(13 February 2020 – to date)

[This is the **current** version and applies as from **13 February 2020**, i.e. the date of commencement of further sections of the Competition Amendment Act 18 of 2018 – **to date**]

COMPETITION ACT 89 OF 1998

(Gazette No. 19412, Notice No. 1392 dated 30 October 1998. Commencement date: 30 November 1998 – unless otherwise indicated [Proc. No. R121, Gazette No. 19557]. Commencement date of remaining sections – 1 September 1999 [Proc. No. R88, Gazette No. 20401])

as amended by:

Competition Amendment Act 35 of 1999 – Government Notice 513 in Government Gazette 19981 dated 30 April 1999. Commencement date: 19 August 1999 – items 4F(1) and 4F(2) of section 1(d) of the said Act [Proc. No. R90, Gazette No. 20403]. Commencement of remaining sections – 1 September 1999 [Proc. No. R89, Gazette No. 20402]

Competition Amendment Act 15 of 2000 – Government Notice 528 in Government Gazette 21234 dated 26 May 2000. Commencement date: 1 September 2000 [Proc. No. R51, Gazette No. 21504].

Competition Second Amendment Act 39 of 2000 – Government Notice 1354 in Government Gazette 21880 dated 13 December 2000. Commencement date: 1 February 2001 [Proc. No. 12, Gazette No. 22025].

Co-operative Banks Act 40 of 2007 – Published under Government Notice 217 in Government Gazette 30802 dated 22 February 2008. Commencement date: 1 August 2008 [GN 818, Gazette No. 31292]

Competition Amendment Act 1 of 2009 – Government Notice 875 in Government Gazette 32533 dated 28 August 2009. Commencement date of section 6: 1 April 2013 [Proc. No. 5, Gazette No. 36221]

Financial Markets Act 19 of 2012 – Government Notice 70 in Government Gazette 36121 dated 1 February 2013. Commencement date: 3 June 2013 [Proc. No. 12, Gazette No. 36485]

Competition Amendment Act 1 of 2009 – Government Notice 875 in Government Gazette 32533 dated 28 August 2009. Commencement date of section 12, insofar as it relates to section 73A(1), (2), (3) and (4): 1 May 2016 [Proc. No. 25, Gazette No. 39952 dated 22 April 2016]

Competition Amendment Act 1 of 2009 – Government Notice 875 in Government Gazette 32533 dated 28 August 2009. Commencement date of section 13: 9 June 2016 [Proc. No. 36, Gazette No. 40057 dated 9 June 2016]

Competition Amendment Act 18 of 2018 - Government Notice 175 in Government Gazette 42231 dated 14 February 2019. Commencement date of certain sections: 12 July 2019 – unless otherwise indicated [Proc. No. 46 in Gazette 42578 dated 12 July 2019]

Competition Amendment Act 18 of 2018 - Government Notice 175 in Government Gazette 42231 dated 14 February 2019. Commencement date of further sections: 13 February 2020 – unless otherwise indicated [Proc. No. 10 in Gazette 43018 dated 13 February 2020]

***Publisher's note** - The principal Act is hereby amended by section 44 of Act 18 of 2018 by the substitution for the expression "excessive price", wherever it occurs, of the expression "*excessive price*".*

(English text signed by the President.)
(Assented to 20 October 1998.)

ACT

To provide for the establishment of a Competition Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers; and for the establishment of a Competition Tribunal responsible to adjudicate such matters; and for the establishment of a Competition Appeal Court; and for related matters.

PREAMBLE

The people of South Africa recognise:

That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.

That the economy must be open to greater ownership by a greater number of South Africans.

That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.

That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans.

IN ORDER TO -

provide all South Africans equal opportunity to participate fairly in the national economy;

achieve a more effective and efficient economy in South Africa;

provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;

create greater capability and an environment for South Africans to compete effectively in international markets;

restrain particular trade practices which undermine a competitive economy;

regulate the transfer of economic ownership in keeping with the public interest;

establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic.

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

(First paragraph of the Preamble substituted by section 22 of Act 39 of 2000)

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CHAPTER 1
DEFINITIONS, INTERPRETATION, PURPOSE AND APPLICATION OF ACT

1. Definitions and interpretation

(1) In this Act-

"**acquiring firm**" means a *firm*-

(a) that, as a result of a transaction in any circumstances set out in section 12, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another *firm*;

(b) that has direct or indirect control over the whole or part of the business of a *firm* contemplated in paragraph (a); or

(c) the whole or part of whose business is directly or indirectly controlled by a *firm* contemplated in paragraph (a) or (b);

(Definition of "acquiring firm" inserted by section 1(a) of Act 39 of 2000)

"**agreement**", when used in relation to a *prohibited practice*, includes a contract, arrangement or understanding, whether or not legally enforceable;

(Definition of "agreement" substituted by section 1(b) of Act 39 of 2000)

"**average avoidable cost**" means the sum of all costs, including variable costs and product-specific fixed costs, that could have been avoided if the firm ceased producing an identified amount of additional output, divided by the quantity of the additional output;

(Definition of "average avoidable cost" inserted by section 1(a) of Act 18 of 2018)

"**average variable cost**" means the sum of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of that product;

(Definition of "average variable cost" inserted by section 1(a) of Act 18 of 2018)

"**civil court**" means a High Court or Magistrates Court, as referred to in sections 166(c) and (d) of the *Constitution;*

"**complainant**" means a person who has submitted a complaint in terms of section 49B(2)(b);

(Definition of "complainant" inserted by section 1(c) of Act 39 of 2000)

"**confidential information**" means trade, business or industrial information that belongs to a *firm,* has a particular economic value, and is not generally available to or known by others;

"**concerted practice**" means co-operative or co-ordinated conduct between *firms,* achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an *agreement;*

"**Constitution**" means the *Constitution* of the Republic of South Africa, 1996 (Act No. 108 of 1996);

"**essential facility**" means an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers;

"**excessive price**" …….

(Definition of "excessive price" deleted by section 1(b) of Act 18 of 2018)

"**exclusionary act**" means an act that impedes or prevents a firm from entering into, participating in or expanding within a market;

(Definition of "exclusionary act" substituted by section 1(c) of Act 18 of 2018)

"**firm**" includes a person, partnership or a trust;

"**goods or services**", when used with respect to particular *goods or services,* includes any other *goods or services* that are reasonably capable of being substituted for them, taking into account ordinary commercial practice and geographical, technical and temporal constraints;

"**horizontal relationship**" means a relationship between competitors;

"**interest**" …

(Definition of "interest" deleted by section 1(d) of Act 39 of 2000)

"**margin squeeze**" occurs when the margin between the price at which a vertically integrated firm, which is dominant in an input market, sells a downstream product, and the price at which it sells the key input to competitors, is too small to allow downstream competitors to participate effectively;

(Definition of "margin squeeze" inserted by section 1(e) of Act 18 of 2018)

"**market power**" means the power of a *firm* to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers;

"**medium-sized business**" means a medium-sized firm as determined by the Minister by notice in the *Gazette*;

(Definition of "medium-sized business" inserted by section 1(f) of Act 18 of 2018)

"**members' interest**" has the meaning set out in the Close Corporations Act, 1984 (Act No. 69 of 1984);

(Definition of "members' interest" inserted by section 1(e) of Act 39 of 2000)

"**Minister**" means the Minister responsible for the administration of this Act;

(Definition of "Minister" substituted by section 1(g) of Act 18 of 2018)

"**organ of state**" has the meaning set out in section 239 of the *Constitution;*

"**participate**" refers to the ability of or opportunity for firms to sustain themselves in the market, and "**participation**" has a corresponding meaning;

(Definition of "participate" inserted by section 1(h) of Act 18 of 2018)

"**party to a merger**" means an *acquiring firm* or a *target firm*;

(Definition of "party to a merger" inserted by section 1(f) of Act 39 of 2000)

"**predatory prices**" means prices for goods or services below the firm's average avoidable cost or average variable cost;

(Definition of "predatory prices" inserted by section 1(i) of Act 18 of 2018)

"**premises**" includes land, any building, structure, vehicle, ship, boat, vessel, aircraft or container;

"**prescribed**" means *prescribed* by *regulation*;

(Definition of "prescribed" substituted by section 1(g) of Act 39 of 2000)

"**primary acquiring firm**" means any *firm* contemplated in paragraph (a) of the definition of "acquiring firm";

(Definition of "primary acquiring firm" inserted by section 1(h) of Act 39 of 2000)

"**primary target firm**" means any *firm* contemplated in paragraph (a) or (b) of the definition of "target firm";

(Definition of "primary target firm" inserted by section 1(h) of Act 39 of 2000)

"**private dwelling**" means any part of a structure that is occupied as a residence, or any part of a structure or outdoor living area that is accessory to, and used wholly for the purposes of, a residence;

"**prohibited practice**" means a practice prohibited in terms of Chapter 2;

(Definition of "prohibited practice" substituted by section 1(j) of Act 18 of 2018)

"**public regulation**" means any national, provincial or local government legislation or subordinate legislation, or any license, tariff, directive or similar authorisation issued by a *regulatory authority* or pursuant to any statutory authority;

"**registered trade union**" means a trade union registered in terms of section 96 of the Labour Relations Act, 1995 (Act No. 66 of 1995);

(Definition of "registered trade union" inserted by section 1(i) of Act 39 of 2000)

"**regulation**" means a *regulation* made under *this Act;*

"**regulatory authority**" means an entity established in terms of national, provincial or local government legislation or subordinate legislation responsible for regulating an industry, or sector of an industry;

"**respondent**" means a *firm* against whom a complaint of a *prohibited practice* has been initiated in terms of *this Act;*

"**restrictive horizontal practice**" means any practice listed in section 4;

"**restrictive vertical practice**" means any practice listed in section 5;

"**small and medium business**" means either a small business or a medium-sized business;

(Definition of "small and medium business" inserted by section 1(k) of Act 18 of 2018)

"**small business**" means a small firm determined by the Minister by notice in the *Gazette*, or if no determination has been made, as set out in the National Small Business Act, 1996 (Act No. 102 of 1996);

(Definition of "small business" substituted by section 1(l) of Act 18 of 2018)

"**target firm**" means a *firm*-

(a) the whole or part of whose business would be directly or indirectly controlled by an *acquiring firm* as a result of a transaction in any circumstances set out in section 12;

(b) that, as a result of a transaction in any circumstances set out in section 12, would directly or indirectly transfer direct or indirect control of the whole or part of, its business to an *acquiring firm*; or

(c) the whole or part of whose business is directly or indirectly controlled, by a *firm* contemplated in paragraph (a) or (b);

(Definition of "target firm" inserted by section 1(j) of Act 39 of 2000)

"**this Act**" includes the regulations and Schedules;

"**vertical relationship**" means the relationship between a *firm* and its suppliers, its customers or both.

"**workers**" means employees as defined in the Labour Relations Act, 1995 (Act No. 66 of 1995), and in the context of ownership, refers to ownership of a broad base of workers;

(Definition of "small and medium business" inserted by section 1(m) of Act 18 of 2018)

(1A) When a particular number of business days is provided for performing an act, the number of days must be calculated by-

(a) excluding the first day, any public holiday, Saturday and Sunday; and

(b) including the last day.

(Section 1(1A) inserted by section 1(k) of Act 39 of 2000)

(2) This Act must be interpreted-

(a) in a manner that is consistent with the *Constitution* and gives effect to the purposes set out in section 2; and

(b) in compliance with the international law obligations of the Republic.

(3) Any person interpreting or applying *this Act* may consider appropriate foreign and international law.

2. Purpose of Act

The purpose of *this Act* is to promote and maintain competition in the Republic in order-

(a) to promote the efficiency, adaptability and development of the economy;

(b) to provide consumers with competitive prices and product choices;

(c) to promote employment and advance the social and economic welfare of South Africans;

(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;

(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

3. Application of Act

(1) This Act applies to all economic activity within, or having an effect within, the Republic, except-

(a) collective bargaining within the meaning of section 23 of the *Constitution*, and the Labour Relations Act, 1995 (Act No. 66 of 1995);

(b) a collective agreement, as defined in section 213 of the Labour Relations Act, 1995; and

(c) …

(Section 3(1)(c) deleted by section 2(a) of Act 39 of 2000)

(d) …

(Section 3(1)(d) deleted by section 2(a) of Act 39 of 2000)

(e) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.

(1A)

(a) In so far as *this Act* applies to an industry, or sector of an industry, that is subject to the jurisdiction of another *regulatory authority*, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of *this Act, this Act* must be construed as establishing concurrent jurisdiction in respect of that conduct.

(b) The manner in which the concurrent jurisdiction is exercised in terms of *this Act* and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21(1)(h) and 82(1) and (2).

(Section 3(1A) inserted by section 2(b) of Act 39 of 2000)

(2) For all purposes of *this Act,* a person is a historically disadvantaged person if that person-

(a) is one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race;

(b) is an association, a majority of whose members are individuals referred to in paragraph (a);

(c) is a juristic person other than an association, and individuals referred to in paragraph (a) own and control a majority of its issued share capital or members' *interest* and are able to control a majority of its votes; or

(d) is a juristic person or association, and persons referred to in paragraph (a), (b) or (c) own and control a majority of its issued share capital or members' *interest* and are able to control a majority of its votes.

CHAPTER 2
PROHIBITED PRACTICES

PART A
RESTRICTIVE PRACTICES

4. Restrictive horizontal practices prohibited

(1) An *agreement* between, or *concerted practice* by, *firms,* or a decision by an association of *firms,* is prohibited if it is between parties in a *horizontal relationship* and if-

(Words preceding section 4(1)(a) substituted by section 3(a) of Act 39 of 2000)

(a) it has the effect of substantially preventing or lessening competition in a market, unless a party to the *agreement,* concerted practice, or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect; or

(Section 4(1)(a) substituted by section 3(b) of Act 39 of 2000)

(b) it involves any of the following *restrictive horizontal practices:*

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of *goods or services;* or

(iii) collusive tendering.

(2) An *agreement* to engage in a *restrictive horizontal practice* referred to in subsection (1)(b) is presumed to exist between two or more *firms* if-

(a) anyone of those *firms* owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and

(Section 4(2)(a) substituted by section 3(c) of Act 39 of 2000)

(b) any combination of those *firms* engages in that *restrictive horizontal practice.*

(3) A presumption contemplated in subsection (2) may be rebutted if *a firm,* director or shareholder concerned establishes that a reasonable basis exists to conclude that the practice referred to in subsection (1)(b) was a normal commercial response to conditions prevailing in that market.

(4) For purposes of subsections (2) and (3), "director" means-

(Words preceding of section 4(4)(a) substituted by section 3(d) of Act 39 of 2000)

(a) a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973);

(b) a member of a close corporation as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984);

(c) a trustee of a trust; or

(d) a person holding an equivalent position in *a firm.*

(5) The provisions of subsection (1) do not apply to an *agreement* between, or *concerted practice* engaged in by-

(a) a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary or any combination of them; or

(b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a).

(Commencement date of this section: 1 September 1999)

5. Restrictive vertical practices prohibited

(1) An *agreement* between parties in a *vertical relationship* is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the *agreement* can prove that any technological, efficiency or other pro-competitive, gain resulting from that *agreement* outweighs that effect.

(2) The practice of minimum resale price maintenance is prohibited.

(3) Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a *good or service* provided-

(a) the supplier or producer makes it clear to the reseller that the recommendation is not binding; and

(b) if the product has its price stated on it, the words "recommended price" appear next to the stated price.

(Commencement date of this section: 1 September 1999)

PART B
ABUSE OF A DOMINANT POSITION

6. Restrictive application of Part

(1) The *Minister*, in consultation with the Competition Commission, must determine-

(a) a threshold of annual turnover, or assets, in the Republic, either in general or in relation to specific industries, below which this Part does not apply to a *firm*; and

(b) a method for the calculation of annual turnover or assets to be applied in relation to that threshold.

(2) The *Minister* may make a new determination in terms of subsection (1) in consultation with the Competition Commission.

(3) Before making a determination contemplated in this section, the *Minister*, in consultation with the Competition Commission, must publish in the *Gazette* a notice-

(a) setting out the proposed threshold and method of calculation for purposes of this section; and

(b) inviting written submissions on that proposal.

(4) Within six months after publishing a notice in terms of subsection (3), the *Minister*, in consultation with the Competition Commission, must publish in the *Gazette* a notice-

(a) setting out the threshold and method of calculation for purposes of this section; and

(b) the effective date of that threshold.

(Section 6 substituted by section 4 of Act 39 of 2000)

7. Dominant firms

A firm is dominant in a market if-

(a) it has at least 45% of that market;

(b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have *market power;* or

(c) it has less than 35% of that market, but has *market power.*

(Commencement date of this section: 1 September 1999)

8. Abuse of dominance prohibited

(1) It is prohibited for a dominant firm to—

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

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

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

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act—

(i) requiring or inducing a supplier or customer to not deal with a competitor;

(ii) refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible;

(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;

(iv) selling goods or services at predatory prices;

(v) buying-up a scarce supply of intermediate goods or resources required by a competitor; or

(vi) engaging in a margin squeeze.

(2) If there is a *prima facie* case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable.

(3) Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include—

(a) the respondent's price-cost margin, internal rate of return, return on capital invested or profit history;

(b) the respondent's prices for the goods or services—

(i) in markets in which there are competing products;

(ii) to customers in other geographic markets;

(iii) for similar products in other markets; and

(iv) historically;

(c) relevant comparator firm's prices and level of profits for the goods or services in a competitive market for those goods or services;

(d) the length of time the prices have been charged at that level;

(e) the structural characteristics of the relevant market, including the extent of the respondent's market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the respondent's own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market; and

(f) any regulations made by the Minister, in terms of section 78 regarding the calculation and determination of an excessive price.

(4)

(a) It is prohibited for a dominant firm in a sector designated by the Minister in terms of paragraph (d) to directly or indirectly, require from or impose on a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons, unfair—

(i) prices; or

(ii) other trading conditions.

(b) It is prohibited for a dominant firm in a sector designated by the Minister in terms of paragraph (d) to avoid purchasing, or refuse to purchase, goods or services from a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons in order to circumvent the operation of paragraph (a).

(c) If there is a prima facie case of a contravention of paragraph (a) or (b), the dominant firm alleged to be in contravention must show that—

(i) in the case of paragraph (a), the price or other trading condition is not unfair; and

(ii) in the case of paragraph (b), it has not avoided purchasing, or refused to purchase, goods or services from a supplier referred to in paragraph (b) in order to circumvent the operation of paragraph (a).

(d) The Minister must, in terms of section 78, make regulations—

(i) designating the sectors, and in respect of firms owned or controlled by historically disadvantaged persons, the benchmarks for determining the firms, to which this subsection will apply; and

(ii) setting out the relevant factors and benchmarks in those sectors for determining whether prices and other trading conditions contemplated in paragraph (a) are unfair.

(Commencement date of section 8(4) as added by section 5 of Act 18 of 2018: 13 February 2020.)

(Section 8 substituted by section 5 of Act 18 of 2018.)
(Commencement date of this section: 1 September 1999)

9. Price discrimination by dominant firm as seller prohibited

(Heading of section 9 substituted by section 6(a) of Act 18 of 2018, with effect from 13 February 2020.)

(1) An action by a dominant *firm,* as the seller of *goods or services,* is prohibited price discrimination, if-

(a) it is likely to have the effect of—

(i) substantially preventing or lessening competition; or

(ii) impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively;

(Section 9(1)(a) substituted by section 6(b) of Act 18 of 2018, with effect from 13 February 2020.)

(b) it relates to the sale, in equivalent transactions, of *goods or services* of like grade and quality to different purchasers; and

(c) it involves discriminating between those purchasers in terms of-

(i) the price charged for the *goods or services;*

(ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of *goods or services;*

(iii) the provision of services in respect of the *goods or services;* or

(iv) payment for services provided in respect of the *goods* or *services.*

(1A) It is prohibited for a dominant firm to avoid selling, or refuse to sell, goods or services to a purchaser that is a small and medium business or a firm controlled or owned by historically disadvantaged persons in order to circumvent the operation of subsection (1)(a)(ii).

(Section 9(1A) inserted by section 6(c) of Act 18 of 2018, with effect from 13 February 2020.)

(2) Despite subsection (1), but subject to subsection (3), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of subsection (1) is not prohibited price discrimination if the dominant firm establishes that the differential treatment—

(a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from—

(i) the differing places to which goods or services are supplied to different purchasers;

(ii) methods by which goods or services are supplied to different purchasers; or

(iii) quantities in which goods or services are supplied to different purchasers;

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

(c) is in response to changing conditions affecting the market for the goods or services concerned, including—

(i) any action in response to the actual or imminent deterioration of perishable goods;

(ii) any action in response to the obsolescence of goods;

(iii) a sale pursuant to a liquidation or sequestration procedure; or

(iv) a sale in good faith in discontinuance of business in the goods or services concerned.

(Section 9(2) substituted by section 6(d) of Act 18 of 2018, with effect from 13 February 2020.)

(3) If there is a *prima facie* case of a contravention of section (1)(a)(ii)—

(a) subsection (2)(a)(iii) is not applicable; and

(b) the dominant firm must, subject to regulations issued under section 9(4), show that its action did not impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to participate effectively.

(Section 9(3) added by section 6(e) of Act 18 of 2018, with effect from 13 February 2020.)

(3A) If there is a *prima facie* case of a contravention of subsection (1A), the dominant firm alleged to be in contravention must show that it has not avoided selling, or refused to sell, goods or services to a purchaser referred to in subsection (1A) in order to circumvent the operation of subsection (1)(a)(ii).

(Section 9(3A) added by section 6(e) of Act 18 of 2018, with effect from 13 February 2020.)

(4) The Minister must make regulations in terms of section 78—

(a) to give effect to this section, including the benchmarks for determining the application of this section to firms owned and controlled by historically disadvantaged persons; and

(b) setting out the relevant factors and benchmarks for determining whether a dominant firm's action is price discrimination that impedes the participation of small and medium businesses and firms controlled or owned by historically disadvantaged persons.

(Section 9(4) added by section 6(e) of Act 18 of 2018, with effect from 13 February 2020.)

(Commencement date of this section: 1 September 1999)

PART C
EXEMPTIONS FROM APPLICATION OF CHAPTER

10. Exemptions

(1) *A firm* may apply to the Competition Commission to exempt from the application of this Chapter-

(a) an *agreement* or practice, if that *agreement* or practice meets the requirements of subsection (3); or

(b) a category of *agreements* or practices, if that category of *agreements* or practices meets the requirements of subsection (3).

(2) Upon receiving an application in terms of subsection (1), the Competition Commission must-

(a) grant a conditional or unconditional exemption for a specified term, if the *agreement* or practice concerned, or category of *agreements* or practices concerned, meets the requirements of subsection (3); or

(b) refuse to grant an exemption, if –

(i) the *agreement* or practice concerned, or category of *agreements* or practices concerned, does not meet the requirements of subsection (3); or

(ii) the *agreement* or practice, or category of *agreements* or practices, does not constitute a *prohibited practice* in terms of this Chapter.

(3) The Competition Commission may grant an exemption in terms of subsection (2)(a) only if-

(a) any restriction imposed on the *firms* concerned by the *agreement* or practice concerned, or category of *agreements* or practices concerned, is required to attain an objective mentioned in paragraph (b); and

(b) the *agreement* or practice concerned, or category of *agreements* or practices concerned, contributes to any of the following objectives:

(i) maintenance or promotion of exports;

(ii) promotion of the effective entry into, participation in or expansion within a market by small and medium businesses, or firms controlled or owned by historically disadvantaged persons;
(Section 10(3)(b)(ii) substituted by section 7(b) of Act 18 of 2018)

(iii) change in productive capacity necessary to stop decline in an industry;
(Section 10(3)(b)(iii) amended by section 7(c) of Act 18 of 2018)

(iv) the economic development, growth, transformation or stability of any industry designated by the Minister, after consulting the Minister responsible for that industry; or
(Section 10(3)(b)(iv) substituted by section 7(c) of Act 18 of 2018)

(v) competitiveness and efficiency gains that promote employment or industrial expansion.
(Section 10(3)(b)(v) added by section 7(d) of Act 18 of 2018)

(4) A *firm* may apply to the Competition Commission to exempt from the application of this Chapter an *agreement* or practice, or category of *agreements* or practices, that relates to the exercise of intellectual property rights, including a right acquired or protected in terms of the Performers' Protection Act, 1967 (Act No. 11 of 1967), the Plant Breeders' Rights Act, 1976 (Act No. 15 of 1976), the Patents Act, 1978 (Act No. 57 of 1978), the Copyright Act, 1978 (Act No. 98 of 1978), the Trade Marks Act, 1993 (Act No. 194 of 1993), and the Designs Act, 1993 (Act No. 195 of 1993).

(4A) Upon receiving an application in terms of subsection (4), the Competition Commission may grant an exemption for a specified term.

(5) The Competition Commission may revoke an exemption granted in terms of subsection (2)(a) or subsection (4A) if-

(a) the exemption was granted on the basis of false or incorrect information;

(b) a condition for the exemption is not fulfilled; or

(c) the reason for granting the exemption no longer exists.

(6) Before granting an exemption in terms of subsection (2) or (4A), or revoking an exemption in terms of subsection (5), the Competition Commission -

(a) must give notice in the *Gazette* of the application for an exemption, or of its intention to revoke that exemption;

(b) must allow interested parties 20 business days from the date of that notice to make written representations as to why the exemption should not be granted or revoked; and

(c) may conduct an investigation into the *agreement* or practice concerned, or category of *agreements* or practices concerned.

(7) The Competition Commission, by notice in the *Gazette, must* give notice of any exemption granted, refused or revoked in terms of this section.

(8) The *firm* concerned, or any other person with a substantial financial interest affected by a decision of the Competition Commission in terms of subsection (2), (4A) or (5), may appeal that decision to the Competition Tribunal, in the *prescribed* manner.

(9) At any time after refusing to grant an exemption in terms of subsection (2)(b)(ii), the Competition Commission-

(a) may withdraw its notice of refusal to grant the exemption, in the prescribed manner; and

(b) if it does withdraw its notice of refusal, must reconsider the application for exemption.

(10) The Minister may, after consultation with the Competition Commission, and in order to give effect to the purposes of this Act as set out in section 2, issue regulations in terms of section 78 exempting a category of agreements or practices from the application of this Chapter.

(Section 10(10) added by section 7(e) of Act 18 of 2018)

(Section 10 substituted by section 5 of Act 39 of 2000)

(Commencement date of this section: 1 September 1999)

CHAPTER 3
MERGER CONTROL

11. Thresholds and categories of mergers

(1) The *Minister*, in consultation with the Competition Commission, must determine-

(a) a lower and a higher threshold of combined annual turnover or assets, or a lower and a higher threshold of combinations of turnover and assets, in the Republic, in general or in relation to specific industries, for purposes of determining categories of mergers contemplated in subsection (5); and

(b) a method for the calculation of annual turnover or assets to be applied in relation to each of those thresholds.

(2) The *Minister* may make a new determination in terms of subsection (1) in consultation with the Competition Commission.

(3) Before making a determination contemplated in this section, the *Minister*, in consultation with the Competition Commission, must publish in the *Gazette* a notice-

(a) setting out the proposed threshold and method of calculation for purposes of this section; and

(b) inviting written submissions on that proposal.

(4) Within six months after publishing a notice in terms of subsection (3), the *Minister*, in consultation with the Competition Commission, must publish in the *Gazette* a notice-

(a) setting out the new threshold and method of calculation for purposes of this section; and

(b) the effective date of that threshold.

(5) For purposes of this Chapter-

(a) **'a small merger'** means a merger or proposed merger with a value at or below the lower threshold established in terms of subsection (1)(a);

(b) **'an intermediate merger'** means a merger or proposed merger with a value between the lower and higher thresholds established in terms of subsection (1)(a); and

(c) **'a large merger'** means a merger or proposed merger with a value at or above the higher threshold established in terms of subsection (1)(a).

12. Merger defined

(1)

(a) For purposes of *this Act*, a merger occurs when one or more *firms* directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another *firm*.

(b) A merger contemplated in paragraph (a) may be achieved in any manner, including through-

(i) purchase or lease of the shares, an interest or assets of the other *firm* in question; or

(ii) amalgamation or other combination with the other *firm* in question.

(2) A person controls a *firm* if that person-

(a) beneficially owns more than one half of the issued share capital of the *firm*;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the *firm*, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;

(c) is able to appoint or to veto the appointment of a majority of the directors of the *firm*;

(d) is a holding company, and the *firm* is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);

(e) in the case of a *firm* that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of a close corporation, owns the majority of *members' interest* or controls directly or has the right to control the majority of members' votes in the close corporation; or

(g) has the ability to materially influence the policy of the *firm* in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

12A. Consideration of mergers

(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and if it appears that the merger is likely to substantially prevent or lessen competition, then determine—

(a) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(b) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

(Section 12A(1) substituted by section 9(a) of Act 18 of 2018)

(1A) Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

(Section 12A(1A) inserted by section 9(b) of Act 18 of 2018)

(2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the *firms* in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including-

(a) the actual and potential level of import competition in the market;

(b) the ease of entry into the market, including tariff and regulatory barriers;

(c) the level and trends of concentration, and history of collusion, in the market;

(d) the degree of countervailing power in the market;

(e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;

(f) the nature and extent of vertical integration in the market;

(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail;

(Section 12A(2)(g) substituted by section 9(c) of Act 18 of 2018)

(h) whether the merger will result in the removal of an effective competitor;

(Section 12A(2)(h) substituted by section 9(c) of Act 18 of 2018)

(i) the extent of ownership by a party to the merger in another firm or other firms in related markets;

(Section 12A(2)(i) added by section 9(d) of Act 18 of 2018)

(j) the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and

(Section 12A(2)(j) added by section 9(d) of Act 18 of 2018)

(k) any other mergers engaged in by a party to a merger for such period as may be stipulated by the Competition Commission.

(Section 12A(2)(k) added by section 9(d) of Act 18 of 2018)

(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on-

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;

(Section 12A(3)(c) substituted by section 9(e) of Act 18 of 2018)

(d) the ability of national industries to compete in international markets; and

(Section 12A(3)(d) substituted by section 9(e) of Act 18 of 2018)

(e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

(Section 12A(3)(e) added by section 9(f) of Act 18 of 2018)

13. Small merger notification and implementation

(1) A party to a small merger-

(a) is not required to notify the Competition Commission of that merger unless the Commission requires it to do so in terms of subsection (3); and

(b) may implement that merger without approval, unless required to notify the Competition Commission in terms of subsection (3).

(2) A party to a small merger may voluntarily notify the Competition Commission of that merger at any time.

(3) Within six months after a small merger is implemented, the Competition Commission may require the parties to that merger to notify the Commission of that merger in the *prescribed* manner and form if, in the opinion of the Commission, having regard to the provisions of section 12A, the merger-

(a) may substantially prevent or lessen competition; or

(b) cannot be justified on public interest grounds.

(4) A *party to a merger* contemplated in subsection (3) may take no further steps to implement that merger until the merger has been approved or conditionally approved.

(5) Within 20 business days after all parties to a small merger have fulfilled all their notification requirements in the *prescribed* manner and form, the Competition Commission-

(a) may extend the period in which it has to consider the proposed merger by a single period not exceeding 40 business days and, in that case, must issue an extension certificate to any party who notified it of the merger; or

(b) after having considered the merger in terms of section 12A, must issue a certificate in the *prescribed* form-

(i) approving the merger;

(ii) approving the merger subject to any conditions;

(iii) prohibiting implementation of the merger, if it has not been implemented; or

(iv) declaring the merger to be prohibited.

(6) If, upon the expiry of the 20 business day period provided for in subsection (5), the Competition Commission has not issued any of the certificates referred to in that subsection or, upon the expiry of an extension period contemplated in subsection (5)(a), the Commission has not issued a certificate referred to in subsection (5)(b), the merger must be regarded as having been approved, subject to section 15.

(7) The Competition Commission must-

(a) publish a notice of the decision in the *Gazette*; and

(b) issue written reasons for the decision if-

(i) it prohibits or conditionally approves the merger; or

(ii) requested to do so by a party to the merger.

13A. Notification and implementation of other mergers

(1) A party to an intermediate or a large merger must notify the Competition Commission of that merger, in the *prescribed* manner and form.

(2) In the case of an intermediate or a large merger, the *primary acquiring firm* and the *primary target firm* must each provide a copy of the notice contemplated in subsection (1) to-

(a) any *registered trade union* that represents a substantial number of its employees; or

(b) the employees concerned or representatives of the employees concerned, if there are no such *registered trade unions*.

(3) The parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17.

13B. Merger investigations

(1) The Competition Commission may direct an inspector to investigate any merger, and may designate one or more persons to assist the inspector.

(2) The Competition Commission may require any *party to a merger* to provide additional information in respect of the merger.

(3) Any person, whether or not a party to or a participant in merger proceedings, may voluntarily file any document, affidavit, statement or other relevant information in respect of that merger.

14. Competition Commission intermediate merger proceedings

(1) Within 20 business days after all parties to an intermediate merger have fulfilled all their notification requirements in the *prescribed* manner and form, the Competition Commission-

(a) may extend the period in which it has to consider the proposed merger by a single period not exceeding 40 business days and, in that case, must issue an extension certificate to any party who notified it of the merger; or

(b) after having considered the merger in terms of section 12A, must issue a certificate in the *prescribed* form-

(i) approving the merger;

(ii) approving the merger subject to any conditions; or

(iii) prohibiting implementation of the merger.

(2) If, upon the expiry of the 20 business day period provided for in subsection (1), the Competition Commission has not issued any of the certificates referred to in that subsection or, upon the expiry of an extension period contemplated in subsection (1)(a), the Commission has not issued a certificate referred to in subsection (1)(b), the merger must be regarded as having been approved, subject to section 15.

(3) The Competition Commission must-

(a) publish a notice of the decision in the *Gazette*; and

(b) issue written reasons for the decision if-

(i) it prohibits or conditionally approves the merger; or

(ii) requested to do so by a party to the merger.

14A. Competition Commission large merger proceedings

(1) After receiving notice of a large merger, the Competition Commission-

(a) must refer the notice to the Competition Tribunal and to the *Minister*; and

(b) within 40 business days after all parties to a large merger have fulfilled their *prescribed* notification requirements, must forward to the Competition Tribunal and the *Minister* a written recommendation, with reasons, whether or not implementation of the merger should be-

(i) approved;

(ii) approved subject to any conditions; or

(iii) prohibited.

(2) The Competition Tribunal may extend the period for making a recommendation in respect of a particular merger upon an application by the Competition Commission, but the Tribunal may not grant an extension of more than 15 business days at a time.

(3) If, upon the expiry of the period contemplated in subsection (1), or an extended period contemplated in subsection (2), the Competition Commission has neither applied for an extension or further extension, as the case may be, nor forwarded a recommendation to the Competition Tribunal, any party to the merger may apply to the Tribunal to begin the consideration of the merger without a recommendation from the Commission.

(4) Upon receipt of an application by a party contemplated in subsection (3), the Tribunal must set a date for proceedings in respect of that merger.

15. Revocation of merger approval and enforcement of merger conditions

(Heading of section 15 substituted by section 10(a) of Act 18 of 2018)

(1) The Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) and (c) if—

(a) the decision was based on incorrect information for which a party to a merger is responsible;

(b) the approval was obtained by deceit; or

(c) a firm concerned has breached an obligation attached to the decision.

(Section 15(1) substituted by section 10(b) of Act 18 of 2018)

(2) If the Competition Commission revokes a decision to approve a merger under subsection (1), it may prohibit that merger even though any time limit set out in this Chapter may have elapsed.

16. Competition Tribunal merger proceedings

(1) If the Competition Commission approves-

(a) a small or intermediate merger subject to any conditions, or prohibits such merger, any party to the merger, by written notice and in the *prescribed* form, may request the Competition Tribunal to consider the conditions or prohibited merger; or

(b) an intermediate merger, or approves such merger subject to any conditions, a person who in terms of section 13A(2) is required to be given notice of the merger, by written notice and in the *prescribed* form, may request the Competition Tribunal to consider the approval or conditional

approval, provided the person had been a participant in the proceedings of the Competition Commission.

(2) Upon receiving a referral of a large merger and recommendation from the Competition Commission in terms of section 14A(1), or a request in terms of subsection (1), the Competition Tribunal must consider the merger in terms of section 12A and the recommendation or request, as the case may be, and within the *prescribed* time-

(a) approve the merger;

(b) approve the merger subject to any conditions; or

(c) prohibit implementation of the merger.

(3) Upon application by the Competition Commission, the Competition Tribunal may revoke its own decision to approve or conditionally approve a merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) or (c), and section 15, read with the changes required by the context, applies to a revocation or other decision in terms of this subsection.

(Section 16(3) substituted by section 11 of Act 18 of 2018)

(4) The Competition Tribunal must-

(a) publish a notice of a decision made in terms of subsection (2) or (3) in the *Gazette*; and

(b) issue written reasons for any such decision.

17. Competition Appeal Court merger proceedings

(1) Within 20 business days after notice of a decision by the Competition Tribunal in terms of section 16, an appeal from that decision may be made to the Competition Appeal Court, subject to its rules, by—

(a) any party to the merger;

(b) the Competition Commission;

(c) the Minister on matters raised in terms of section 12A(3), where the Minister participated in the Competition Commission's or Competition Tribunal's proceedings in terms of section 18 or on application for leave to appeal to the Competition Appeal Court; or

(d) a person who, in terms of section 13A(2), is required to be given notice of the merger, provided the person had been a participant in the proceedings of the Competition Tribunal.

(Section 17(1) substituted by section 12 of Act 18 of 2018)

(2) The Competition Appeal Court may-

(a) set aside the decision of the Competition Tribunal;

(b) amend the decision by ordering or removing restrictions, or by including or deleting conditions; or

(c) confirm the decision.

(3) If the Competition Appeal Court sets aside a decision of the Competition Tribunal, the Court must-

(a) approve the merger;

(b) approve the merger subject to any conditions; or

(c) prohibit implementation of the merger.

18. Intervention in merger proceedings

(1) In order to make representations on any public interest ground referred to in section 12A(3), the Minister may participate as a party in any merger proceedings before the Competition Commission, Competition Tribunal or the Competition Appeal Court, in the prescribed manner.

(Section 18(1) substituted by section 13 of Act 18 of 2018)

(2) Despite anything to the contrary in *this Act*, the Competition Commission may not make a decision in terms of section 13(5)(b) or 14(1)(b), and the Competition Tribunal may not make an order in terms of section 16(2), if the-

(a) merger constitutes-

(i) an acquisition of shares for which permission is required in terms of section 37 of the Banks Act, 1990 (Act No. 94 of 1990);

(ii) a transaction for which consent is required in terms of section 54 of the Banks Act, 1990 (Act No. 94 of 1990);

(iii) an acquisition of shares for which approval is required in terms of section 67 of the Financial Markets Act, 2012; or

(iv) a transaction for which approval is required in terms of section 64 of the Financial Markets Act, 2012; and

(b) Minister of Finance has, in the *prescribed* manner, issued a notice to the Commissioner specifying the names of the parties to the merger and certifying that-

(i) the merger is a merger contemplated in paragraph (a); and

(ii) it is in the public interest that the merger is subject to the jurisdiction of the Banks Act, 1990 (Act No. 94 of 1990) or the Financial Markets Act, 2012, as the case may be, only.

(Section 18(2) amended by section 90, Schedule, of Act 40 of 2007)

(Section 18(2) substituted by section 111, Schedule, of Act 19 of 2012)

(3) Sections 13(6) and 14(2) do not apply to a merger in respect of which the Minister of Finance has issued a certificate contemplated in subsection (2).

(Chapter 3 substituted by section 6 of Act 39 of 2000)

CHAPTER 4
COMPETITION COMMISSION, TRIBUNAL AND COURT

PART A
THE COMPETITION COMMISSION

19. Establishment and constitution of Competition Commission

(1) There is hereby established a body to be known as the Competition Commission, which-

(a) has jurisdiction throughout the Republic;

(b) is a juristic person; and

(c) must exercise its functions in accordance with *this Act.*

(2) The Competition Commission consists of the Commissioner and two or more Deputy Commissioners, appointed by the Minister in terms of this Act.

(Section 19(2) substituted by section 7 of Act 39 of 2000)

(Section 19(2) substituted by section 15 of Act 18 of 2018)

20. Independence of Competition Commission

(1) The Competition Commission-

(a) is independent and subject only to the *Constitution* and the law; and

(b) must be impartial and must perform its functions without fear, favour, or prejudice.

(2) The Commissioner, each Deputy Commissioner and each member of the staff of the Competition Commission, must not-

(a) engage in any activity that may undermine the integrity of the Commission;

(b) participate in any investigation, hearing or decision concerning a matter in respect of which that person has a direct financial interest or any similar personal interest;

(c) make private use of, or profit from, any *confidential information* obtained as a result of performing that person's official functions in the Commission; or

(d) divulge any information referred to in paragraph 2(c) to any third party, except as required as part of that person's official functions within the Commission.

(3) Each *organ of state* must assist the Commission to maintain its independence and impartiality, and to effectively carry out its powers and duties.

21. Functions of Competition Commission

(1) The Competition Commission is responsible to-

(a) implement measures to increase market transparency;

(b) implement measures to develop public awareness of the provisions of *this Act;*

(c) investigate and evaluate alleged contraventions of Chapter 2;

(d) grant or refuse applications for exemption in terms of Chapter 2;

(e) authorise, with or without conditions, prohibit or refer mergers of which it receives notice in terms of Chapter 3;

(f) negotiate and conclude consent orders in terms of section 63;

(g) refer matters to the Competition Tribunal, and appear before the Tribunal, as required by *this Act;*

(gA) initiate and conduct market inquiries in terms of Chapter 4A;

(Section 21(1)(gA) inserted by section 16(a) of Act 18 of 2018)

(gB) conduct impact studies in terms of section 21A;

(Section 21(1)(gB) inserted by section 16(a) of Act 18 of 2018)

(gC) grant or refuse applications for leniency in terms of section 49E;

(Section 21(1)(gC) inserted by section 16(a) of Act 18 of 2018)

(gD) develop a policy regarding the granting of leniency to any firm contemplated in section 50;

(Section 21(1)(gD) inserted by section 16(a) of Act 18 of 2018)

(gE) issue guidelines in terms of section 79; and

(Section 21(1)(gE) inserted by section 16(a) of Act 18 of 2018)

(gF) issue advisory opinions in terms of section 79A;

(Section 21(1)(gF) inserted by section 16(a) of Act 18 of 2018)

(h) negotiate agreements with any *regulatory authority* to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of *this Act;*

(i) participate in the proceedings of any *regulatory authority;*

(j) advise, and receive advice from, any *regulatory authority;*

(k) over time, review legislation and *public regulations,* and report to the *Minister* concerning any provision that permits uncompetitive behaviour; and

(l) deal with any other matter referred to it by the Tribunal.

(2) In addition to the functions listed in subsection (1), the Competition Commission may-

(a) report to the *Minister* on any matter relating to the application of *this Act;*

(b) enquire into and report to the *Minister* on any matter concerning the purposes of *this Act;* and

(c) perform any other function assigned to it in terms of this or any other Act.

(3) The Minister must table in Parliament any report submitted in terms of subsection (1)(k) or section 43E(1), and any report submitted in terms of subsection (2) if that report deals with a substantial matter relating to the purposes of this Act—

(Words preceding section 21(3)(a) substituted by section 16(b) of Act 18 of 2018)

(a) within 10 business days after receiving that report from the Competition Commission; or

(Section 21(3)(a) substituted by section 8(a) of Act 39 of 2000)

(b) if Parliament is not then sitting, within 10 business days after the commencement of the next sitting.

(Section 21(3)(b) substituted by section 8(a) of Act 39 of 2000)

(4) The *Minister*, in consultation with the Commissioner and by notice in the *Gazette,* may *prescribe regulations* for matters relating to the functions of the Commission, including-

(Words preceding section 21(4)(a) substituted by section 8(b) of Act 39 of 2000)

(a) forms;

(b) time periods;

(c) information required;

(d) additional definitions;

(e) filing fees;

(f) access to *confidential information;*

(g) manner and form of participation in Commission procedures; and

(h) procedures.

21A. Impact Studies

(1) The Competition Commission may study the impact of any decision, ruling or judgment of the Commission, the Competition Tribunal or the Competition Appeal Court.

(2) The Commission may request information from any firm in order to compile its impact study report.

(3) The Commission must submit its report to the Minister and publish its report in the *Gazette* within 15 business days after submitting it to the Minister.

(4) The Minister must table in the National Assembly any impact study report within 10 business days after receiving the report from the Commission and, if Parliament is not sitting, within 10 business days after the commencement of the next sitting.

(5) Sections 44 and 45A, read with the changes required by the context, apply to the Commission's request for information from a firm and the publication of its report.

(6) A firm that receives a request for information in terms of subsection (2) may lodge an objection with the Competition Tribunal within 20 business days of receiving the request.

(7) The Competition Tribunal must determine the objection referred to in subsection (6) and may make any appropriate order after having considered all relevant information, including—

(a) the nature and extent of the information requested;

(b) the purpose and scope of the impact study; and

(c) the relevance of the information requested to the impact study.

(Section 21A inserted by section 17 of Act 18 of 2018)

22. Appointment of Commissioner

(1) The *Minister* must appoint a person with suitable qualifications and experience in economics, law, commerce, industry or public affairs to be the Commissioner for a term of five years.

(2) The *Minister* may re-appoint a person as Commissioner at the expiry of that person's term of office.

(3) The Commissioner, who is the Chief Executive Officer of the Competition Commission, is responsible for the general administration of the Commission and for carrying out any functions assigned to it in terms of *this Act,* and must-

(a) perform the functions that are conferred on the Commissioner by or in terms of *this Act;*

(b) manage and direct the activities of the Commission; and

(c) supervise the Commission's staff.

(3A) The Commissioner, after consultation with the Minister, may determine a policy regarding the delegation of authority in the Competition Commission in order to facilitate administrative and operational efficiency.

(Section 22(3A) inserted by section 18 of Act 18 of 2018)

(3B) The delegation of authority referred to in subsection (3A) may—

(a) provide for the delegation to a Deputy Commissioner or another staff member of the Commission of—

(i) any of the Commissioner's powers, functions or duties conferred or imposed upon the Commissioner under this Act, except those referred to in sections 24 and 25(1)(b); and

(ii) any of the Competition Commission's powers, functions or duties conferred or imposed upon the Commission under this Act, except those referred to in section 15; and

(b) in appropriate circumstances, include the power to sub-delegate a delegated power.

(Section 22(3B) inserted by section 18 of Act 18 of 2018)

(3C) The Commissioner may—

(a) delegate only in terms of the policy on delegations of authority;

(b) delegate either to a specific individual or the incumbent of a specific post;

(c) delegate subject to any conditions or restrictions that are deemed fit;

(d) withdraw or amend a delegation made in terms of the policy on delegations of authority;

(e) withdraw or amend any decision made by a person who exercises a power or performs a function or duty delegated in terms of the policy on delegations of authority.

(Section 22(3C) inserted by section 18 of Act 18 of 2018)

(3D) A delegation in terms of the delegations of authority policy—

(a) must be in writing, unless it is impracticable in the circumstances;

(b) does not limit or restrict the competence of the Commissioner to exercise or perform any power, function or duty that has been delegated;

(c) does not divest the Commissioner of the responsibility concerning the exercise of the power or performance of the delegated duty; and

(d) is subject to the limitations, conditions and directions that the policy on delegations of authority imposes.

(Section 22(3D) inserted by section 18 of Act 18 of 2018)

(4) The *Minister* must, in consultation with the Minister of Finance, determine the Commissioner's remuneration, allowances, benefits, and other terms and conditions of employment.

(5) The Commissioner, on one month written notice addressed to the *Minister,* may resign as Commissioner.

(6) The *Minister*-

(a) must remove the Commissioner from office if that person becomes subject to any of the disqualifications referred to in section 28(3)(a) to (d); and

(b) other than as provided in paragraph (a), may remove the Commissioner from office only for-

(i) serious misconduct;

(ii) permanent incapacity; or

(iii) engaging in any activity that may undermine the integrity of the Competition Commission.

23. Appointment of Deputy Commissioner

(1) The *Minister* must appoint at least one person, and may appoint other persons, with suitable qualifications and experience in economics, law, commerce, industry or public affairs as Deputy Commissioner to assist the Commissioner in carrying out the functions of the Competition Commission.

(2) The Minister must designate—

(a) a Deputy Commissioner to perform the functions of the Commissioner whenever—

(i) the Commissioner is unable for any reason to perform the functions of the Commissioner; or

(ii) the office of Commissioner is vacant; and

(b) one or more full-time or part-time Deputy Commissioners who are responsible for conducting market inquiries.

(Section 23(2) substituted by section 19 of Act 18 of 2018)

24. Appointment of inspectors

(1) The Commissioner may appoint any person in the service of the Competition Commission, or any other suitable person, as an inspector.

(2) The *Minister* may, in consultation with the Minister of Finance, determine the remuneration paid to a person who is appointed in terms of subsection (1), but who is not in the full-time service of the Competition Commission.

(3) An inspector must be provided with a certificate of appointment signed by the Commissioner stating that the person has been appointed as an inspector in terms of *this Act.*

(4) When an inspector performs any function in terms of *this Act*, the inspector must-

(Words preceding paragraph (a) of section 24(4) substituted by section 9 of Act 39 of 2000)

(a) be in possession of a certificate of appointment issued to that inspector in terms of subsection (3); and

(b) show that certificate to any person who-

(i) is affected by the exercise of the functions of the inspector; and

(ii) requests to see the certificate.

25. Staff of Competition Commission

(1) The Commissioner may—

(a) appoint staff, or contract with other persons, to assist the Competition Commission in carrying out its functions; and

(b) in consultation with the Minister and the Minister of Finance, determine the remuneration, allowances, benefits, and other terms and conditions of employment of each member of the staff.

(2) Subject to the provisions of this Act, the Commissioner may designate a staff member of the Competition Commission who has suitable qualifications or experience, to appear on behalf of the Commission in any court of law.

(Section 25 substituted by section 20 of Act 18 of 2018)

PART B

THE COMPETITION TRIBUNAL

26. Establishment and constitution of Competition Tribunal

(1) There is hereby established a body to be known as the Competition Tribunal, which-

(a) has jurisdiction throughout the Republic;

(b) is a juristic person;

(c) is a Tribunal of record; and

(d) must exercise its functions in accordance with *this Act.*

(2)

(a) The Competition Tribunal consists of a Chairperson and not less than three, but not more than 14, other women or men appointed by the President, on a full or part-time basis, on the recommendation of the Minister, from among persons nominated by the Minister either on the Minister's initiative or in response to a public call for nominations, and any other person appointed in an acting capacity in terms of paragraph (b).

(b) The Minister, after consultation with the Chairperson of the Competition Tribunal, may appoint one or more persons who meet the requirements of section 28, as acting part-time members of the Competition Tribunal for such a period as the Minister may determine.

(c) The Minister may re-appoint an acting member at the expiry of that member's term of office.

(d) Sections 30 to 34 and 54 to 55, read with the changes required by the context, apply to acting members of the Competition Tribunal.

(Section 26(2) substituted by section 10 of Act 39 of 2000)
(Section 26(2) substituted by section 21 of Act 18 of 2018)

(3) The President must-

(a) appoint the Chairperson and other members of the Competition Tribunal on the date that *this Act* comes into operation; and

(b) appoint a person to fill any vacancy on the Tribunal.

(4) Section 20, read with the changes required by the context, applies to the Competition Tribunal.

27. Functions of Competition Tribunal

(1) The Competition Tribunal may-

(a) adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and, if so, to impose any remedy provided for in *this Act;*

(b) adjudicate on any other matter that may, in terms of *this Act*, be considered by it, and make any order provided for in *this Act*;

(c) hear appeals from, or review any decision of, the Competition Commission that may in terms of *this Act* be referred to it; and

(d) make any ruling or order necessary or incidental to the performance of its functions in terms of *this Act*.

(2) Section 21(4), read with the changes required by the context, applies to the Competition Tribunal, and the reference in that section to the Commissioner must be construed as a reference to the Chairperson of the Tribunal.

(Section 27 substituted by section 11 of Act 39 of 2000)

28. Qualifications of members of Competition Tribunal

(1) The Chairperson and other members of the Competition Tribunal, viewed collectively must-

(a) represent a broad cross-section of the population of the Republic; and

(b) comprise sufficient persons with legal training and experience to satisfy the requirements of section 31(2)(a).

(2) Each member of the Competition Tribunal must-

(a) be a citizen of South Africa, who is ordinarily resident in South Africa;

(b) have suitable qualifications and experience in economics, law, commerce, industry or public affairs; and

(c) be committed to the purposes and principles enunciated in section 2.

(3) A person may not be a member of the Competition Tribunal if that person-

(a) is an office-bearer of any party, movement, organisation or body of a partisan political nature;

(b) is an unrehabilitated insolvent;

(c) is subject to an order of a competent court holding that person to be mentally unfit or disordered; or

(d) has been convicted of an offence committed after the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), took effect, and sentenced to imprisonment without the option of a fine.

29. Term of office of members of Competition Tribunal

(1) Subject to subsection (2), the Chairperson and each other member of the Competition Tribunal serves for a term of five years.

(2) The President may re-appoint a member of the Competition Tribunal at the expiry of that member's term of office, but no person may be appointed to the office of the Chairperson of the Tribunal for more than two consecutive terms.

(3) The Chairperson, on one month written notice addressed to the *Minister,* may-

(a) resign from the Competition Tribunal; or

(b) resign as Chairperson, but remain as a member of the Tribunal.

(4) A member of the Competition Tribunal other than the Chairperson may resign by giving at least one month's written notice to the *Minister.*

(5) The President, on the recommendation of the *Minister*-

(a) must remove the Chairperson or any other member of the Competition Tribunal from office if that person becomes subject to any of the disqualifications referred to in section 28(3); and

(b) other than as provided in subsection (a), may remove the Chairperson or a member from office only for-

(i) serious misconduct;

(ii) permanent incapacity; or

(iii) engaging in any activity that may undermine the integrity of the Tribunal.

30. Deputy Chairperson of Competition Tribunal

(1) The President must, on the recommendation of the *Minister,* designate a member of the Competition Tribunal as Deputy Chairperson of the Tribunal.

(2) The Deputy Chairperson performs the functions of Chairperson whenever-

(a) the office of Chairperson is vacant; or

(b) the Chairperson is for any other reason temporarily unable to perform the functions of Chairperson.

31. Competition Tribunal proceedings

(1) The Chairperson is responsible to manage the caseload of the Competition Tribunal, and must assign each matter referred to the Tribunal to a panel composed of any three members of the Tribunal.

(2) When assigning a matter in terms of subsection (1), the Chairperson must—

(a) ensure that at least one member of the panel is a person who has legal training and experience;

(b) ensure that no more than one member of the panel is an acting member appointed in terms of section 23(2)(b); and

(c) designate a member of the panel to preside over the panel's proceedings.

(Section 31(2) substituted by section 22(a) of Act 18 of 2018)

(3) If, because of withdrawal from a hearing in terms of section 32, resignation, illness or death, a member of the panel is unable to complete the proceedings in a matter assigned to that panel, the Chairperson must-

(a) direct that the hearing of that matter proceed before any remaining members of the panel subject to the requirements of subsection (2)(a); or

(b) terminate the proceedings before that panel and constitute another panel, which may include any member of the original panel, and direct that panel to conduct a new hearing.

(4) The decision of a panel on a matter referred to it must be in writing and include reasons for that decision.

(5) The Chairperson of the Competition Tribunal, or another member of the Tribunal assigned by the Chairperson, sitting alone, may make an order of an interlocutory nature that, in the opinion of the Chairperson, does not warrant being heard by a panel comprised of three members, including—

(a) extending or reducing a prescribed period in terms of this Act;

(b) condoning late performance of an act that is subject to a prescribed period in terms of this Act;

(c) granting access to information contemplated in sections 44 to 45A and any conditions that must be attached to the access order; and

(d) compelling discovery of documents.

(Section 31(5) substituted by section 12 of Act 39 of 2000)
(Section 31(2) substituted by section 22(b) of Act 18 of 2018)

(6) A decision of the Chairperson or other person contemplated in subsection (5), or of a majority of the members of a panel in any other matter, is the decision of the Tribunal.

(Section 31(6) added by section 12 of Act 39 of 2000)

32. Conflicts and disclosure of interest by members of Competition Tribunal

(1) A member of the Tribunal may not represent any person before a panel of the Tribunal.

(2) If, during a hearing, it appears to a member of the Competition Tribunal that a matter concerns a financial or other interest of that member contemplated in section 20(2)(b), that member must-

(a) immediately and fully disclose the fact and nature of that interest to the Chairperson and to the presiding member at that hearing; and

(b) withdraw from any further involvement in that hearing.

33. Acting by member of Competition Tribunal after expiry of term of office

If, on the expiry of the term of office of a member of the Competition Tribunal, that member is still considering a matter before the Tribunal, that member may continue to act as a member in respect of that matter only.

34. Remuneration and benefits of members of Competition Tribunal

(1) The *Minister* may, in consultation with the Minister of Finance, determine the remuneration, allowances, and other benefits of the Chairperson, Deputy Chairperson and other members of the Competition Tribunal.

(2) The *Minister* may not during the term of office of a member of the Competition Tribunal, reduce the member's salary, allowances or benefits.

(3) The *Minister* may determine any other conditions of appointment not provided for in this section.

35. Staff of Competition Tribunal

The Chairperson may-

(a) appoint staff, or contract with other persons, to assist the Competition Tribunal in carrying out its functions; and

(b) in consultation with the *Minister* and the Minister of Finance, determine the remuneration, allowances, benefits, and other terms and conditions of appointment of a member of the staff.

PART C
THE COMPETITION APPEAL COURT

36. Establishment and constitution of Competition Appeal Court

(1) There is hereby established a court to be known as the Competition Appeal Court, which-

(a) is a court contemplated in section 166(e) of the *Constitution* with a status similar to that of a High Court;

(b) has jurisdiction throughout the Republic; and

(c) is a court of record.

(2) The Competition Appeal Court consists of at least three judges, appointed by the President on the advice of the Judicial Services Commission, each of whom must be a judge of the High Court.

(Section 36(2) substituted by section 1(a) of Act 15 of 2000)

(3) The President must designate one of the judges of the Competition Appeal Court to be Judge President of the Court.

(Section 36(3) added by section 1(b) of Act 15 of 2000)

(4) The Minister of Justice, after consulting the Judge President of the Competition Appeal Court, may second any number of judges of the High Court to serve as acting judges of the Competition Appeal Court.

(Section 36(4) added by section 1(b) of Act 15 of 2000)

(5) When the office of Judge President of the Competition Appeal Court is vacant, or when the Judge President is temporarily unable to perform the functions of that office for any reason, the senior judge of the Court must perform the functions of Judge President.

(Section 36(5) added by section 1(b) of Act 15 of 2000)

37. Functions of Competition Appeal Court

(1) The Competition Appeal Court may-

(a) review any decision of the Competition Tribunal; or

(b) consider an appeal arising from the Competition Tribunal in respect of-

(i) any of its final decisions other than a consent order made in terms of section 63; or

(ii) any of its interim or interlocutory decisions that may, in terms of this Act, be taken on appeal.

(2) The Competition Appeal Court may give any judgment or make any order, including an order to -

(a) confirm, amend or set aside a decision or order of the Competition Tribunal; or

(b) remit a matter to the Competition Tribunal for a further hearing on any appropriate terms.

(Section 37 substituted by section 2 of Act 15 of 2000)

38. Business of Competition Appeal Court

(1) The Judge President of the Competition Appeal Court-

(a) is responsible to supervise and direct the work of the Court;

(b) must preside at proceedings of the Court or designate another judge of the Competition Appeal Court to preside at particular proceedings of the Court; and

(Section 38(1)(b) substituted by section 3(a) of Act 15 of 2000)

(c) by notice in the *Gazette,* may make rules for the proceedings of the Court.

(2) Subject to subsection (2A), the Judge President must assign each matter before the Court to a bench composed of three judges of the Court.

(Section 38(2) substituted by section 3(b) of Act 15 of 2000)

(2A) The Judge President, or any other judge of the Competition Appeal Court designated by the Judge President, may sit alone to consider an-

(a) appeal against a decision of an interlocutory nature, as prescribed by the rules of the Competition Appeal Court;

(b) application concerning the determination or use of confidential information;

(c) application for leave to appeal, as prescribed by the rules of the Competition Appeal Court;

(d) application to suspend the operation and execution of an order that is the subject of a review or appeal; or

(e) application for procedural directions.

(Section 38(2A) inserted by section 3(c) of Act 15 of 2000)

(3) The decision of a judge sitting alone in terms of subsection (2A), or of a majority of the bench hearing a particular matter, is the decision of the Competition Appeal Court.

(Section 38(3) substituted by section 3(d) of Act 15 of 2000)

(4) If a judge or any of the judges hearing a matter assigned in terms of subsection (2) is unable to complete the proceedings in that matter, the Judge President must-

(a) direct that the hearing of that matter proceed before the remaining judge or judges to whom the matter was assigned; or

(b) terminate the proceedings before that bench and constitute another bench, which may include a judge to whom the matter was originally assigned, and direct that bench to hear the matter afresh.

(Section 38(4) substituted by section 3(e) of Act 15 of 2000)

(5) A decision of the Competition Appeal Court must be in writing and include reasons for that decision.

39. Term of office

(1) The Judge President and any other judge of the Competition Appeal Court is appointed for a fixed term determined by the President at the time of the appointment and holds office until-

(a) the expiry of the term;

(b) the date the judge ceases to be a judge of the High Court; or

(c) the judge resigns from the Court by giving written notice to the President.

(2) Section 33, read with the changes required by the context, applies to the Judge President and other judges of the Competition Appeal Court.

(3) The tenure of office, the remuneration, and the terms and conditions of service applicable to a judge of the High Court in terms of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act No. 88 of 1989), are not affected by the appointment and concurrent tenure of office of that judge who is appointed as a judge of the Competition Appeal Court.

(Section 39 substituted by section 4 of Act 15 of 2000)

(Take Note: Section 5 of Act 15 of 2000 reads as follows: "5. Transitional provision

Anyone serving as Judge President or as a judge of the Competition Appeal Court immediately before this Act comes into operation continues to serve in that office after this Act comes into operation, subject to section 39 of the principal Act.")

PART D
ADMINISTRATIVE MATTERS CONCERNING THE COMPETITION COMMISSION AND THE COMPETITION TRIBUNAL

40. Finances

(1) The Competition Commission is financed from-

(a) money that is appropriated by Parliament for the Commission;

(b) fees payable to the Commission in terms of *this Act*;

(c) income derived by the Commission from its investment and deposit of surplus money in terms of subsection (6); and

(d) money received from any other source.

(2) The financial year of the Competition Commission is the period from 1 April in any year to 31 March in the following year, except that the first financial year of the Commission begins on the date that *this Act* comes into operation, and ends on 31 March next following that date.

(3) Each year, at a time determined by the *Minister,* the Commissioner must submit to the *Minister* a statement of the Competition Commission's estimated income and expenditure, and requested appropriation from Parliament, in respect of the next ensuing financial year.

(4) The Competition Commission must open and maintain an account in the name of the Commission with a registered bank, or other registered financial institution, in the Republic, and-

(a) any money received by the Commission must be deposited into that account; and

(b) every payment on behalf of the Commission must be made from that account.

(5) Cheques drawn on the account of the Competition Commission must be signed on its behalf by two persons authorised for that purpose by resolution of the Commission.

(6) The Competition Commission may invest or deposit money of the Commission that is not immediately required for contingencies or to meet current expenditures-

(a) on a call or short-term fixed deposit with any registered bank or financial institution in the Republic; or

(b) in an investment account with the Corporation for Public Deposits established by section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984).

(7) The Commissioner is the accounting authority of the Competition Commission for purposes of the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(Section 40(7) substituted by section 13(a) of Act 39 of 2000)

(8) …

(Section 40(8) deleted by section 13(b) of Act 39 of 2000)

(9) Within six months after the end of each financial year, the Commissioner must prepare financial statements in accordance with established accounting practice, principles and procedures, comprising-

(a) a statement reflecting, with suitable and sufficient particulars, the income and expenditure of the Competition Commission during the preceding financial year; and

(b) a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year.

(10) The Auditor General must audit the Competition Commission's financial records each year.

41. Annual Report

(1) Within six months after the end of the Competition Commission's financial year, the Commissioner must prepare and submit to the *Minister* an annual report in the *prescribed* form, including-

(a) the audited financial statements prepared in terms of section 40(9);

(b) the auditor's report prepared in terms of section 40(10);

(c) a report of activities undertaken in terms of its functions set out in *this Act;*

(d) a statement of the progress achieved during the preceding year towards realization of the purposes of *this Act;* and

(e) any other information that the *Minister,* by notice in the *Gazette,* determines.

(2) The *Minister* must table in the National Assembly each annual report submitted in terms of subsection (1)-

(a) within 10 business days after receiving that report from the Competition Commission; or

(Sections 41(2)(a) substituted by section 14 of Act 39 of 2000)

(b) if Parliament is not then sitting, within 10 business days after the commencement of the next sitting.

(Sections 41(2)(b) substituted by section 14 of Act 39 of 2000)

42. Rules applicable to Competition Tribunal

Sections 40 and 41, each read with the changes required by the context, applies to the Competition Tribunal, except that a reference in either section to the Commissioner must be read as referring to the Chairperson of the Tribunal.

43. Liability

(1) The State Liability Act, 1957 (Act No. 20 of 1957), read with the changes required by the context, applies to the Competition Commission and to the Competition Tribunal, but a reference in that Act to "the Minister of the Department concerned" must be interpreted as referring to the Commissioner, or to the Chairperson, as the case may be.

(2) No Competition Tribunal member, Competition Appeal Court member, Commissioner, staff person or contractor is liable for any report, finding, point of view or recommendation that is given in good faith and is submitted to Parliament, or made known, under the *Constitution* or *this Act.*

CHAPTER 4A
MARKET INQUIRIES

43A. Interpretation and Application of this Chapter

(1) In this Chapter, “market inquiry” means a formal inquiry in respect of the general state of competition, the levels of concentration in and structure of a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm.

(2) An adverse effect on competition is established if any feature, or combination of features, of a market for goods or services impedes, restricts or distorts competition in that market.

(3) Any reference to a feature of a market for goods or services includes—

(a) the structure of that market or any aspect of that structure, including:

(i) the level and trends of concentration and ownership in the market;

(ii) the barriers to entry in the market, the regulation of the market, including the instruments in place to foster transformation in the market and past or current advantage that is not due to the respondent's own commercial efforts or investment, such as direct or indirect state support for a firm or firms in the market;

(b) the outcomes observed in the market, including—

(i) levels of concentration and ownership;

(ii) prices, customer choice, the quality of goods or services and innovation;

(iii) employment;

(iv) entry into and exit from the market;

(v) the ability of national industries to compete in international markets;

(c) conduct, whether in or outside the market which is the subject of the inquiry, by a firm or firms that supply or acquire goods or services in the market concerned;

(d) conscious parallel or co-ordinated conduct by two or more firms in a concentrated market without the firms having an agreement between or among themselves; or

(e) conduct relating to the market which is the subject of the inquiry of any customers of firms who supply or acquire goods or services.

(Section 43A substituted by section 23 of Act 18 of 2018)

43B. Initiating and conducting market inquiries

(Heading of section 43B substituted by section 24(a) of Act 18 of 2018)

(1)

(a) The Competition Commission, acting within its functions set out in section 21(1), may conduct a market inquiry at any time, subject to subsections (2) to (6)—

(i) if it has reason to believe that any feature or combination of features of a market for any goods or services impedes, distorts or restricts competition within that market; or

(ii) to achieve the purposes of this Act.

(b) The Minister may, after consultation with the Competition Commission and after consideration of the factors in paragraph (a)(i) and (ii), require the Competition Commission to conduct a market inquiry contemplated in paragraph (a) during a specified period.

(Section 43B(1) substituted by section 24(b) of Act 18 of 2018)

(2) The Competition Commission must, at least 20 business days before the commencement of a market inquiry, publish a notice in the *Gazette* announcing the establishment of the market inquiry, setting out the terms of reference for the market inquiry and inviting members of the public to provide written representations to the market inquiry.

(Section 43B(2) substituted by section 24(c) of Act 18 of 2018)

(2A) Before publishing the notice referred to in subsection (2), the Competition Commission must notify and consult with the relevant regulatory authority if the intended market inquiry will investigate a sector over which the regulatory authority has jurisdiction in terms of any public regulation.

(Section 43B(2A) inserted by section 24(d) of Act 18 of 2018)

(2B) The Competition Commission must appoint a Deputy Commissioner referred to in section 23(2)(b) to chair a market inquiry and may appoint one or more additional suitably qualified persons to the panel that conducts the market inquiry.

(Section 43B(2B) inserted by section 24(d) of Act 18 of 2018)

(3) The Competition Commission may conduct a market inquiry in any manner but, for greater certainty, the provisions of-

(a) sections 44 to 45A, each read with the changes required by the context, apply to the conduct of the market inquiry and to the publication of the report of a market inquiry in terms of subsection (4);

(b) sections 46 to 49 do not apply in respect of the conduct of a market inquiry;

(c) section 49A, read with the changes required by the context, applies to the conduct of a market inquiry;

(cA) Sections 49A(1), 52(2), 52(2A), 52(3), 55 and 56, read with the changes required by the context, apply to the conduct of a market inquiry, but for the purposes of this section, a reference in any of those sections to the Competition Tribunal, Chairperson of the Competition Tribunal or to a person 'presiding at a hearing' must be regarded as referring to the Competition Commission.

(Section 43B(3)(cA) inserted by section 24(e) of Act 18 of 2018)

(d) section 54(b), (e) and (f), each read with the changes required by the context, apply to the conduct of a market inquiry, but for the purpose of this section, a reference in any of those sections to the

"Tribunal" or to a person "presiding at a hearing" must be regarded as referring to the Competition Commission; and

(e) sections 72 and 73(2)(a), (b), (c), (d) and (f) apply to the conduct of a market inquiry, but a reference in any of those sections to 'an investigation' must be regarded as referring to the market inquiry.

(3A) For purposes of this Chapter—

(a) the Competition Commission may, within 20 business days of receipt of information claimed as confidential in terms of section 44(1), determine whether or not the information is confidential information;

(b) if the Competition Commission determines that the information is confidential, it may, within five business days, make an appropriate determination concerning access to that information by any person;

(c) before making the decision in paragraph (a) or (b), the Competition Commission must give the party claiming the information to be confidential, notice of its intention to make its determination and consider the representations, if any, made to it by that person;

(d) any person aggrieved by the determination of the Competition Commission in terms of this subsection may within 15 business days of the determination, appeal against the determination to the Competition Tribunal.

(Section 43B(3A) inserted by section 24(f) of Act 18 of 2018)

(4)

(a) The terms of reference required in terms of subsection (2) must include, at a minimum, a statement of the scope of the inquiry, and the time within which it is expected to be completed, which period may not exceed 18 months.

(b) The Competition Commission may apply to the Minister to extend for a reasonable period, the completion of a market inquiry beyond the period referred to in paragraph (a).

(Section 43B(4) substituted by section 24(g) of Act 18 of 2018)

(5) The Competition Commission may amend the terms of reference, including the scope of the inquiry, or the time within which it is expected to be completed, by further notice in the *Gazette*.

(6) Subject to subsections (4) and (5), the Competition Commission must complete a market inquiry by publishing a report contemplated in sections 43D and 43E, within the time set out in the terms of reference referred to in subsection (2).

(Section 43B(6) substituted by section 24(h) of Act 18 of 2018)

43C. Matters to be decided at market inquiry

(1) In a market inquiry, the Competition Commission must decide—

(a) whether any feature, including structure and levels of concentration, of each relevant market for any goods or services impedes, restricts or distorts competition within that market; and

(b) on the procedures to be followed at the market inquiry.

(2) In making its decision in terms of subsection (1)(a), the Competition Commission must have regard to the impact of the adverse effect on competition on small and medium businesses, or firms controlled or owned by historically disadvantaged persons.

(3) If the Competition Commission decides that there is an adverse effect on competition, it must determine—

(a) the action that must be taken in terms of section 43D;

(b) whether it must make recommendations to any Minister, regulatory authority or affected firm to take action to remedy, mitigate or prevent the adverse effect on competition;

(c) if any action must be taken in terms of paragraph (b), the action that must be taken in respect of what must be remedied, mitigated or prevented.

(4) In determining the matters in subsection (3), the Competition Commission must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable.

(Section 43C repealed by section 25 of Act 18 of 2018 and re-inserted by section 26 of Act 18 of 2018)

43D. Duty to remedy adverse effects on competition

(1) Subject to the provisions of any law, the Competition Commission may, in relation to each adverse effect on competition, take action to remedy, mitigate or prevent the adverse effect on competition.

(2) The action taken in terms of subsection (1) may include a recommendation by the Competition Commission to the Competition Tribunal in terms of section 60(2)(c), and the Competition Tribunal may make an appropriate order in relation thereto.

(3) The decision of the Competition Commission in terms of subsection (1) must be consistent with the decisions of its report unless there has been a material change in circumstances since the preparation of the report or the Competition Commission has a justifiable reason for deciding differently.

(4) Any action in terms of subsection (1) must be reasonable and practicable, taking into account relevant factors, including—

(a) the nature and extent of the adverse effect on competition;

(b) the nature and extent of the remedial action;

(c) the relation between the adverse effect on competition and the remedial action;

(d) the likely effect of the remedial action on competition in the market that is the subject of the market inquiry and any related markets;

(e) the availability of less restrictive means to remedy, mitigate or prevent the adverse effect on competition; and

(f) any other relevant factor arising from any information obtained by the Competition Commission during the market inquiry.

(Section 43D inserted by section 26 of Act 18 of 2018)

43E. Outcome of market inquiry

(1) Upon completing a market inquiry, the Competition Commission must publish a report of the inquiry in the *Gazette*, and must submit the report to the Minister with recommendations, which may include, but are not limited to—

(a) recommendations for new or amended policy, legislation or regulations; and

(b) recommendations to other regulatory authorities in respect of competition matters.

(2) Section 21(3), read with the changes required by the context, applies to a report to the Minister in terms of subsection (1).

(3) On the basis of information obtained during a market inquiry, the Competition Commission may—

(a) initiate a complaint and enter into a consent order with any respondent, in accordance with section 49D, with or without conducting any further investigation;

(b) initiate a complaint against any firm for further investigation, in accordance with Part C of Chapter 5;

(c) initiate and refer a complaint directly to the Competition Tribunal without further investigation;

(d) take any other action within its powers in terms of this Act recommended in the report of the market inquiry; or

(e) take no further action.

(4) Before the completion of the market inquiry, the Competition Commission must take appropriate steps to communicate, and where necessary on a confidential basis, to any person who is materially affected by any provisional finding, decision, remedial action or recommendation of the market inquiry in terms of this section and call for comments from them.

(5) The Competition Commission must have regard to any further information or submissions received in terms of subsection (4) when deciding the action or making the recommendation in terms of section 43D(1) and (2).

(Section 43E inserted by section 26 of Act 18 of 2018)

43F. Appeals against decisions made under this Chapter

(1) The Minister, or any person referred to in section 43G(1) who is materially and adversely affected by the determination of the Competition Commission in terms of section 43D, may, within the prescribed period, appeal against that determination to the Competition Tribunal in accordance with the Rules of the Competition Tribunal.

(2) In determining an appeal in terms of subsection (1), the Competition Tribunal may—

(a) confirm the determination of the Competition Commission;

(b) amend or set aside the determination, in whole or in part; or

(c) make any determination or order that is appropriate in the circumstances.

(3) If the Competition Tribunal sets aside the decision of the Competition Commission, in whole or in part, it may remit the matter, or part of the matter, to the Competition Commission for further inquiry in terms of this Chapter.

(4) Any remittal to the Competition Commission in terms of subsection (3) must be completed within six months from the date of the order of the Competition Tribunal.

(5) The Competition Tribunal may, on good cause shown, extend the period referred to in subsection (4) for one further period of six months.

(6) Any person referred to in subsection (1) who is aggrieved by a determination or order of the Competition Tribunal in terms of subsection (2) may appeal against that determination or order to the Competition Appeal Court.

(Section 43F inserted by section 26 of Act 18 of 2018)

43G. Participation in and representations to market inquiry

(1) In accordance with the procedures adopted by the inquiry, the following persons may participate in a market inquiry—

(a) firms, including small and medium businesses, in the market that is the subject of the inquiry;

(b) any registered trade union that represents a substantial number of employees or the employees or representatives of the employees if there are no registered trade unions at the firms referred to in paragraph (a);

(c) officials and staff of the Competition Commission or witnesses, who in the opinion of the Commission, would substantially assist with the work of the inquiry;

(d) a regulatory authority referred to in section 82(1);

(e) the Minister;

(f) at the request of the Minister, any Minister responsible for the sector that includes, or is materially affected by, the market that is the subject of the inquiry; and

(g) any other person—

(i) who has a material interest in the market inquiry;

(ii) whose interest is, in the opinion of the Competition Commission, not adequately represented by another participant; and

(iii) who would, in the opinion of the Competition Commission, substantially assist with the work of the inquiry.

(2) The Competition Commission must take reasonable steps to promote the participation of small and medium businesses, who have a material interest in the inquiry and are, in the opinion of the Competition Commission, not adequately represented.

(3) Subject to the procedures and time periods adopted for the inquiry, any person may make representations to the market inquiry on any issue related to the terms of reference published in terms of section 43B(2).

(4) Subject to the procedures and time periods adopted for the inquiry, participants referred to in subsection (1) may be required to respond to surveys and questionnaires, requests for information and submissions issued by the Commission.

(Section 43G inserted by section 26 of Act 18 of 2018)

(Chapter 4A inserted by section 6 of Act 1 of 2009. With effect from 1 April 2013)

CHAPTER 5
INVESTIGATION AND ADJUDICATION PROCEDURES

PART A
CONFIDENTIAL INFORMATION

44. Right of informants to claim confidentiality

(1)

(a) A person, when submitting information to the Competition Commission or the Competition Tribunal, may identify information that the person claims to be *confidential information*.

(b) Any claim contemplated in paragraph (a) must be supported by a written statement in the *prescribed* form, explaining why the information is confidential.

(2) From the time information comes into the possession of the Competition Commission, Competition Tribunal or Minister until a final determination has been made concerning that information, the Commission, Tribunal and Minister must treat as confidential, any information that is the subject of a claim in terms of this section.

(Section 44(2) substituted by section 27(a) of Act 18 of 2018, with effect from 13 February 2020.)

(3) In respect of information submitted to the Competition Commission, the Competition Commission may—

(a) determine whether the information is confidential information; and

(b) if it finds that the information is confidential, make any appropriate determination concerning access to that information.

(Section 44(3) substituted by section 27(b) of Act 18 of 2018, with effect from 13 February 2020.)

(4) The Competition Commission may not make a determination in terms of subsection (3) before it has given the claimant the prescribed notice of its intention to make the determination and has considered the claimant's representations, if any.

(Section 44(4) added by section 27(c) of Act 18 of 2018, with effect from 13 February 2020.)

(5) A person contemplated in subsection (1) who is aggrieved by the determination of the Competition Commission in terms of subsection (3) may, within the prescribed period of the Commission's decision, refer the decision to the Competition Tribunal.

(Section 44(5) added by section 27(c) of Act 18 of 2018, with effect from 13 February 2020.)

(6) The Competition Tribunal may confirm or substitute the Competition Commission's determination or substitute it with another appropriate ruling.

(Section 44(6) added by section 27(c) of Act 18 of 2018, with effect from 13 February 2020.)

(7) In respect of confidential information submitted to the Competition Tribunal, the Tribunal may—

(a) determine whether the information is confidential information; and

(b) if it finds that the information is confidential, make any appropriate determination concerning access to that information.

(Section 44(7) added by section 27(c) of Act 18 of 2018, with effect from 13 February 2020.)

(8) A person aggrieved by the ruling of the Competition Tribunal in terms of subsection (6) or (7) may, within the prescribed period and in accordance with the Competition Appeal Court's rules—

(a) refer the Tribunal's ruling to the Competition Appeal Court, if the Tribunal grants leave to appeal; and

(b) petition the President of the Competition Appeal Court for leave to refer the Tribunal's ruling to the Competition Appeal Court, if the Tribunal refuses leave to appeal.

(Section 44(8) added by section 27(c) of Act 18 of 2018, with effect from 13 February 2020.)

(9) Unless the Competition Commission, Competition Tribunal or Competition Appeal Court holds' otherwise, an appropriate determination concerning access to confidential information includes the disclosure of the information to the legal representatives and economic advisors of the person seeking access—

(a) in a manner determined by the circumstances; and

(b) subject to the provision of appropriate confidentiality undertakings.

(Section 44(9) added by section 27(c) of Act 18 of 2018, with effect from 13 February 2020.)

45. Disclosure of information

(1) A person who seeks access to information that is subject to a claim or determination that it is confidential information may apply to the Competition Tribunal in the prescribed manner and form, and the Competition Tribunal may—

(a) determine whether or not the information is confidential information; and

(b) if it finds that the information is confidential, make any appropriate order concerning access to that confidential information.

(2) The provisions of section 44(8), read with the changes required by the context, apply to the application referred to in subsection (1).

(3) Subject to section 44(2) and for the purposes of their participation in proceedings contemplated in this Act, including merger proceedings—

(a) the Minister may have access to a firm's confidential information, which information may only be used for the purposes of this Act unless required to be disclosed in terms of any other law or the Minister has reasonable grounds to believe the information discloses a potential criminal offence; and

(b) any other relevant Minister and any relevant regulatory authority may have access to a firm's confidential information unless the Tribunal determines otherwise, which information may only be used for the purposes of this Act unless required to be disclosed in terms of any other law or the Minister has reasonable grounds to believe the information discloses a potential criminal offence.

(4) Once a final determination has been made concerning any information, it is confidential only to the extent that it has been accepted to be confidential information by the Competition Tribunal or the Competition Appeal Court.

(Section 45 substituted by section 28 of Act 18 of 2018, with effect from 13 February 2020.)

45A. Restricted use of information

(1)

(a) When making any decision in terms of *this Act*, the Competition Commission, subject to paragraph (b), may take *confidential information* into account in making its decision.

(b) If the Commission's reasons for the decision would reveal any *confidential information*, the Commission must provide a copy of the proposed reasons to the party concerned at least 10 business days before publishing those reasons.

(2) A party may apply to the Competition Tribunal within the period contemplated in subsection (1)(b) after receiving a copy of the proposed reasons, subject to its rules, for an appropriate order to protect the confidentiality of the relevant information.

(3) A party concerned may appeal against a decision of the Competition Tribunal in terms of subsection (2) to the Competition Appeal Court, subject to its rules.

(4) If a party applies to the Competition Tribunal in terms of subsection (2), the Competition Commission may not publish the proposed reasons until the Tribunal or the Competition Appeal Court, as the case may be, has made an order regarding the matter.

PART B
Powers of search and summons

46. Authority to enter and search under warrant

(1) A judge of the High Court, a regional magistrate or a magistrate may issue a warrant to enter and search any *premises* that are within the jurisdiction of that judge or magistrate, if, from information on oath or affirmation, there are reasonable grounds to believe that-

(a) a *prohibited practice* has taken place, is taking place or is likely to take place on or in those *premises*; or

(b) anything connected with an investigation in terms of *this Act* is in the possession of, or under the control of, a person who is on or in those *premises*.

(2) A warrant to enter and search may be issued at any time and must specifically-

(a) identify the *premises* that may be entered and searched; and

(b) authorise an inspector or a police officer to enter and search the *premises* and to do anything listed in section 48.

(3) A warrant to enter and search is valid until one of the following events occurs:

(a) The warrant is executed;

(b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;

(c) the purpose for issuing it has lapsed; or

(d) the expiry of one month after the date it was issued.

(4) A warrant to enter and search may be executed only during the day, unless the judge, regional magistrate or magistrate who issued it authorises that it may be executed at night at a time that is reasonable in the circumstances.

(5) A person authorised by warrant issued in terms of subsection (2) may enter and search *premises* named in that warrant.

(6) Immediately before commencing with the execution of a warrant, a person executing that warrant must-

(a) if the owner, or person in control, of the *premises* to be searched is present-

(i) provide identification to that person and explain to that person the authority by which the warrant is being executed; and

(ii) hand a copy of the warrant to that person or to the person named in it; or

(b) if none of those persons is present, affix a copy of the warrant to the *premises* in a prominent and visible place.

47. Authority to enter and search without warrant

(1) An inspector who is not authorised by a warrant in terms of section 46(2) may enter and search *premises* other than a *private dwelling*.

(2) Immediately before entering and searching in terms of this section, the inspector conducting the search must provide identification to the owner or person in control of the *premises* and explain to that person the authority by which the search is being conducted, and must -

(a) get permission from that person to enter and search the *premises*; or

(b) believe on reasonable grounds that a warrant would be issued under section 46 if applied for, and that the delay that would ensue by first obtaining a warrant would defeat the object or purpose of the entry and search.

(3) An entry and search without a warrant may be carried out only during the day, unless doing it at night is justifiable and necessary in the circumstances.

48. Powers to enter and search

(1) A person who is authorised under section 46 or 47 to enter and search premises may-

(a) enter upon or into those *premises*;

(b) search those *premises*;

(c) search any person on those *premises* if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation;

(d) examine any article or document that is on or in those *premises* that has a bearing on the investigation;

(e) request information about any article or document from the owner of, or person in control of, the *premises* or from any person who has control of the article or document, or from any other person who may have the information;

(f) take extracts from, or make copies of, any book or document that is on or in the *premises* that has a bearing on the investigation;

(g) use any computer system on the *premises*, or require assistance of any person on the *premises* to use that computer system, to-

(i) search any data contained in or available to that computer system;

(ii) reproduce any record from that data; and

(iii) seize any output from that computer for examination and copying; and

(h) attach and, if necessary, remove from the premises for examination and safekeeping, anything that has a bearing on the investigation.

(2) Section 49A(3) applies to an answer given or statement made to an inspector in terms of this section.

(3) An inspector authorised to conduct an entry and search in terms of section 46 or 47 may be accompanied and assisted by a police officer.

49. Conduct of entry and search

(1) A person who enters and searches any *premises* under section 48 must conduct the entry and search with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy.

(2) During any search under section 48(1)(c), only a female inspector or police officer may search a female person, and only a male inspector or police officer may search a male person.

(3) A person who enters and searches *premises* under section 48, must before questioning anyone-

(a) advise that person of the right to be assisted at the time by an advocate or attorney; and

(b) allow that person to exercise that right.

(4) A person who removes anything from *premises* being searched must-

(a) issue a receipt for it to the owner of, or person in control of, the *premises*; and

(b) return it as soon as practicable after achieving the purpose for which it was removed.

(5) During a search, a person may refuse to permit the inspection or removal of an article or document on the grounds that it contains privileged information.

(6) If the owner or person in control of an article or document refuses in terms of subsection (5) to give that article or document to the person conducting the search, the person conducting the search may request the registrar or sheriff of the High Court that has jurisdiction to attach and remove the article or document for safe custody until that court determines whether or not the information is privileged.

(7) A police officer who is authorised to enter and search *premises* under section 46, or who is assisting an inspector who is authorised to enter and search *premises* under section 46 or 47, may overcome resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window of the *premises*.

(8) Before using force in terms of subsection (7), a police officer must audibly demand admission and must announce the purpose of the entry, unless it is reasonable to believe that doing so may induce someone to destroy or dispose of an article or document that is the object of the search.

(9) The Competition Commission may compensate anyone who suffers damage because of a forced entry during a search when no one responsible for the *premises* was present.

49A. Summons

(1) At any time during an investigation in terms of *this Act*, the Commissioner may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject-

(a) to appear before the Commissioner or a person authorised by the Commissioner, to be interrogated at a time and place specified in the summons; or

(b) at a time and place specified in the summons, to deliver or produce to the Commissioner, or a person authorised by the Commissioner, any book, document or other object specified in the summons.

(2) A person questioned by an inspector conducting an investigation, or by the Commissioner or other person in terms of subsection (1), must answer each question truthfully and to the best of that person's ability, but the person is not obliged to answer any question if the answer is self-incriminating.

(3) No self-incriminating answer given or statement made to a person exercising any power in terms of this section is admissible as evidence against the person who gave the answer or made the statement in criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 72 or section 73(2)(d), and then only to the extent that the answer or statement is relevant to prove the offence charged.

PART C
Complaint procedures

49B. Initiating complaint

(1) The Commissioner may initiate a complaint against an alleged *prohibited practice*.

(2) Any person may-

(a) submit information concerning an alleged *prohibited practice* to the Competition Commission, in any manner or form; or

(b) submit a complaint against an alleged *prohibited practice* to the Competition Commission, in the *prescribed* form.

(3) Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.

(4) At any time during an investigation, the Commissioner may designate one or more persons to assist the inspector.

49C. Interim relief

(1) At any time, whether or not a hearing has commenced into an alleged *prohibited practice*, the *complainant* may apply to the Competition Tribunal for an interim order in respect of the alleged practice.

(2) The Competition Tribunal-

(a) must give the *respondent* a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and

(b) may grant an interim order if it is reasonable and just to do so, having regard to the following factors:

(i) The evidence relating to the alleged *prohibited practice*;

(ii) the need to prevent serious or irreparable damage to the applicant; and

(iii) the balance of convenience.

(3) In any proceedings in terms of this section, the standard of proof is the same as the standard of proof in a High Court on a common law application for an interim interdict.

(4) An interim order in terms of this section may not extend beyond the earlier of the-

(a) conclusion of a hearing into the alleged *prohibited practice*; or

(b) date that is six months after the date of issue of the interim order.

(5) If an interim order has been granted, and a hearing into that matter has not been concluded within six months after the date of that order, the Competition Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months.

(6) Any party to an application may apply to the Competition Appeal Court to review a decision of the Competition Tribunal in terms of this section.

(7) The applicant may appeal to the Competition Appeal Court against a refusal by the Competition Tribunal to grant an interim order in terms of this section.

(8) The *respondent* may appeal to the Competition Appeal Court in terms of this section against any order of the Competition Tribunal that has a final or irreversible effect.

49D. Consent orders

(1) If, during, on or after the completion of the investigation of a complaint or a market inquiry, the Competition Commission and the respondent, or any person that is the subject of action by the Competition Commission in terms of section 43E, agree on the terms of an appropriate order, the

Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b).

(Section 49D(1) substituted by section 29 of Act 18 of 2018)

(2) After hearing a motion for a consent order, the Competition Tribunal must-

(a) make the order as agreed to and proposed by the Competition Commission and the *respondent*;

(b) indicate any changes that must be made in the draft order before it will make the order; or

(c) refuse to make the order.

(3) With the consent of a *complainant*, a consent order may include an award of damages to the *complainant*.

(4) A consent order does not preclude a *complainant* from applying for-

(a) a declaration in terms of section 58(1)(a)(v) or (vi); or

(b) an award of civil damages in terms of section 65, unless the consent order includes an award of damages to the *complainant*.

49E. Leniency

(1) The Competition Commission must develop, and publish in the *Gazette*, a policy on leniency, including the types of leniency that may be granted, criteria for granting leniency, the procedures to apply for leniency and the possible conditions that may be attached to a decision to grant leniency.

(2) The Competition Commission may grant leniency, with or without conditions, in terms of its leniency policy.

(Section 49E inserted by section 30 of Act 18 of 2018)

50. Outcome of complaint

(1) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.

(2) Within one year after a complaint was submitted to it, the Commissioner must-

(a) subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a *prohibited practice* has been established; or

(b) in any other case, issue a notice of non-referral to the *complainant* in the *prescribed* form.

(3) When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2)(a), it-

(a) may-

(i) refer all the particulars of the complaint as submitted by the *complainant*;

(ii) refer only some of the particulars of the complaint as submitted by the *complainant*; or

(iii) add particulars to the complaint as submitted by the *complainant*; and

(b) must issue a notice of non-referral as contemplated in subsection (2)(b) in respect of any particulars of the complaint not referred to the Competition Tribunal.

(4) In a particular case-

(a) the Competition Commission and the *complainant* may agree to extend the period allowed in subsection (2); or

(b) on application by the Competition Commission made before the end of the period contemplated in paragraph (a), the Competition Tribunal may extend that period.

(5) If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2) or the extended period contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period.

51. Referral to Competition Tribunal

(1) If the Competition Commission issues a notice of non-referral in response to a complaint, the *complainant* may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure.

(2) A referral to the Competition Tribunal, whether by the Competition Commission in terms of section 50(1) or by a *complainant* in terms of subsection (1), must be in the *prescribed* form.

(3) The Chairperson of the Competition Tribunal must, by notice in the *Gazette*, publish each referral made to the Tribunal.

(4) The notice published in terms of subsection (3) must include-

(a) the name of the respondent; and

(b) the nature of the conduct that is the subject of the referral.

PART D
Tribunal hearings and orders

52. Hearings before Competition Tribunal

(1) The Competition Tribunal must conduct a hearing, subject to its rules, into every matter referred to it in terms of *this Act*.

(2) Subject to subsections (3) and (4), the Competition Tribunal-

(a) must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice; and

(b) may conduct its hearings informally or in an inquisitorial manner.

(2A) Despite subsection (2)(a), the Chairperson of the Tribunal may order that a matter be heard-

(a) in chambers, if no oral evidence will be heard, or that oral submissions be made at the hearing; or

(b) by telephone or video conference, if it is in the interests of justice and expediency to do so.

(3) Despite subsection (2), the Tribunal member presiding at a hearing may exclude members of the public, or specific persons or categories of persons, from attending the proceedings-

(a) if evidence to be presented is *confidential information*, but only to the extent that the information cannot otherwise be protected;

(b) if the proper conduct of the hearing requires it; or

(c) for any other reason that would be justifiable in civil proceedings in a High Court.

(4) At the conclusion of a hearing, the Competition Tribunal must make any order permitted in terms of *this Act*, and must issue written reasons for its decision.

(5) The Competition Tribunal must provide the participants and other members of the public reasonable access to the record of each hearing, subject to any ruling to protect *confidential information* made in terms of subsection (3)(a).

53. Right to participate in hearing

The following persons may participate in a hearing, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:

(a) If the hearing is in terms of Part C-

(i) the Commissioner, or any person appointed by the Commissioner;

(ii) the *complainant*, if-

(aa) the *complainant* referred the complaint to the Competition Tribunal; or

(bb) in the opinion of the presiding member of the Competition Tribunal, the *complainant's* interest is not adequately represented by another participant, and then only to the extent required for the c*omplainant's* interest to be adequately represented;

(iii) the respondent; and

(iv) any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Competition Tribunal, that interest is adequately represented by another participant, but only to the extent required for the *complainant's* interest to be adequately represented;

(b) if the hearing is in terms of section 10 or Schedule 1-

(i) the applicant for an exemption;

(ii) the Competition Commission;

(iii) the appellant, if the appellant is not the applicant for an exemption;

(iv) an interested person contemplated in section 10(8) who submitted a representation to the Competition Commission, unless, in the opinion of the presiding member of the Competition Tribunal, that person's interest is adequately represented by another participant, but only to the extent required for the person's interest to be adequately represented; and

(v) the Minister or member of the Executive Council if consulted in terms of Schedule 1;

(c) if the hearing is in terms of Chapter 3-

(i) any party to the merger;

(ii) the Competition Commission;

(iii) any person who was entitled to receive a notice in terms of section 13A(2), and who indicated to the Commission an intention to participate, in the *prescribed* form;

(iv) the *Minister*, if the *Minister* has indicated an intention to participate; and

(v) any other person whom the Tribunal recognised as a participant; and

(d) if the hearing is in terms of Part A-

(i) the person who owns the information that is the subject of the hearing;

(ii) any person who sought disclosure of the information that is the subject of the hearing;

(iii) the Competition Commission; and

(iv) any other person whom the Tribunal recognised as a participant.

54. Powers of member presiding at hearing

The member of the Competition Tribunal presiding at a hearing may-

(a) direct or summon any person to appear at any specified time and place;

(b) question any person under oath or affirmation;

(c) summon or order any person-

(i) to produce any book, document or item necessary for the purposes of the hearing; or

(ii) to perform any other act in relation to *this Act*;

(d) give directions prohibiting or restricting the publication of any evidence given to the Competition Tribunal;

(dA) amend or withdraw any direction or summons referred to in subsection (a), (c) or (d);

(Section 54(dA) inserted by section 31 of Act 18 of 2018)

(e) accept oral submissions from any participant; and

(f) accept any other information that is submitted by a participant.

55. Rules of procedure

(1) Subject to the Competition Tribunal's rules of procedure, the Tribunal member presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case, and the requirements of section 52(2).

(2) The Tribunal may condone any technical irregularities arising in any of its proceedings.

(3) The Tribunal may-

(a) accept as evidence any relevant oral testimony, document or other thing, whether or not-

(i) it is given or proven under oath or affirmation; or

(ii) would be admissible as evidence in court; but

(b) refuse to accept any oral testimony, document or other thing that is unduly repetitious.

56. Witnesses

(1) Every person giving evidence at a hearing of the Competition Tribunal must answer any relevant question.

(2) The law regarding a witness' privilege in a criminal case in a court of law applies equally to a person who provides information during a hearing.

(3) The Competition Tribunal may order a person to answer any question, or to produce any article or document, even if it is self-incriminating to do so.

(4) Section 49A(3) applies to evidence given by a witness in terms of this section.

57. Costs

(1) Subject to subsection (2) and the Competition Tribunal's rules of procedure, each party participating in a hearing must bear its own costs.

(2) If the Competition Tribunal-

(a) has not made a finding against a *respondent*, the Tribunal member presiding at a hearing may award costs to the *respondent*, and against a *complainant* who referred the *complaint* in terms of section 51(1); or

(b) has made a finding against a *respondent*, the Tribunal member presiding at a hearing may award costs against the *respondent*, and to a *complainant* who referred the complaint in terms of section 51(1).

58. Orders of Competition Tribunal

(1) In addition to its other powers in terms of *this Act*, the Competition Tribunal may-

(a) make an appropriate order in relation to a prohibited practice or an appeal referred to in section 43F, including—
(Words preceding section 58(1)(a)(i) substituted by section 32(a) of Act 18 of 2018)

(i) interdicting any *prohibited practice*;

(ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a *prohibited practice*;

(iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;

(iv) ordering divestiture, subject to section 60;

(v) declaring conduct of a *firm* to be a *prohibited practice* in terms of *this Act*, for purposes of section 65;

(vi) declaring the whole or any part of an *agreement* to be void;

(vii) ordering access to an *essential facility* on terms reasonably required;

(b) confirm a consent *agreement* in terms of section 49D as an order of the Tribunal; or

(c) subject to sections 13(6), 14(2) and 43B(4)(b), condone, on good cause shown, any non-compliance of—
(Words preceding section 58(1)(c)(i) substituted by section 32(b) of Act 18 of 2018)

(i) the Competition Commission or Competition Tribunal rules; or

(ii) a time limit set out in *this Act*.

(2) At any time, the Competition Tribunal may adjourn a hearing for a reasonable period of time, if there is reason to believe that the hearing relates to a *prohibited practice* that might qualify for exemption in terms of section 10.

(3) Despite any other provision of *this Act*, if the Competition Tribunal adjourns a hearing in terms of subsection (2), the *respondent* may apply for an exemption during that adjournment.

59. Administrative penalties

(1) The Competition Tribunal may impose an administrative penalty only-

(a) for a prohibited practice in terms of section 4(1), 5(1) and (2), 8(1), 8(4), 9(1) or 9(1A);

(Section 59(1)(a) substituted by section 33(a) of Act 18 of 2018. Commencement date of section 59(1)(a), in so far as it relates to section 8(4) and 9(1A): 13 February 2020)

(b) …….

(Section 59(1)(b) deleted by section 33(b) of Act 18 of 2018)

(c) for contravention of, or failure to comply with, an interim or final order of the Competition Tribunal or the Competition Appeal Court; or

(d) if the parties to a merger have-

(i) failed to give notice of the merger as required by Chapter 3;

(ii) proceeded to implement the merger in contravention of a decision by the Competition Commission or Competition Tribunal to prohibit that merger;

(iii) proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Competition Commission in terms of section 13 or 14, or the Competition Tribunal in terms of section 16; or

(iv) proceeded to implement the merger without the approval of the Competition Commission or Competition Tribunal, as required by *this Act*.

(2) An administrative penalty imposed in terms of subsection (1) may not exceed 10 per cent of the *firm's* annual turnover in the Republic and its exports from the Republic during the *firm's* preceding financial year.

(2A) An administrative penalty imposed in terms of subsection (1) may not exceed 25 per cent of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice.

(Section 59(2A) inserted by section 33(c) of Act 18 of 2018)

(3) When determining an appropriate penalty, the Competition Tribunal must consider the following factors:

(a) the nature, duration, gravity and extent of the contravention;

(b) any loss or damage suffered as a result of the contravention;

(c) the behaviour of the respondent;

(d) the market circumstances in which the contravention took place, including whether, and to what extent, the contravention had an impact upon small and medium businesses and firms owned or controlled by historically disadvantaged persons;

(e) the level of profit derived from the contravention;

(f) the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal;

(g) whether the respondent has previously been found in contravention of this Act; and

(h) whether the conduct has previously been found to be a contravention of this Act or is substantially the same as conduct regarding which Guidelines have been issued by the Competition Commission in terms of section 79.

(Section 59(3) substituted by section 33(d) of Act 18 of 2018)

(3A) In determining the extent of the administrative penalty to be imposed, the Competition Tribunal may—

(a) increase the administrative penalty referred to in subsections (2) and (2A) to include the turnover of any firm or firms that control the respondent, where the controlling firm or firms knew or should reasonably have known that the respondent was engaging in the prohibited conduct; and

(b) on notice to the controlling firm or firms, order that the controlling firm or firms be jointly and severally liable for the payment of the administrative penalty imposed.

(Section 59(3A) inserted by section 33(e) of Act 18 of 2018)

(4) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the *Constitution*.

60. Divestiture

(1) If a merger is implemented in contravention of Chapter 3, the Competition Tribunal may-

(a) order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger; or

(b) declare void any provision of an *agreement* to which the merger was subject.

(2) The Competition Tribunal, in addition to or in lieu of making an order under section 58, may make an order directing any *firm*, or any other person, to sell any shares, interest or assets of the *firm* if-

(a) it has contravened section 8, and

(b) the prohibited practice—

(i) cannot adequately be remedied in terms of another provision of this Act;

(ii) is substantially a repeat by that firm of conduct previously found by the Tribunal to be a prohibited practice; or

(Section 60(2)(b) substituted by section 34(a) of Act 18 of 2018)

(c) after a market inquiry conducted in terms of Chapter 4A, the Competition Commission finds that there is an adverse effect on competition in the relevant market and makes a recommendation to the Competition Tribunal that such an order is appropriate.

(Section 60(2)(c) added by section 34(b) of Act 18 of 2018)

(3) An order made by the Competition Tribunal in terms of subsection (2), except an order made in terms of section 43D(2), is of no force or effect unless confirmed by the Competition Appeal Court.

(Section 60(3) substituted by section 34(c) of Act 18 of 2018)

(4) An order made in terms of subsection (1) or (2) may set a time for compliance, and any other terms that the Competition Tribunal considers appropriate, having regard to the commercial interests of the party concerned and the purposes of this Act.

(Section 60(4) substituted by section 34(d) of Act 18 of 2018)

Part E

Appeals and reviews to Competition Appeal Court

61. Appeals

(1) A person affected by a decision of the Competition Tribunal may appeal against, or apply to the Competition Appeal Court to review, that decision in accordance with the Rules of the Competition Appeal Court if, in terms of section 37, the Court has jurisdiction to consider that appeal or review that matter.

(2) The Competition Appeal Court may make an order for the payment of costs against any party in the hearing, or against any person who represented a party in the hearing, according to the requirements of the law and fairness.

62. Appellate jurisdiction

(1) The Competition Tribunal and Competition Appeal Court share exclusive jurisdiction in respect of the following matters:

(a) Interpretation and application of Chapters 2, 3 and 5, other than-

(i) a question or matter referred to in subsection (2); or

(ii) a review of a certificate issued by the Minister of Finance in terms of section 18(2); and

(b) the functions referred to in sections 21(1), 27(1) and 37, other than a question or matter referred to in subsection (2).

(2) In addition to any other jurisdiction granted in *this Act* to the Competition Appeal Court, the Court has jurisdiction over-

(a) the question whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of *this Act*;

(b) any constitutional matter arising in terms of *this Act*; and

(c) the question whether a matter falls within the exclusive jurisdiction granted under subsection (1).

(3) The jurisdiction of the Competition Appeal Court-

(a) is final over a matter within its exclusive jurisdiction in terms of subsection (1); and

(b) is neither exclusive nor final in respect of a matter within its jurisdiction in terms of subsection (2).

(4) An appeal from a decision of the Competition Appeal Court in respect of a matter within its jurisdiction in terms of subsection (2) lies to the Constitutional Court, subject to section 63 and its respective rules.

(Section 62(4) substituted by section 35(b) of Act 18 of 2018)

(5) For greater certainty, the Competition Tribunal and the Competition Appeal Court have no jurisdiction over the assessment of the amount, and awarding, of damages arising out of a *prohibited practice*.

63. Leave to appeal

(1) The right to an appeal in terms of section 62(4)-

(a) is subject to any law that-

(i) specifically limits the right of appeal set out in that section; or

(ii) specifically grants, limits or excludes any right of appeal;

(b) is not limited by monetary value of the matter in dispute; and

(c) exists even if the matter in dispute is incapable of being valued in money.

(2) Subject to the Constitution and despite any other law, an appeal in terms of section 62(4) may be brought to the Constitutional Court with the leave of the Constitutional Court.

(Section 63(2) substituted by section 36(a) of Act 18 of 2018)

(3) A court granting leave to appeal in terms of this section may attach any appropriate conditions, including a condition that the applicant provide security for the costs of the appeal.

(4) If the Competition Appeal Court, when refusing leave to appeal, made an order of costs against the applicant, the Constitutional Court may vary that order on granting leave to appeal.

(Section 63(4) substituted by section 36(b) of Act 18 of 2018)

(5) An application to the Competition Appeal Court for leave to appeal must be made in the manner and form required by the Competition Appeal Court Rules.

(6) An application to the Constitutional Court for leave to appeal must be made in the manner and form required by its Rules.

(7) …….

(Section 63(7) deleted by section 36(c) of Act 18 of 2018)

(8) …….

(Section 63(8) deleted by section 36(c) of Act 18 of 2018)

(Chapter 5 substituted by section 15 of Act 39 of 2000)

CHAPTER 6
ENFORCEMENT

64. Status and enforcement of orders

(1) Any decision, judgment or order of the Competition Commission, Competition Tribunal or Competition Appeal Court may be served, executed and enforced as if it were an order of the High Court.

(2) The Competition Commission may institute proceedings in the High Court on its own behalf for recovery of an administrative penalty imposed by the Competition Tribunal.

(3) Proceedings under subsection (2) may not be initiated more than three years after the imposition of the administrative penalty.

65. Civil actions and jurisdiction

(1) Nothing in *this Act* renders void a provision of an *agreement* that, in terms of *this Act*, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void.

(2) If, in any action in a *civil court*, a party raises an issue concerning conduct that is prohibited in terms of *this Act*, that court must not consider that issue on its merits, and-

(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that-

(i) the issue has not been raised in a frivolous or vexatious manner; and

(ii) the resolution of that issue is required to determine the final outcome of the action.

(3) …

(4) …

(5) …

(6) A person who has suffered loss or damage as a result of a *prohibited practice*-

(a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); or

(b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the *prescribed* form-

(i) certifying that the conduct constituting the basis for the action has been found to be a *prohibited practice* in terms of *this Act*;

(ii) stating the date of the Tribunal or Competition Appeal Court finding; and

(iii) setting out the section of *this Act* in terms of which the Tribunal or the Competition Appeal Court made its finding.

(7) A certificate referred to in subsection (6)(b) is conclusive proof of its contents, and is binding on a *civil court*.

(8) An appeal or application for review against an order made by the Competition Tribunal in terms of section 58 suspends any right to commence an action in a *civil court* with respect to the same matter.

(9) A person's right to bring a claim for damages arising out of a *prohibited practice* comes into existence-

(a) on the date that the Competition Tribunal made a determination in respect of a matter that affects that person; or

(b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.

(10) For the purposes of section 2A(2)(a) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), interest on a debt in relation to a claim for damages in terms of *this Act* will commence on the date of issue of the certificate referred to in subsection (6).

66. Variation of order

The Competition Tribunal, or the Competition Appeal Court, acting of its own accord or on application of a person affected by a decision or order, may vary or rescind its decision or order-

(a) erroneously sought or granted in the absence of a party affected by it;

(b) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or

(c) made or granted as a result of a mistake common to all of the parties to the proceedings.

67. Limitations of bringing action

(1) A complaint in respect of a prohibited practice that ceased more than three years before the complaint was initiated may not be referred to the Competition Tribunal.

(Section 67(1) substituted by section 37 of Act 18 of 2018)

(2) A complaint may not be referred to the Competition Tribunal against any *firm* that has been a *respondent* in completed proceedings before the Tribunal under the same or another section of *this Act* relating substantially to the same conduct.

68. Standard of proof

In any proceedings in terms of *this Act*, other than proceedings in terms of section 49C or criminal proceedings, the standard of proof is on a balance of probabilities.

(Chapter 6 substituted by section 15 of Act 39 of 2000)

CHAPTER 7
OFFENCES

69. Breach of confidence

(1) It is an offence to disclose any *confidential information* concerning the affairs of any person or *firm* obtained-

(a) in carrying out any function in terms of *this Act;* or

(b) as a result of initiating a complaint or participating in any proceedings in terms of *this Act.*

(2) Subsection (1) does not apply to information disclosed-

(a) for the purpose of the proper administration or enforcement of *this Act;*

(b) for the purpose of the administration of justice; or

(c) at the request of an inspector, Commissioner, Deputy Commissioner or Competition Tribunal member entitled to receive the information.

(Commencement date of this section: 1 September 1999)

70. Hindering administration of Act

It is an offence to hinder, oppose, obstruct or unduly influence any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by *this Act.*

(Commencement date of this section: 1 September 1999)

71. Failure to attend when summoned

(1) A person commits an offence who, having been summoned in terms of section 49A, or directed or summoned to attend a hearing-

(Words preceding paragraph (a) of section 71(1) substituted by section 16 of Act 39 of 2000)

(a) fails without sufficient cause to appear at the time and place specified or to remain in attendance until excused; or

(b) attends as required, but-

(i) refuses to be sworn in or to make an affirmation; or

(ii) fails to produce a book, document or other item as ordered, if it is in the possession of, or under the control of, that person.

(Commencement date of this section: 1 September 1999)

72. Failure to answer fully or truthfully

A person commits an offence who, having been sworn in or having made an affirmation-

(a) subject to section 49A(3) or 56, fails to answer any question fully and to the best of that person's ability; or

(Section 72(a) substituted by section 17 of Act 39 of 2000)

(b) gives false evidence, knowing or believing it to be false.

(Commencement date of this section: 1 September 1999)

73. Failure to comply with Act

(1) A person commits an offence who contravenes or fails to comply with an interim or final order of the Competition Tribunal or the Competition Appeal Court.

(Section 73(1) substituted by section 18 of Act 39 of 2000)

(2) A person commits an offence who--

(a) does anything calculated to improperly influence the Competition Tribunal or Competition Commission concerning any matter connected with an investigation;

(b) anticipates any findings of the Tribunal or Commission concerning an investigation in a way that is calculated to influence the proceedings or findings;

(c) does anything in connection with an investigation that would have been contempt of court if the proceedings had occurred in a court of law;

(d) knowingly provides false information to the Commission;

(e) defames the Tribunal or the Competition Appeal Court, or a member of either of them, in their respective official capacities;

(f) wilfully interrupts the proceedings or misbehaves in the place where a hearing is being conducted;

(g) acts contrary to a warrant to enter and search;

(h) without authority, but claiming to have authority in terms of section 46 or 47-

(i) enters or searches *premises;* or

(ii) attaches or removes an article or document.

(Commencement date of this section: 1 September 1999)

73A. Causing or permitting firm to engage in prohibited practice

(1) A person commits an offence if, while being a director of a firm or while engaged or purporting to be engaged by a firm in a position having management authority within the firm, such person—

(a) caused the firm to engage in a prohibited practice in terms of section 4(1)(b); or

(b) knowingly acquiesced in the firm engaging in a prohibited practice in terms of section 4(1)(b).

(Section 73A(1) inserted by section 12 of Act 1 of 2009, with effect from 1 May 2016)

(2) For the purpose of subsection (1)(b), 'knowingly acquiesced' means having acquiesced while having actual knowledge of the relevant conduct by the firm.

(Section 73A(2) inserted by section 12 of Act 1 of 2009, with effect from 1 May 2016)

(3) Subject to subsection (4), a person may be prosecuted for an offence in terms of this section only if—

(a) the relevant firm has acknowledged, in a consent order contemplated in section 49D, that it engaged in a prohibited practice in terms of section 4(1)(b); or

(b) the Competition Tribunal or the Competition Appeal Court has made a finding that the relevant firm engaged in a prohibited practice in terms of section 4(1)(b).

(Section 73A(3) inserted by section 12 of Act 1 of 2009, with effect from 1 May 2016)

(4) The Competition Commission—

(a) may not seek or request the prosecution of a person for an offence in terms of this section if the Competition Commission has certified that the person is deserving of leniency in the circumstances; and

(b) may make submissions to the National Prosecuting Authority in support of leniency for any person prosecuted for an offence in terms of this section, if the Competition Commission has certified that the person is deserving of leniency in the circumstances.

(Section 73A(4) inserted by section 12 of Act 1 of 2009, with effect from 1 May 2016)

(Publisher's note – The remainder of the sections inserted by section 12 of Act 1 of 2009 is still to be proclaimed)

74. Penalties

Any person convicted of an offence in terms of *this Act,* is liable-

(a) in the case of a contravention of section 73(1), or section 73A, to a fine not exceeding R500 000-00 or to imprisonment for a period not exceeding 10 years, or to both a fine and such imprisonment; or

(Section 74(a) substituted by section 13(b) of Act 1 of 2009)

(b) in any other case, to a fine not exceeding R10 000-00 or to imprisonment for a period not exceeding six months, or to both a fine and imprisonment.

(Section 74(b) substituted by section 38 of Act 18 of 2018)

(Section 74, amended by the deletion of (1) from the beginning of the section, by section 13(a) of Act 1 of 2009)

(Commencement date of this section: 1 September 1999)

75. Magistrate's Court jurisdiction to impose penalties

Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in *this Act.*

(Commencement date of this section: 1 September 1999)

76. …

(Section 76 repealed by section 19 of Act 39 of 2000))

77. Proof of facts

(1) In any criminal proceedings in terms of *this Act*-

(a) if it is alleged that a person at *a firm* is or was an employee, that person must be presumed to be an employee at that *firm*, unless the contrary is proved;

(b) if it is proved that a false statement, entry or record or false information appears in or on a book, document, plan, drawing or computer storage medium, the person who kept that item must be presumed to have made the statement, entry, record or information, unless the contrary is proved; and

(c) an order certified by the Chairperson of the Competition Tribunal or the Judge President of the Competition Appeal Court, is conclusive proof of the contents of the order of the Competition Tribunal or the Competition Appeal Court, as the case may be.

(2) A statement, entry or record or information, in or on any book, document, plan, drawing or computer storage medium is admissible in evidence as an admission of the facts in or on it by the person who appears to have made, entered, recorded or stored it unless it is proved that that person did not make, enter, record or store it.

(Commencement date of this section: 1 September 1999)

CHAPTER 8
GENERAL PROVISIONS

78. Regulations

(1) The Minister, by notice in the *Gazette*, may make regulations that are required to give effect to the purposes of this Act.

(2) Before making the regulations referred to in sections 4, 5, 8, and 9, the Minister must consult the Competition Commission and publish a notice in the *Gazette*—

(a) stating that draft regulations have been prepared;

(b) specifying the place, which may include a website, where a copy of the draft regulations may be obtained;

(c) inviting interested parties to submit written comments on the draft regulations within a reasonable period; and

(d) consider any comments submitted within the period contemplated in paragraph (c).

(Section 78 substituted by section 39 of Act 18 of 2018)

79. Guidelines

(1) The Competition Commission may prepare, amend, replace and issue guidelines to indicate the Commission's policy approach to any matter within its jurisdiction in terms of this Act.

(2) A guideline referred to in subsection (1) must be published in the *Gazette*.

(3) Before the Competition Commission issues a guideline referred to in subsection (1), the Competition Commission must—

(a) publish a notice in the *Gazette*—

(i) stating that a draft guideline has been prepared;

(ii) stating the place, which may include the Competition Commission's website, where a copy of the draft guideline may be obtained; and

(iii) inviting interested parties to submit written representations on the draft guideline within a reasonable period; and

(b) consider any representations which were submitted within the period specified in the notice.

(4) A guideline referred to in subsection (1) is not binding, but any person interpreting or applying this Act must take it into account.

(Section 79 substituted by section 40 of Act 18 of 2018)

79A. Advisory opinions of Commission

The Minister may, after consultation with the Competition Commission, issue regulations to provide for non-binding advisory opinions to be issued by the Competition Commission, including the fees payable in respect of a non-binding opinion.

(Section 79A inserted by section 41 of Act 18 of 2018)

80. Official seal

The President, by proclamation in the *Gazette,* may prescribe an official seal for each of the Competition Commission, Competition Tribunal and the Competition Appeal Court.

(Commencement date of this section: 1 September 1999)

81. Act binds State

This Act binds the State.

(Commencement date of this section: 1 September 1999)

82. Relationship with other agencies

(1) A regulatory authority which, in terms of any public regulation, has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 or on matters set out in Chapter 4A within a particular sector—

(Words preceding section 82(1)(a) substituted by section 42 of Act 18 of 2018)

(a) must negotiate *agreements* with the Competition Commission, as anticipated in section 21(1)(h); and

(b) in respect of a particular matter within its jurisdiction, may exercise its jurisdiction by way of such an *agreement*.

(2) Subsection (1)(a) and (b), read with the changes required by the context, applies to the Competition Commission.

(3) In addition to the matters contemplated in section 21(1)(h), an agreement in terms of subsection (1) must-

(a) identify and establish procedures for the management of areas of concurrent jurisdiction;

(b) promote co-operation between the *regulatory authority* and the Competition Commission;

(c) provide for the exchange of information and the protection of *confidential information*; and

(d) be published in the *Gazette*.

(4) The President may assign to the Competition Commission any duty of the Republic, in terms of an international *agreement* relating to the purpose of *this Act*, to exchange information with a similar foreign agency.

(Section 82 substituted by section 20 of Act 39 of 2000)

83. Transitional arrangements and repeal of laws

(1) Subject to Schedule 3, the laws specified in Schedule 2, and all proclamations, *regulations* or notices promulgated or published in terms of those laws, are repealed.

(2) The repeal of those laws specified in Schedule 2 does not affect any transitional arrangements made in Schedule 3.

(3) Until a leniency policy referred to in section 49E is published in the *Gazette*, the leniency policy published in Government *Gazette* No. 31064 (GN 628 of 23 May 2008), and amended in Government *Gazette* No. 35139 (GN 212 of 16 March 2012), remains in effect.

(Section 83(3) added by section 43 of Act 18 of 2018)

(Commencement date of this section: 1 September 1999)

84. Short Title and commencement of Act

(1) This Act is called the Competition Act and comes into operation on a date fixed by the President by proclamation in the *Gazette.*

(2) The President may set different dates for different provisions of *this Act* to come into operation.

(3) Unless the context otherwise indicates, a reference in a section of *this Act* to a time when this *Act* comes into operation must be construed as a reference to the time when that section comes into operation.

SCHEDULE 1

EXEMPTION OF PROFESSIONAL RULES

(Heading of Schedule 1 substituted by section 21(a) of Act 39 of 2000)

PART A

1. A professional association whose rules contain a restriction that has the effect of substantially preventing or lessening competition in a market may apply in the *prescribed* manner to the Competition Commission for an exemption in terms of item 2.

2. The Competition Commission may exempt all or part of the rules of a professional association from the provisions of Part A of Chapter 2 of *this Act* for a specified period if, having regard to internationally applied norms, any restriction contained in those rules that has the effect of substantially preventing or lessening competition in a market is reasonably required to maintain-

   (a) professional standards; or

   (b) the ordinary function of the profession.

3. Upon receiving an application in terms of item 1, the Competition Commission must-

   (a) publish a notice of the application in the *Gazette*;

   (b) allow interested parties 20 business days from the date of that notice to make representations concerning the application; and

   (c) consult the responsible Minister, or member of the Executive Council concerning the application.

4. After considering the application and any submissions or other information received in relation to the application, and consulting with the responsible Minister or member of the Executive Council, the Commission must-

   (a) either grant an exemption or reject the application by issuing a notice in the *prescribed* form to the applicant,

   (b) give written reasons for its decision; and

   (c) publish a notice of that decision in the *Gazette*.

5. The Competition Commission, in the *prescribed* manner, may revoke an exemption granted under item 4 on good cause shown, at any time after it has-

   (a) given notice in the *Gazette* of its intention to revoke the exemption;

(b) allowed interested parties 20 business days from the date of that notice to make representations concerning the exemption; and

(c) consulted the responsible Minister, or member of the Executive Council.

6. A professional rule is exempt, or its exemption revoked, only as of the date on which notice of the exemption or revocation, as the case may be, is published in the *Gazette*.

7. The Competition Commission must maintain for public inspection a record of all professional rules that have received exemption, or for which exemption has been revoked.

8. A professional association, or any other person with a substantial interest affected by a decision of the Competition Commission in terms of item 4 may appeal against that decision to the Competition Tribunal in the *prescribed* manner and form.

9. In this Schedule-

'professional association' means an association referred to in Part B of this Schedule;

'professional rules' means rules regulating a professional association that are binding on its members;

'rules' includes *public regulations*, codes of practice and statements of principle.

(Schedule 1, Part A, substituted by section 21(b) of Act 39 of 2000)

PART B

For the purpose of *this Act,* a professional association is-

(a) for each of the following professions, a governing body of that profession registered in terms of an Act mentioned below the name of that profession; or

(b) any other association, if the Competition Commission is satisfied that it represents the interests of members of a profession referred to in paragraph (a):

Accountants and Auditors
Public Accountants and Auditors Act, 1991 (Act No. 80 of 1991).

Architects
Architects Act, 1970 (Act No. 35 of 1970).

Engineering

Engineering Profession of South Africa Act, 1990 (Act No. 114 of 1990)

Estate Agents

Estate Agents Act, 1976 (Act No. 112 of 1976)

Attorneys and Advocates

Attorneys Act, 1979 (Act No. 53 of 1979)

Admission of Advocates Act, 1964 (Act No. 74 of 1964)

Natural sciences

Natural Scientific Professions Act, 1993 (Act No. 106 of 1993)

Quantity Surveyors

Quantity Surveyors Act, 1970 (Act No. 36 of 1970)

Surveyors

Professional and Technical Surveyors Act, 1984 (Act No. 40 of 1984)

Town and Regional Planners

Town and Regional Planners Act, 1984 (Act No. 19 of 1984)

Valuers

Valuers Act, 1982 (Act No. 23 of 1982)

Medical

Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974)

Nursing Act, 1978 (Act No. 50 of 1978)

Dental Technicians Act, 1979 (Act No. 19 of 1979)

Pharmacy Act, 1974 (Act No. 53 of 1974)

Veterinary and Para-veterinary Professions Act, 1982 (Act No. 19 of 1982)

Chiropractors Homeopaths and Allied Health Service Professions Act, 1982 (Act No. 63 of 1982)

Miscellaneous

Any other *professional association* to whom the provisions of this Schedule have been declared applicable by the *Minister* by notice in the *Gazette.*

(Commencement date of this Schedule: 1 September 1999)

SCHEDULE 2

REPEAL OF LAWS (SECTION 83)

No and Year of Law	Short Title	Extent of Repeal
Act No. 96 of 1979	Maintenance and Promotion of Competition Act, 1979	The whole
Act No. 58 of 1980	Maintenance and Promotion of Competition Amendment Act, 1980	The whole
Act No. 62 of 1983	Maintenance and Promotion of Competition Amendment Act, 1983	The whole
Act No. 12 of 1985	Maintenance and Promotion of Competition Amendment Act, 1985	The whole
Act No. 5 of 1986	Maintenance and Promotion of Competition Amendment Act, 1986	The whole
Act No. 96 of 1987	Maintenance and Promotion of Competition Amendment Act, 1987	The whole
Act No. 88 of 1990	Maintenance and Promotion of Competition Amendment Act, 1990	The whole

(Commencement date of this Schedule: 1 September 1999)

SCHEDULE 3

Transitional Arrangements

1. A ruling issued in terms of section 6(2)(a) of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), or notice issued in terms of section 14(1)(c) of that Act, in relation to an "acquisition" as defined in that Act, must be regarded for purposes of *this Act, depending on the context,* to be either -

   (a) a conditional approval of a merger as if it had been granted after *this Act* came into operation by the Competition Commission in terms of section 14(1)(b)(ii) or by the Competition Tribunal in terms of section 15(2)(b); or

   (b) a prohibition of a merger as if it had been prohibited after *this Act* came into operation, by the Competition Commission in terms of section 14(1)(b)(iii) or by the Competition Tribunal in terms of section 15(2)(c).

(Item 1 of Schedule 3 substituted by section 1(a) of Act 35 of 1999. With effect from 1 September 1999.)

2. An arrangement entered into in terms of section 11(1) of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as having been confirmed as a consent order in terms of section 63 of *this Act* and is valid for a period of 12 months from the date on which *this Act* comes into operation.

(Item 2 of Schedule 3 amended by section 1(e) of Act 35 of 1999. With effect from 1 September 1999.)

3. An exemption granted in terms of Section 14(5) of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as having been granted in terms of section 10 of *this Act* and is valid for a period of 12 months from the date on which *this Act* comes into operation.

(Item 3 of Schedule 3 amended by section 1(e) of Act 35 of 1999. With effect from 1 September 1999.)

3A. A notice issued by the Minister in terms of section 14(1)(c) of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), in relation to a "restrictive practice" or a "monopoly situation" as defined in that Act, must be regarded as an order in terms of section 60(1)(a) of this Act and is valid for a period of 12 months from the date on which this Act comes into operation.

(Item 3A of Schedule 3 inserted by section 1(b) of Act 35 of 1999. With effect from 1 September 1999.)

4. Any reference in any other statute to-

(a) the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as a reference to *this Act;*

(b) a "restrictive practice" or "monopoly situation" as defined in terms of section 1 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as a reference to a *"prohibited practice"* in terms of *this Act;*

(c) an "acquisition" as defined in terms of section 1 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as a reference to a "merger" in terms of *this Act;*

(d) the "Competition Board" as established in terms of section 3 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as a reference to the Competition Commission.

(e) The chairperson of the Competition Board contemplated in section 3 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as a reference to either the Competition Commissioner contemplated in section 22 of *this Act*, or the chairperson of the Competition Tribunal contemplated in section 26 of *this Act*, as determined by *the Minister.*

(Item 4(e) of Schedule 3 added by section 1(c) of Act 35 of 1999. With effect from 1 September 1999.)

(Item 4 of Schedule 3 amended by section 1(e) of Act 35 of 1999. With effect from 1 September 1999.)

4A. Any transaction that takes place between the date on which *this Act* is published and the date on which *this Act* comes into operation, and which would constitute an intermediate or large merger if it had taken place after *this Act* came into operation, is regarded for a period of 12 months after the date on which

this Act comes into operation as a merger in contravention of Chapter 3 and is subject to the provisions of section 62(1), unless-

(a) the transaction has been approved by the Competition Board in terms of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979); or

(b) the transaction has been notified in terms of item 4B.

(Item 4A of Schedule 3 inserted by section 1(d) of Act 35 of 1999. With effect from 1 September 1999.)

4B. Any party to a transaction contemplated in item 4A may, within three months after the date on which *this Act* comes into operation, notify the Competition Commission of the transaction in terms of section 13 as if it were an intermediate or large merger.

(Item 4B of Schedule 3 inserted by section 1(d) of Act 35 of 1999. With effect from 1 September 1999.)

4C. The provisions of Chapter 3, with the changes required by the context, apply to a transaction that is notified under item 4B.

(Item 4C of Schedule 3 inserted by section 1(d) of Act 35 of 1999. With effect from 1 September 1999.)

4D. After *this Act* comes into operation, any appeal pending before a special court contemplated in section 15 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), must be regarded as an appeal to the Competition Appeal Court contemplated in section 36 of *this Act* in the manner *prescribed*.

(Item 4D of Schedule 3 inserted by section 1(d) of Act 35 of 1999. With effect from 1 September 1999.)

4E. Subject to items 1 to 3A, the Competition Appeal Court may, after hearing any appeal contemplated in item 4D, make any decision that the special court could have made in terms of section 15(10) of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), and the provisions of *this Act* otherwise apply to that decision, as if it were a decision of the Competition Appeal Court in terms of *this Act*.

(Item 4E of Schedule 3 inserted by section 1(d) of Act 35 of 1999. With effect from 1 September 1999.)

4F(1) Notwithstanding sections 6 and 11, the first determinations of thresholds made by the *Minister* in terms of those sections must be made before the date on which *this Act* comes into operation.

(2) Notwithstanding sections 6(2) and 11(2), the first determinations contemplated in subsection (1) take effect on the date on which *this Act* comes into operation.

(Item 4F inserted by section 1(d) of Act 35 of 1999 and comes into operation on 19 August 1999 [Proc. No. R90, Gazette No. 20403])

5. When this Act comes into operation an officer or employee appointed in terms of the Public Service Act, 1994, to serve the Competition Board established by the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), continues to be an officer or employee under the Public Service Act, subject to the direction of the Department of Trade and Industry.

(Item 5 of Schedule 3 amended by section 1(e) of Act 35 of 1999. With effect from 1 September 1999.)

6. If an officer or an employee referred to in item 5 is appointed as an officer or employee of the Competition Commission, the accumulated value of that person's contributions to any pension fund, together with the accumulated value of the contributions made to that fund by that person's employer, may be transferred to a pension fund established for the benefit of the staff of the Commission.

(Commencement date of this Schedule: 1 September 1999)