current precedent, it is not clear what would be required for this.
 - b. Second, though the Commission may develop guidelines it is not clear that the Tribunal and the Appeal court will follow said guidelines.
9. We propose that the amendments should consider the type of challenges that have arisen in the excessive pricing cases which have been heard, and consider whether these issues are unique to the two cases or are representative of the type of excessive pricing cases that would typically arise in South Africa. The common thread in the cases against Mittal Steel SA and Sasol Chemical Industries was that both firms had achieved the respective dominant positions due to prior state ownership and extensive state support. These characteristics are consistent with the types of markets where prices will not self-correct and where it is appropriate for the competition authorities to focus. These are markets with high barriers to entry, where the firm's dominant position is entrenched, and where the market position is not a result of ongoing innovation or risk taking by the firm and rather past exclusive rights or state support.⁵
10. This also would also ensure that the objectives and preamble of the Act, particularly with regards to addressing the legacy of past concentrations, are given effect by the provisions of the Act. The proposal is thus that the definition of dominance should take into account the history of state support, as well as whether the dominant firm is investing and building stronger local industrial linkages. In addition, as noted above, the extent of dominance is a relevant factor as there is an evident difference between quasi-monopoly firms and those that just meet the 45% threshold and, as such, the burden of proof should be lessened on most firms and lie with the few firms that can be characterised as 'super dominant'.

Exclusionary conduct

11. Exclusionary conduct is now a broad prohibition, with specified non-exhaustive inclusions, meaning the definition of exclusionary conduct is crucial, which is '[a]n act that impedes or prevents a firm from entering into, participating in or expanding within a market'. This change will increase the deterrence effect and allows the Commission to better take into account the different ways in which firms seek to exclude rivals rather than having to pigeon-hole a firm's evolving exclusionary strategies.
12. The Commission would still be required to weigh-up the anti-competitive effect of the firm's conduct with the technological, efficiency or other pro-competitive gains. This anti-competitive effect now includes 'participation'. We propose that the amendments include a list of factors to be considered when weighing up the evidence similar to those in mergers. In addition, the meaning of 'participation' is not clear and how this differs from entering and/or expanding in a market. It may mean smaller firms are understood to be competitively significant (because of the different product varieties and business models

⁵Motta, M. and A. de Streel (2006) Exploitative and Exclusionary Excessive Prices in EU Law, in Ehlermann, C-D. and I. Atanasiu (eds.) (2006) European Competition Law Annual, 2003: What is an abuse of a dominant position?, Oxford: Hart Publishing.; Vickers, J. (2006) 'How does the prohibition of abuse of dominance fit with the rest of competition policy?' in Ehlermann and Atanasiu (eds); and Evans, D. (2009) 'Why different jurisdictions do not (and should not) adopt the same antitrust rules', Chicago Journal of International Law, Summer, 2009 Symposium: Anti-competitive behaviour and international law

they have) and the exclusion of 'potentially efficient' competitors should be considered. If this is so, then it could be spelt out. It is also not clear why it was decided against using the terminology of 'distorting competition' employed in other jurisdictions.

Discrimination

13. The price discrimination amendments shift the onus onto the dominant firm charging the differential prices to demonstrate that the conduct will not prevent or lessen competition. The effects assessment has also been changed from "substantially preventing or lessening competition" to "preventing or lessening competition" and includes the effect on small businesses and those owned/controlled by HDIs. Furthermore, a penalty is now applicable. These represent substantial changes to the provision.
14. Given the pervasiveness of differential prices, including for many pro-competitive reasons, this proposed amendment will likely lead to very substantial compliance costs on the part of firms which may be viewed as dominant. One way in which this can be lessened is by adopting criteria in the assessment which indicate that the extent and duration of dominance is a relevant consideration, as suggested above. This would mean that super-dominant firms which have held that position for some time will indeed have a greater obligation to ensure their pricing does not discriminate against small business (without good justification). However, firms with shares only slightly above 35%, and thus where customers do have alternative suppliers to which to turn, are less likely to fall foul of the provision.

Mergers

15. The changes to mergers include the consideration of cross-shareholdings and 'creeping mergers', as well as adding HDI ownership to public interest. Broadly, these amendments are welcomed and address recent concerns.

Collusion

16. Two amendments affect the collusion provisions of the Act. First, a penalty may now be imposed for horizontal restrictive practices which substantially prevent, lessen competition but which are not price fixing, market division or bid-rigging (that is, they fall under section 4(1)(a)). Second, there is the addition of dividing markets by allocating market shares to section 4(b)(1). This draws on learnings from recent cases.
17. These are both welcome amendments given the extent of collusion uncovered and the likely use of different strategies of firms to collude in ways which will be more difficult to identify.
18. At the same time, however, there is a perception in markets that any collaboration between competitors can fall foul of the Competition Act, potentially with substantial penalties to pay. It is important to recognise that there may be valuable cooperative and collaborative relationships which should not be deterred. An exemption can be applied for in these circumstances, however, provisions relating to prohibited horizontal practices could enable greater certainty here. For example, a group of small suppliers who cooperate in order to compete more effectively with larger incumbents ought not to be treated as a hard-core cartel, where they account for a very small share of the market and are lowering costs and

prices. Similarly, cooperative or collaborative arrangements to build skills and technological capabilities ought to be distinguished.

19. Guidance is required here, including setting out where circumstances would mean firms should not be penalized (for example, cooperatives where firms are a small proportion of the market or face intensive competition from low cost imports).

Market inquiries

20. The market inquiry provisions give the Competition Commission more extensive powers to analyse how markets are working and the remedies which can be implemented to change the market outcomes. In this, the amendments foresee the Commission taking on a wider role in addressing markets in line with being a 'competition and markets authority', as is the case in other countries such as the Netherlands, the UK and Australia.

21. We believe this is appropriate and, indeed, necessary given the problems in the South African economy. The Commission has built-up considerable expertise in market analysis and, although not a specialist on any particular market as a sector regulator is, the Commission is also removed from the ongoing lobbying and engagement with powerful interests in a given sector to which a sector regulator is subject.

22. We have three main concerns regarding market inquiries.

- a. First, how market inquiries can be initiated is critical to the role they will play. In the amendments the Minister can *require* the Commission to undertake a market inquiry (which presumably also includes defining the scope of the inquiry). This needs to be qualified, not least because of the competing demands on the Commission and the need for it to have the resources to properly undertake the inquiry. In addition, the Commission ought to have the express latitude to determine the scope of the inquiry. Market inquiries are likely to be more effective when they are focused on a particular set of issues in an identified market or markets. The public pressure on a Minister is likely to push for a very wide range of issues to be examined in a broad set of markets.
- b. Consideration could be given to how competition concerns, especially the concerns of small-scale entrepreneurs from historically disadvantaged groups and low-income consumers, can be brought to the Commission's attention for market inquiries. A possible route would be to recognise representative organisations SMEs and consumers as being 'super-complainants' for these purposes, bringing issues to the Commission's attention which could then be screened by the Commission in a transparent way.⁶ This would have the added benefit of raising awareness of the Commission's work and bringing it closer to communities.
- c. Second, the resources, expertise and capacity for the Commission to undertake inquiries is critical for their success. The major demand on the Commission of inquiries is evident in the inquiries conducted in recent years. Consideration also

⁶ The UK has designated certain consumer bodies as being able to lodge super-complaints relating to where 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers'. A market study is one possible course of action. See <https://www.gov.uk/government/publications/what-are-super-complaints/what-are-super-complaints>

needs to be given to how the Commission can draw in additional expertise, as required.

- d. Third, the obligation on the Commission to consult with other regulators including government departments, where relevant, could be spelt out more clearly. There may be a tendency for the legislation governing regulators and the Commission to try to trump the other, in successive amendment acts, rather than clarifying the complementary roles of the different institutions. As we understand that the Commission is able to recommend to any minister or regulatory authority what actions should be taken following an inquiry, it is important to ensure that there is appropriate consultation during the process so that the other institution is, as far as possible, on board.