

COMPETITION ACT 89 OF 1998

[ASSENTED TO 20 OCTOBER 1998]

[DATE OF COMMENCEMENT: 1 SEPTEMBER 1999]

(Unless otherwise indicated)

(English text signed by the President)

as amended by

Competition Amendment Act 35 of 1999

Competition Amendment Act 15 of 2000

Competition Second Amendment Act 39 of 2000

Regulations under this Act

DETERMINATION OF THRESHOLD (GenN 253 in GG 22025 of 1 February 2001)

DETERMINATION OF THRESHOLD (GenN 254 in GG 22025 of 1 February 2001)

NOTICE OF DESIGNATION OF THE PETROLEUM INDUSTRY IN TERMS OF THE COMPETITION ACT
89 OF 1998

RULES FOR THE CONDUCT OF PROCEEDINGS IN THE COMPETITION COMMISSION

RULES FOR THE CONDUCT OF PROCEEDINGS IN THE COMPETITION TRIBUNAL

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.

[Preamble amended by s. 22 of Act 39 of 2000.]

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CHAPTER 1
DEFINITIONS, INTERPRETATION, PURPOSE AND APPLICATION OF ACT
(ss 1-3)

[Date of commencement of Chapter 1: 30 November 1998.]

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 s. 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 s. 1 (b) of Act 39 of 2000.]

'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 s. 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 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' means a price for a good or service which-

(aa) bears no reasonable relation to the economic value of that good or service;
and

(bb) is higher than the value referred to in subparagraph (aa);

'exclusionary act' means an act that impedes or prevents a firm from entering into, or expanding within, a market;

'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 s. 1 (d) of Act 39 of 2000.]

'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;

'members' interest' has the meaning set out in the Close Corporations Act, 1984 (Act 69 of 1984);

[Definition of 'members' interest' inserted by s. 1 (e) of Act 39 of 2000.]

'Minister' means the *Minister* of Trade and Industry;

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

'party to a merger' means an acquiring firm or a target firm;

[Definition of 'party to a merger' inserted by s. 1 (f) of Act 39 of 2000.]

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

'prescribed' means prescribed by regulation ;

[Definition of 'prescribed' substituted by s. 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 s. 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 s. 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;

'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 66 of 1995);

[Definition of 'registered trade union' inserted by s. 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 business' has the meaning set out in the National Small Business Act, 1996 (Act 102 of 1996);

'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 s. 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.

(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.

[Sub-s. (1A) inserted by s. 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.

[Date of commencement of s. 1: 30 November 1998.]

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.

[Date of commencement of s. 2: 30 November 1998.]

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

[Paras. (c) and (d) deleted by s. 2 (a) of Act 39 of 2000.]

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

(1A) 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).

[Sub-s. (1A) inserted by s. 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 200 of 1993), came into operation, were disadvantageded 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.

[Date of commencement of s. 3: 30 November 1998.]

CHAPTER 2
PROHIBITED PRACTICES (ss 4-10)

Part A

Restrictive practices (ss 4-5)

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-

(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

[Para. (a) substituted by s. 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.

[Sub-s. (1) amended by s. 3 (b) of Act 39 of 2000.]

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

[Para. (a) substituted by s. 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-

(a) a director of a company as defined in the Companies Act, 1973 (Act 61 of 1973);

(b) a member of a close corporation as defined in the Close Corporations Act, 1984 (Act 69 of 1984);

(c) a trustee of a trust ; or

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

[Sub-s. (4) amended by s. 3 (d) of Act 39 of 2000.]

(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).

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.

Part B

Abuse of a dominant position (ss 6-9)

6 Restrictive application of Part

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

- (a) a threshold^{1*} 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.

[S. 6 substituted by s. 4 of Act 39 of 2000.]

[Date of commencement of s. 6: 30 November 1998.]

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*.

[Date of commencement of s. 7: 30 November 1998.]

8 Abuse of dominance prohibited

It is prohibited for a dominant *firm* to-

- (a) charge an *excessive price* to the detriment of consumers;
- (b) refuse to give a competitor access to an *essential facility* when it is economically feasible to do so;
- (c) engage in an *exclusionary act*, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain; or
- (d) engage in any of the following *exclusionary acts*, unless the *firm* concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act:
 - (i) requiring or inducing a supplier or customer to not deal with a competitor;
 - (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
 - (iii) selling *goods or services* on condition that the buyer purchases separate *goods or services* unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
 - (iv) selling *goods or services* below their marginal or average variable cost; or
 - (v) buying-up a scarce supply of intermediate goods or resources required by a competitor.

[Date of commencement of s. 8: 30 November 1998.]

9 Price discrimination by dominant firm prohibited

(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 substantially preventing or lessening competition;
- (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*.

(2) Despite subsection (1), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of that subsection 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 the differing places to which, methods by which, or 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.

[Date of commencement of s. 9: 30 November 1998.]

Part C

Exemptions from application of Chapter (s 10)

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 ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;
 - (iii) change in productive capacity necessary to stop decline in an industry; or
 - (iv) the economic stability of any industry designated by the Minister, after consulting the Minister responsible for that industry.

(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 11 of 1967),

the Plant Breeders' Rights Act, 1976 (Act 15 of 1976), the Patents Act, 1978 (Act 57 of 1978), the Copyright Act, 1978 (Act 98 of 1978), the Trade Marks Act, 1993 (Act 194 of 1993), and the Designs Act, 1993 (Act 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.

[S. 10 substituted by s. 5 of Act 39 of 2000.]

[Date of commencement of s. 10: 30 November 1998.]

CHAPTER 3

MERGER CONTROL (ss 11-18)

[Chapter 3 substituted by s. 6 of Act 39 of 2000.]

11 Thresholds and categories of mergers

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

- (a) a lower and a higher threshold^{2*} 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^{3*} 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).

[S. 11 substituted by s. 6 of Act 39 of 2000.]

[Date of commencement of s. 11: 30 November 1998.]

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 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).

[S. 12 substituted by s. 6 of Act 39 of 2000.]

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-

- (a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine-
- (i) 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
- (ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or
- (b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

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

(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 businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
- (d) the ability of national industries to compete in international markets.

[S. 12A inserted by s. 6 of Act 39 of 2000.]

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.

[S. 13 substituted by s. 6 of Act 39 of 2000.]

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.

[S. 13A inserted by s. 6 of Act 39 of 2000.]

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.

[S. 13B inserted by s. 6 of Act 39 of 2000.]

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.

[S. 14 substituted by s. 6 of Act 39 of 2000.]

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.

[S. 14A inserted by s. 6 of Act 39 of 2000.]

15 Revocation of merger approval

(1) The Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger if-

- (a) the decision was based on incorrect information for which a party to the merger is responsible;
- (b) the approval was obtained by deceit; or
- (c) a firm concerned has breached an obligation attached to the decision.

(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.

[S. 15 substituted by s. 6 of Act 39 of 2000.]

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, and section 15, read with the changes required by the context, applies to a revocation in terms of this subsection.

(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.

[S. 16 substituted by s. 6 of Act 39 of 2000.]

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; or
- (b) 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.

(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.

[S. 17 substituted by s. 6 of Act 39 of 2000.]

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 intermediate or large merger proceedings before the Competition Commission, Competition Tribunal or Competition Appeal Court, in the prescribed manner.

(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 94 of 1990); or
 - (ii) a transaction for which consent is required in terms of section 54 of the Banks Act, 1990 (Act 94 of 1990); 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) (i) or (ii); and
- (ii) it is in the public interest that the merger is subject to the jurisdiction of the Banks Act, 1990 (Act 94 of 1990), only.

(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).

[S. 18 substituted by s. 6 of Act 39 of 2000.]

CHAPTER 4

COMPETITION COMMISSION, TRIBUNAL AND COURT (ss 19-43)

[Date of commencement of Chapter 4: 30 November 1998.]

Part A

The Competition Commission (ss 19-25)

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 one or more Deputy Commissioners, appointed by the Minister in terms of this Act.

[Sub-s. (2) substituted by s. 7 of Act 39 of 2000.]

[Date of commencement of s. 19: 30 November 1998.]

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.

[Date of commencement of s. 20: 30 November 1998.]

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*;
- (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 the National Assembly any report submitted in terms of subsection (1) (k), and any report submitted in terms of subsection (2) if that report deals with a substantial matter relating to the purposes of *this Act*-

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

[Para. (a) substituted by s. 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.

[Para. (b) substituted by s. 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-

- (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.

[Sub-s. (4) amended by s. 8 (b) of Act 39 of 2000.]

[Date of commencement of s. 21: 30 November 1998.]

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.

(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.

[Date of commencement of s. 22: 30 November 1998.]

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 Deputy Commissioner to perform the functions of the Commissioner whenever-

- (a) the Commissioner is unable for any reason to perform the functions of the Commissioner; or
- (b) the office of Commissioner is vacant.

[Date of commencement of s. 23: 30 November 1998.]

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-

- (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.

[Sub-s. (4) amended by s. 9 of Act 39 of 2000.]

[Date of commencement of s. 24: 30 November 1998.]

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 appointment of each member of the staff.

[Date of commencement of s. 25: 30 November 1998.]

Part B

The Competition Tribunal (ss 26-35)

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) The Competition Tribunal consists of a Chairperson and not less than three, but not more than ten, 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.

[Sub-s. (2) substituted by s. 10 of Act 39 of 2000.]

(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.

[Date of commencement of s. 26: 30 November 1998.]

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.

[S. 27 substituted by s. 11 of Act 39 of 2000.]

[Date of commencement of s. 27: 30 November 1998.]

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 200 of 1993), took effect, and sentenced to imprisonment without the option of a fine.

[Date of commencement of s. 28: 30 November 1998.]

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.

[Date of commencement of s. 29: 30 November 1998.]

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.

[Date of commencement of s. 30: 30 November 1998.]

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; and
 - (b) designate a member of the panel to preside over the panel's proceedings.
- (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) If the Competition Tribunal may extend or reduce a prescribed period in terms of this Act, the Chairperson of the Tribunal or another member of the Tribunal assigned by the Chairperson, sitting alone, may make an order-
 - (a) extending or reducing that period; or
 - (b) condoning late performance of an act that is subject to that period.

[Sub-s. (5) substituted by s. 12 of Act 39 of 2000.]

[Date of commencement of s. 31: 30 November 1998.]

- (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.

[Sub-s. (6) added by s. 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.

[Date of commencement of s. 32: 30 November 1998.]

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.

[Date of commencement of s. 33: 30 November 1998.]

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.

[Date of commencement of s. 34: 30 November 1998.]

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.

[Date of commencement of s. 35: 30 November 1998.]

Part C

The Competition Appeal Court (ss 36-39)

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.

[Sub-s. (2) substituted by s. 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.

[Sub-s. (3) added by s. 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.

[Sub-s. (4) added by s. 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.

[Sub-s. (5) added by s. 1 (b) of Act 15 of 2000.]

[Date of commencement of s. 36: 30 November 1998.]

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.

[S. 37 substituted by s. 2 of Act 15 of 2000.]

[Date of commencement of s. 37: 30 November 1998.]

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

[Para. (b) substituted by s. 3 (1) (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.

[Sub-s. (2) substituted by s. 3 (1) (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.

[Sub-s. (2A) inserted by s. 3 (1) (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.

[Sub-s. (3) substituted by s. 3 (1) (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.

[Sub-s. (4) substituted by s. 3 (1) (e) of Act 15 of 2000.]

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

[Date of commencement of s. 38: 30 November 1998.]

39 Terms 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 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.

[S. 39 substituted by s. 4 of Act 15 of 2000.]

[Date of commencement of s. 39: 30 November 1998.]

Part D

Administrative matters concerning the Competition Commission and the Competition Tribunal (ss 40-43)

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 46 of 1984).

(7) The Commissioner is the accounting authority of the Competition Commission for purposes of the Public Finance Management Act, 1999 (Act 1 of 1999).
[Sub-s. (7) substituted by s. 13 (a) of Act 39 of 2000.]

(8)

[Sub-s. (8) deleted by s. 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.

[Date of commencement of s. 40: 30 November 1998.]

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
[Para. (a) substituted by s. 14 of Act 39 of 2000.]
- (b) if Parliament is not then sitting, within 10 business days after the commencement of the next sitting.
[Para. (b) substituted by s. 14 of Act 39 of 2000.]
[Date of commencement of s. 41: 30 November 1998.]

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.

[Date of commencement of s. 42: 30 November 1998.]

43 Liability

(1) The State Liability Act, 1957 (Act 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*.

[Date of commencement of s. 43: 30 November 1998.]

CHAPTER 5

INVESTIGATION AND ADJUDICATION PROCEDURES (ss 44-63)

[Chapter 5 substituted by s. 15 of Act 39 of 2000.]

Part A

Confidential information (ss 44-45A)

[Part A inserted by s. 15 of Act 39 of 2000.]

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) The Competition Commission is bound by a claim contemplated in subsection (1), but may at any time during its proceedings refer the claim to the Competition Tribunal to determine whether or not the information is confidential information.

- (3) The Competition Tribunal may-
- (a) determine whether or not the information is confidential; and
 - (b) if it finds that the information is confidential, make any appropriate order concerning access to that information.

[S. 44 substituted by s. 15 of Act 39 of 2000.]

45 Disclosure of information

(1) A person who seeks access to information that is subject to a claim 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) Within 10 business days after an order of the Competition Tribunal is made in terms of section 44 (3), a party concerned may appeal against that decision to the Competition Appeal Court, subject to its rules.

(3) From the time information comes into the possession of the Competition Commission or Competition Tribunal until a final determination has been made concerning it, the Commission and Tribunal must treat as confidential, any information that-

- (a) the Competition Tribunal has determined is confidential information; or
- (b) is the subject of a claim in terms of this section.

(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.

[S. 45 substituted by s. 15 of Act 39 of 2000.]

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.

[S. 45A inserted by s. 15 of Act 39 of 2000.]

Part B

Powers of search and summons (ss 46-49A)

[Part B inserted by s. 15 of Act 39 of 2000.]

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.

[S. 46 substituted by s. 15 of Act 39 of 2000.]

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.

[S. 47 substituted by s. 15 of Act 39 of 2000.]

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.

[S. 48 substituted by s. 15 of Act 39 of 2000.]

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.

[S. 49 substituted by s. 15 of Act 39 of 2000.]

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.

[S. 49A inserted by s. 15 of Act 39 of 2000.]

Part C

Complaint procedures (ss 49B-51)

[Part C inserted by s. 15 of Act 39 of 2000.]

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.

[S. 49B inserted by s. 15 of Act 39 of 2000.]

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.

[S. 49C inserted by s. 15 of Act 39 of 2000.]

49D Consent orders

(1) If, during, on or after the completion of the investigation of a complaint, the Competition Commission and the respondent 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).

(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.

[S. 49D inserted by s. 15 of Act 39 of 2000.]

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.

[S. 50 substituted by s. 15 of Act 39 of 2000.]

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.

[S. 51 substituted by s. 15 of Act 39 of 2000.]

Part D

Tribunal hearings and orders (ss 52-60)

[Part D inserted by s. 15 of Act 39 of 2000.]

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).

[S. 52 substituted by s. 15 of Act 39 of 2000.]

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 complainant'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.
- [S. 53 substituted by s. 15 of Act 39 of 2000.]

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;
- (e) accept oral submissions from any participant; and
- (f) accept any other information that is submitted by a participant.

[S. 54 substituted by s. 15 of Act 39 of 2000.]

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.

[S. 55 substituted by s. 15 of Act 39 of 2000.]

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.

[S. 56 substituted by s. 15 of Act 39 of 2000.]

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).

[S. 57 substituted by s. 15 of Act 39 of 2000.]

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, including-
 - (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) and 14 (2), condone, on good cause shown, any non-compliance of-
 - (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.

[S. 58 substituted by s. 15 of Act 39 of 2000.]

59 Administrative penalties

(1) The Competition Tribunal may impose an administrative penalty only-

- (a) for a prohibited practice in terms of section 4 (1) (b), 5 (2) or 8 (a), (b) or (d);
- (b) for a prohibited practice in terms of section 4 (1) (a), 5 (1), 8 (c) or 9 (1), if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice;
- (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.

(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;
- (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; and
- (g) whether the respondent has previously been found in contravention of this Act.

(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.

[S. 59 substituted by s. 15 of Act 39 of 2000.]

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; or
 - (ii) is substantially a repeat by that firm of conduct previously found by the Tribunal to be a prohibited practice.

(3) An order made by the Competition Tribunal in terms of subsection (2) is of no force or effect unless confirmed by the Competition Appeal Court.

(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.

[S. 60 substituted by s. 15 of Act 39 of 2000.]

Part E

Appeals and reviews to Competition Appeal Court (ss 61-63)

[Part E inserted by s. 15 of Act 39 of 2000.]

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.

[S. 61 substituted by s. 15 of Act 39 of 2000.]

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 Supreme Court of Appeal or Constitutional Court, subject to section 63 and their respective rules.

(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.

[S. 62 substituted by s. 15 of Act 39 of 2000.]

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) An appeal in terms of section 62 (4) may be brought to the Supreme Court of Appeal or, if it concerns a constitutional matter, to the Constitutional Court, only-
 - (a) with leave of the Competition Appeal Court; or
 - (b) if the Competition Appeal Court refuses leave, with leave of the Supreme Court of Appeal or the Constitutional Court, as the case may be.
- (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 Supreme Court of Appeal or the Constitutional Court may vary that order on granting leave to appeal.
- (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 21 (1A) to (3) (e) of the Supreme Court Act, 1959 (Act 59 of 1959), read with the changes required by the context, applies to an application to the Supreme Court of Appeal for leave to appeal in terms of this Act.
- (8) A person applying to the Supreme Court of Appeal for leave to appeal under this Act must give notice of the application to the registrar of the Competition Appeal Court.

[S. 63 substituted by s. 15 of Act 39 of 2000.]

CHAPTER 6 ENFORCEMENT (ss 64-68)

[Chapter 6 substituted by s. 15 of Act 39 of 2000.]

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.

[S. 64 substituted by s. 15 of Act 39 of 2000.]

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.

(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 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).

[S. 65 substituted by s. 15 of Act 39 of 2000.]

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.

[S. 66 substituted by s. 15 of Act 39 of 2000.]

67 Limitations of bringing action

(1) A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.

(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.

[S. 67 substituted by s. 15 of Act 39 of 2000.]

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.

[S. 68 substituted by s. 15 of Act 39 of 2000.]

CHAPTER 7 OFFENCES (ss 69-77)

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.

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*.

71 Failure to attend when summoned

A person commits an offence who, having been summoned in terms of section 49A, or directed or summoned to attend a hearing-

- (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.

[S. 71 amended by s. 16 of Act 39 of 2000.]

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

[Para. (a) substituted by s. 17 of Act 39 of 2000.]

- (b) gives false evidence, knowing or believing it to be false.

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.

[Sub-s. (1) substituted by s. 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.

74 Penalties

(1) Any person convicted of an offence in terms of *this Act*, is liable-

- (a) in the case of a contravention of section 73 (1), to a fine not exceeding R500 000-00 or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or
- (b) in any other case, to a fine not exceeding R2 000-00 or to imprisonment for a period not exceeding six months, or to both a fine and imprisonment.

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*.

76

[S. 76 repealed by s. 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.

CHAPTER 8

GENERAL PROVISIONS (ss 78-84)

78 Regulations

The *Minister*, by notice in the *Gazette*, may make *regulations* that are required to give effect to the purposes of *this Act*.

[Date of commencement of s. 78: 30 November 1998.]

79 Guidelines

(1) The Competition Commission may prepare guidelines to indicate the Commission's policy approach to any matter within its jurisdiction in terms of *this Act*.

(2) A guideline prepared in terms of subsection (1)-

- (a) must be published in the *Gazette*; but
- (b) is not binding on the Competition Commission, the Competition Tribunal or the Competition Appeal Court in the exercise of their respective discretion, or their interpretation of *this Act*.

[Date of commencement of s. 79: 30 November 1998.]

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.

81 Act binds State

This Act binds the State.

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 within a particular sector-

- (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.

[S. 82 substituted by s. 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.

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.

[Date of commencement of s. 84: 30 November 1998.]

Schedule 1

EXEMPTION OF PROFESSIONAL RULES

[Heading substituted by s. 21 (a) of Act 39 of 2000.]

PART A

[Part A substituted by s. 21 (b) of Act 39 of 2000.]

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

- (c) 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.

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 80 of 1991).

Architects

Architects Act, 1970 (Act 35 of 1970).

Engineering

Engineering Profession of South Africa Act, 1990 (Act 114 of 1990)

Estate Agents

Estate Agents Act, 1976 (Act 112 of 1976)

Attorneys and Advocates

Attorneys Act, 1979 (Act 53 of 1979)

Admission of Advocates Act, 1964 (Act 74 of 1964)

Natural sciences

Natural Scientific Professions Act, 1993 (Act 106 of 1993)

Quantity Surveyors

Quantity Surveyors Act, 1970 (Act 36 of 1970)

Surveyors

Professional and Technical Surveyors Act, 1984 (Act 40 of 1984)

Town and Regional Planners

Town and Regional Planners Act, 1984 (Act 19 of 1984)

Valuers

Valuers Act, 1982 (Act 23 of 1982)

Medical

Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act 56 of 1974)

Nursing Act, 1978 (Act 50 of 1978)

Dental Technicians Act, 1979 (Act 19 of 1979)

Pharmacy Act, 1974 (Act 53 of 1974)

Veterinary and Para-veterinary Professions Act, 1982 (Act 19 of 1982)

Chiropractors Homeopaths and Allied Health Service Professions Act, 1982 (Act 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*.

Schedule 2
REPEAL OF LAWS
(Section 83)

No and Year of Law	Short Title	Extent of Repeal
Act 96 of 1979	Maintenance and Promotion of Competition Act, 1979	The whole
Act 58 of 1980	Maintenance and Promotion of Competition Amendment Act, 1980	The whole
Act 62 of 1983	Maintenance and Promotion of Competition Amendment Act, 1983	The whole
Act 12 of 1985	Maintenance and Promotion of Competition Amendment Act, 1985	The whole
Act 5 of 1986	Maintenance and Promotion of Competition Amendment Act, 1986	The whole
Act 96 of 1987	Maintenance and Promotion of Competition Amendment Act, 1987	The whole

Schedule 3 TRANSITIONAL ARRANGEMENTS

[Schedule 3 amended by s. 1 of Act 35 of 1999.]

1.

A ruling issued in terms of section 6 (2) (a) of the Maintenance and Promotion of Competition Act, 1979 (Act 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 the 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 substituted by s. 1 (a) of Act 35 of 1999.]

2.

An arrangement entered into in terms of section 11 (1) of the Maintenance and Promotion of Competition Act, 1979 (Act 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 amended by s. 1 (e) of Act 35 of 1999.]

3.

An exemption granted in terms of Section 14 (5) of the Maintenance and Promotion of Competition Act, 1979 (Act 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 amended by s. 1 (e) of Act 35 of 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 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 inserted by s. 1 (b) of Act 35 of 1999.]

4.

Any reference in any other statute to-

- (a) the Maintenance and Promotion of Competition Act, 1979 (Act 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 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 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 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 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*.

[Para. (e) added by s. 1 (c) of Act 35 of 1999.]

[Item 4 amended by s. 1 (e) of Act 35 of 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 96 of 1979); or
- (b) the transaction has been notified in terms of item 4B.

[Item 4A inserted by s. 1 (d) of Act 35 of 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 inserted by s. 1 (d) of Act 35 of 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 inserted by s. 1 (d) of Act 35 of 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 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 inserted by s. 1 (d) of Act 35 of 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 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 inserted by s. 1 (d) of Act 35 of 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 s. 1 (d) of Act 35 of 1999.]

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 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 amended by s. 1 (e) of Act 35 of 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.

¹See General Notice 253 in *Government Gazette* 22025 of 1 February 2001, amended by GN 562 in *GG* 22128 of 9 March 2001.

²See General Notice 254 in *Government Gazette* 22025 of 1 February 2001, as amended by General Notice 930 in *Government Gazette* 22280 of 7 May 2001.

³See General Notice 254 in *Government Gazette* 22025 of 1 February 2001, as amended by General Notice 930 in *Government Gazette* 22280 of 7 May 2001.