

# NEDLAC - Policy Statement on Competition Policy for Jobs

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**competition commission**  
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# Competition and Growth

Greater competition forces greater efficiency and innovation from firms, and in so doing reduces prices to the benefit of other firms in the economy (using intermediate products), delivery by the state (purchasing products and services) and consumers

A more competitive economy results in higher growth and job creation by enhancing the ability of domestic firms to replace imports and expand exports. Greater innovation also creates new opportunities for businesses.

The Competition Act seeks to also ensure that such growth is more inclusive, addressing past exclusion through actively promoting transformation and SME participation as public interest objectives in its enforcement actions

In contrast, an uncompetitive economy suffers from high prices and the erection of barriers to entry / expansion by other firms and concentration of ownership.

# South African Economy in context



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**Persistent inequality and unemployment, and lack of inclusivity – Impact of Covid-19 ??**

**Low levels of investments:** Why lack of investment in the economy?? The most important point is that firms have market power which allows for high profitability levels but investment remains weak.

## **Structure of Ownership and Concentration:**

- Both the OECD (2013) and IMF (2017) have noted that South Africa has maintained among the highest levels of concentration and corporate profitability compared to other emerging market economies.
- CC recent detailed analysis of the national databases and sectors provide some interesting overall insights into the levels and trends of concentration and participation in the economy (to be published soon).
- The claims by some that concentration reflects the efficiency of large firms is difficult to square with poor productivity performance and low investment in the economy as a whole.

**Higher barriers to entry by SME and HDI** into key sectors of the economy.

The patterns of ownership, concentration, competition and orientation of large firms are thus critical to understanding the failure to move towards more inclusive growth.

# The Competition Act

Passed for the first time in 1998, formed part of the pool of transformative legislations within the new democratic dispensation.

In drafting the Competition Act, competition policy principles were negotiated by business, labour and government representatives in a tripartite negotiating structure - NEDLAC

Purpose of the Competition Act is to promote and maintain competition in order to:

- Promote efficiency and development of the economy;
- Provide consumers with competitive prices and product choices;
- Ensure SMME's an equitable opportunity in the economy;
- Advance economic welfare of South Africans;
- Expand opportunities for South African participation in world markets;
- Promote greater spread of ownership, in particular HDI's.

# The Competition Act (cont)

The South African institutional system for competition law enforcement comprises three bodies:

- a. **The Competition Commission** is the investigative body investigating anti-competitive conduct; assessing the impact of mergers and acquisitions and monitoring competition levels and market transparency in the economy;
- b. **The Competition Tribunal** is the primary adjudicative body. It is responsible for the approval of large mergers and adjudicates on conduct prohibited in terms of the Competition Act and is responsible for the imposition of penalties under the Act; and
- c. **The Competition Appeal Court:** Decisions of the Competition Tribunal may be appealed to the Competition Appeal Court.

The Competition Act prohibits various acts – **abuse of dominance, including excessive pricing and price discrimination; collusion – price fixing, allocation of markets and bid rigging; and other forms of restrictive practices (exclusionary conduct).**

# The Competition Act (cont..)

We also have provisions that allows us to conduct market inquiries into the general state of competition in any industry or market, and make recommendations for reform.

We also conduct advocacy work where the Commission engages broadly with our stakeholders to address specific issues of importance in promoting market competition and addressing public interest issues without the need for enforcement action.

Our Act has recently been amended to strengthen various areas of our work to give greater emphasis on our **public interest focus**, on **SMME** and **participation by historically disadvantaged communities** for transformation and inclusivity.

# Instruments to aid Competition, Participation and Growth

## Merger control

- Mandatory notification of mergers over a threshold prevents the acquisition of market power through acquisitions
- Actively ensures mergers do not result in a negative impact on the public interest, incl. employment, SME participation and the greater spread of ownership.
- Amendments enable the public interest to be actively promoted.

## Enforcement against abuse of dominance

- Powers to investigate and prosecute conduct by dominant firms that exploits customers (excessive pricing) or excludes rivals from competing (e.g. margin squeeze or denying access to customers)
- Amendments strengthen the ability to act on abuse against SMEs and historically disadvantaged firms as customers (unfair price discrimination raising their costs) and suppliers (abuse of buyer power to impose unfair prices and trading conditions)

## Exemptions from the Act to achieve public interest



# Instruments to aid Competition, Participation and Growth (*cont*)

## Enforcement against cartel activity

- Effective leniency and detection programmes to prosecute firms colluding to raise prices to consumers, the state and other firms
- Grant exemptions to conduct supporting development
- Authority to exempt firm conduct from the Act where it is found to support economic development & stability, as well as greater participation by SMEs and historically disadvantaged persons
- Amendments enable block exemptions for sectors or groups

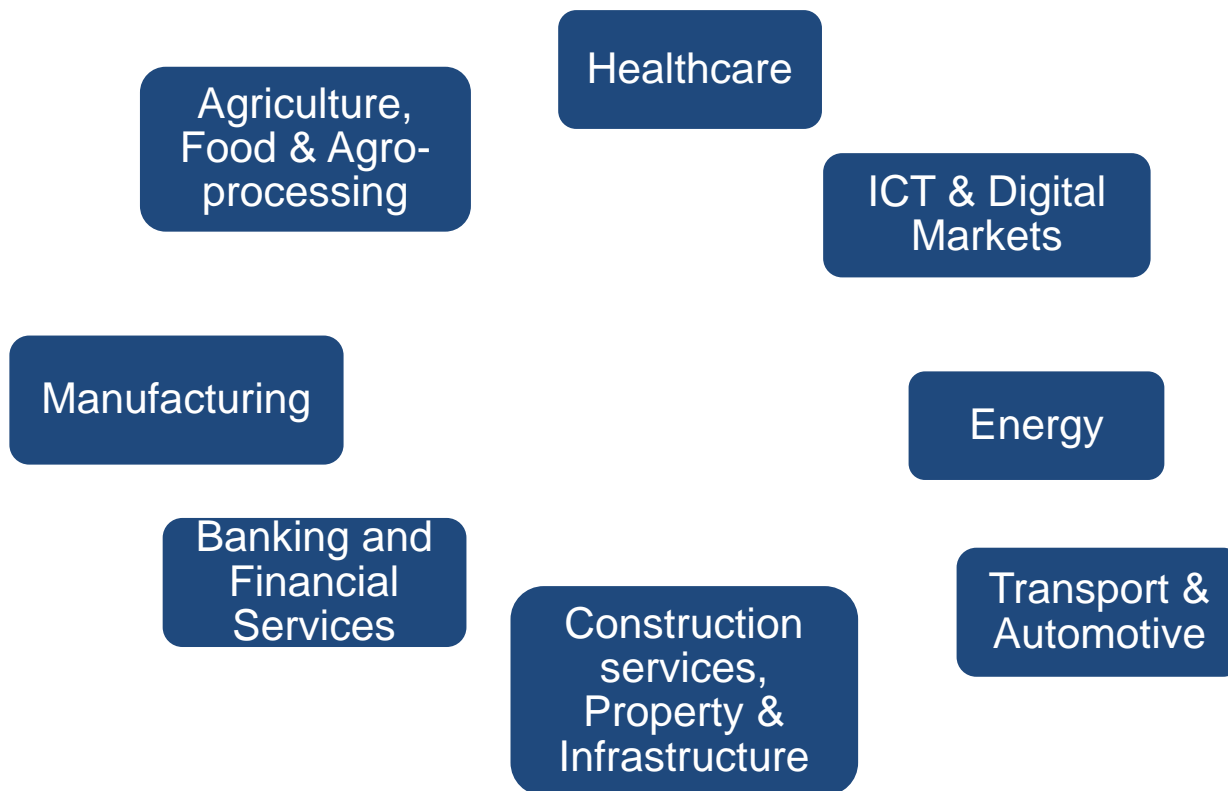
## Market Inquiries

- Proactive tool to conduct an inquiry into a sector where there are features that prevent or hinder both competition and the participation of SMEs and historically disadvantaged persons
- Amendments provide powers to impose legally binding remedies to address the market failings identified

# Our Priority Areas

The Commission identified 8 priority sectors for strategic period 2020-2025, which sought to align our priority sectors to the Re-imagined Industrial Policy.

Sector prioritization was also informed by Covid-19 pandemic, impact on consumers and level of competition in particular sectors.



# Public Interest Focus

# Assessing Public Interest Considerations

Public Interest has played crucial role in South Africa.

Competition Law and Policy (together with a host of other legal instruments) was therefore introduced to enable transformation with the following policy related expectations:

- Enable Black participation in the economy
- Enable SMMEs to play a more meaningful role in the economy
- Recognize the voice of other previously disadvantaged groups (**workers**)

Competition Policy in South Africa is therefore unique as it was adopted due to it addressing **equity AND transformation** considerations.

**Public Interest applies to:**

- **Mergers** – balancing Substantial Lessening of Competition (SLC) test and Public Interest factors
- **Exemption Applications** – from cartel behavior to facilitate public interest, such as export promotion, participation of SMMEs and historically disadvantaged groups.

# Mergers and Public Interest

The assessment considers the classic Substantial Lessening of Competition (SLC) test. Our law also requires assessment of the impact on Public Interest factors.

The public interest is defined in the Competition Act and includes five key considerations which Government and the competition authorities must have when considering a merger.

Public interest factors are listed in the Section 12A(3) of the Competition Act and Guidelines:

*(a) a particular industrial sector or region; (b) employment; (c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market; (d) the ability of national industries to compete in international markets; and (e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.”*

Persons who must be consulted in Mergers include Trade Unions and Government (Minister of Trade, Industry and Competition)

The assessments then lead to (1) prohibition, (2) partial approval with remedies, or (3) total approval.

# Mergers and Public Interest (*cont*)

Remedies/conditions are factors that are considered in the analysis which can lead to - prohibition, partial approval or total approval of a merger transaction.

Guidelines and how the process is undertaken considers the following questions:

- Job losses and Justification – can merging parties justify these job losses?
- The Effect on employees, at what level, and what skills are lost, can lost employees find work elsewhere?
- Remedies to address these issues:
  - Job preservation,
  - Broad-based ownership through employee share ownership schemes (Esops)
  - Supplier-development and localisation measures

# Examples with focus on Public Interest

## Harmony/Gold Fields

- Expert testimony used for the first time for public interest
- Assessment impact of mining merger on the workers, including assessment of previous mining mergers and labour economics
- Expert concluded there would be significant job losses
- Undertakings taken/conditions imposed (no merger specific retrenchments) as a result of the expert evidence
- Set a precedence - remedy structure of placing hold on job losses

## Metropolitan Holdings Ltd and Momentum Group Ltd.

- Following a hearing on the matter, the CTSA imposed a temporary moratorium on job losses in that matter, signalling a more rigorous approach to assessing merger related retrenchments.
- Case established a principle – Merging Parties have an obligation to conduct their own assessment on the impact the merger has on employment, otherwise they face adverse inference against them.

## Walmart

- Raised great Public Interest concerns (labour and local suppliers/value chains)
- Local Authorities agreed that the dismissal of local employees before the merger was merger specific and called for their reinstatement to project jobs.
- We recommended a remedy in relation to local suppliers - A Fund was established to support those potentially affected by the merger.

## AB Inbev/SAB Miller

- A remedy was imposed in this case in relation to supporting local suppliers/new entrants by creating of a new vehicle to supply the merging parties

## Simba (Pty) Ltd (a subsidiary of PepsiCO) and Pioneer Food Group Limited

- In addition to competition concerns merger approved subject to addressing public interest issues.
- Merging parties had proactively engaged the DTIC to present a suite of public interest commitments to the Commission, relating to:
  - Development of local supply chains, emerging farmers and small / medium business, including a B-BBEE proposal that will create an employee share scheme that will result in employee participation of at least 12.9% shareholding in the merged entity, with the scheme valued at least R1.6 billion.
  - The merging parties also committed to create direct and indirect jobs, and not retrenching any employees as a result of the merger for a period of 5 years



# Examples with focus on Public Interest (cont)

Overall Employment conditions saved in excess of **45 000 jobs** in 2019/20, including **8559 jobs** net impact (jobs saved+intended job creation – jobs lost) in Q3 of the 2020/21 Financial Year.

Apart from the employment conditions, supply conditions imposed in the London Stock Exchange/Refinitiv, and Alstom/Bombardier transactions to ensure that local customers continue to enjoy pre-merger supply arrangement.

Conditions imposed to address ownership structures in the K2020704995/Comair and Flemming/G4S matter and pioneering conditions in the Google LLC/Fitbit Inc matter in order to address concerns about access in the platform markets.

Recently prohibited transaction by Grand Parade Investments Limited (GPI) to dispose of its investment in Burger King South Africa to a US private equity firm given concerns about the deal raising “substantial negative effect on the promotion of greater spread of ownership by HDIs.

# Other Competition Interventions

# Covid-19 Price Gouging Cases and PPE

## Procurement

Ongoing enforcement of high pricing and price gouging on items in high demand, including recently on ginger and garlic.

The Commission forms part of the Fusion Centre, which brings together all the relevant law enforcement agencies (SIU) looking into the Personal Protective Equipment (“PPE”).

We will continue to take a multi-pronged approach, which includes engagements and advocacy with retailers to institute price discipline.

Over **2000** cases investigated in the past year, achieved settlements:

- Reduction of up to **25% on margins**
- **Refund of R109 772.84** to National Health Laboratory Services.
- Total settlement/fines amount: **R17 083 631,93**
- Settlements with retail groups **to cap their mark-up** on ginger and garlic for the period agreed with the Commission

We will also follow the developments around the vaccine programme to ensure that procurement processes and the supply of the vaccines are compliant with Competition laws.

# Market Inquiries

## ***Data market inquiry:***

- The Inquiry found that prices were excessive and anti-poor in structure given the vast differences in the price per MB for smaller prepaid bundles compared to post-paid bundles.
- Settlements have been reached to reduce monthly prepaid tariffs by 35%-50% and to offer extensive zero-rating of educational and government websites along with some daily free data.

## ***Grocery Retail market inquiry:***

- Recommendations to support independent retail in township economies being taken forward by an intergovernmental group, incl. incentives, infrastructure provision and removing regulatory barriers
- Code of Conduct Guidelines published ( Retail Grocery Supplier Code of Conduct and Retail Property Code of Conduct)

## ***Private Healthcare market inquiry:***

- Establishing a Multilateral Forum for negotiating maximum prices for the treatment of Prescribed Minimum Benefits
- Recommendations will facilitate the transition to the National Health Insurance, including outcomes monitoring, health technology assessment and value-based pricing, non-PMB reference prices.

# Market Inquiries (*cont*)

Undertake a market inquiry into Online Intermediation Platforms that was launched in March 2021.

Undertake a scoping study to inform future market inquiries and enforcement areas.

- Commenced a Scoping study to assess competition issues in Fresh Produce Markets – this is particularly important to stimulate participation by SMEs and HDIs in the agricultural value chain.

# Exemptions to support Economic Recovery

The Economic Recovery Plan places considerable emphasis on re-industrialisation and export promotion in key local sectors.

The primary means through which this will occur are social compacts with business and labour around sectoral Masterplans.

The Commission will be supporting the industrial policy masterplan processes through appropriate Section 10 provisions – Exemptions around the plan design. These include the following sectors: Steel, Sugar, Agriculture and Manufacturing.

We will fast track exemption processes where cooperation amongst firms is required to support localization and export promotion, small businesses, or firms controlled or owned by historically disadvantaged persons whilst providing sufficient safeguards against harmful collusive conduct.

# Food Price Monitoring

The Commission has since the beginning of Lockdown monitored food market pricing to understand retail level inflation and the need for enforcement action.

The second Essential Food Price Monitoring report was published in September 2020 and it covered the following aspects:

1. Examination of fresh produce market volatility and differentials across markets nationally
2. Examination of the farm gate to shelf price gap at the advent of the crisis and beyond for some key food items using StatsSA survey raw data.
3. Continued monitoring of the movements in grains and fresh produce prices in the wholesale and commodity trading markets

The latest report is available at: <http://www.compcom.co.za/wp-content/uploads/2020/09/Essential-Food-Pricing-Report-September-2020.pdf>

# Advocacy Initiatives

## ***School Uniform***

- Continue promoting compliance with SGB associations with whom we have entered into MoUs.
- Continue co-operation with the Department of Basic Education.

## ***Automotive***

- Continued educational campaign on the recently published Guidelines for Competition in the South African Automotive Aftermarket.
- Monitor implementation of the Guideline, after effective date of 01 July 2021.
- Continue engagements with NT and DoT on G-fleet procurement to promote greater participation of Black and women-owned automotive repairers.

## ***Banking & Insurance Panels***

- Continue advocacy to promote transformation on appointment processes and in the allocation of work of Panels, following conveyancing advocacy project.

## ***Built Environment Professionals***

- On-going advocacy with the 5 councils of CBE for transformation and pro-competitive reforms on guideline fees and identification of work.



# Conclusion

Democratic South Africa was built through active engagement of all sectors, including all business and social partners - Nedlac.

There are many areas of our work which have been abled by active participation by our social partners – **this relationship remains NB.**

Assessment of Public Interest in these matters has worked very well to enable transformation:

- The Rules are clear and accessible
- There is judicial oversight which allows the success of the Public Interest regulations
- Public Interest Guidelines assist parties to comply

More can still be achieved:

- Providing information to assist investigations.
- Active Participation in hearings in the Tribunal and Courts
- Influencing policy reforms – **Transformation and Inclusivity NB.**
- Influencing Public Interest conditions in our interventions.
- Collaboration with our Advocacy efforts to reach areas of priority.

# THANK YOU

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