COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW ON THE COMPETITION AMENDMENT BILL, 2017

January 30, 2018

The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Sections of Antitrust Law and International Law of the American Bar Association (“Sections”) respectfully submit these Comments to the Competition Amendment Bill, 2017 (“Amendment Bill”). The Sections offer these Comments in the hope that they will assist the Ministry of Economic Development of the Republic of South Africa (“Ministry”) and the Competition Commission in further refining the Amendment. The Sections are available to provide additional comments or to participate in consultations with the Ministry or the Competition Commission as either may deem appropriate.

Executive Summary

The Sections appreciate the careful thought that went into the Amendment Bill. Based on their collective experience in multiple jurisdictions, including the United States and the European Union, the Sections offer suggestions to assist the Ministry in further refining the Amendment Bill in four areas: market study powers, greater Ministry participation, mergers, and abuse of dominance.

Market Studies. The Sections support the grant of market studies powers to the Commission to explore specific industries and agree that such market studies can be used as a starting point in bringing competition cases according to competition principles. Competition authorities in other jurisdictions have used market studies to better understand the competitive dynamics of certain markets and, on occasion, as a basis for bringing antitrust cases. The Sections respectfully suggest, however, that the Ministry consider in the first instance whether the deconcentrating of a competitive market or industry should be left to the South African Parliament. Consideration of socio-economic goals unrelated to competition law principles, such as deconcentrating on an industrial scale and ensuring sufficient opportunity for historically disadvantaged businesses so as to rectify the structural inequities of apartheid may be, from an institutional perspective, better left to the elected legislative branch than to unelected competition authorities, whose regulatory authority is grounded in competition law. Moreover, leaving remedies for market findings of concentration up to the South African Parliament allows for consideration of options short of the deconcentrating of industry such as creating incentives for new entry into the market. And the use of market studies as a springboard for consideration of industry-wide legislation or regulation by the South African Parliament to promote freer and fairer markets would also fit the experience of other jurisdictions.
In the alternative, should the Ministry decide that the Competition Commission should retain the power to propose remedies to address market concentration as such, divorced from any violations of competition law, the Sections would respectfully suggest that the Ministry further delineate the circumstances under which market concentration in and of itself will be deemed to warrant remediation. Increasing concentration can be the result of procompetitive efficiencies that include, but go beyond, the economies of scale properly recognized in the Amendment Bill. And increasing concentration in an industry may still be relative within an industry characterized by competition and a number of strong competitors.

In that respect, the Sections respectfully suggest that the Amendment Bill set out a process of market analysis that resembles that used to determine if a merger may be anticompetitive, including defining a relevant market, determining if the level of concentration is at such a level as to support an inference that the market is not competitive, analyzing whether barriers to entry exist that prevent new businesses or historically disadvantaged businesses from entering that market, and finally determining whether economies of scale or other potential procompetitive efficiencies justify the concentration in that industry. In this manner, the Competition Commission would better be able to gauge the effects of concentration, to tailor a remedy more tightly focused on remediating the identified negative effects, and produce a result that could be reviewed by the Competition Tribunal, as called for in the Amendment Bill and by due process principles. Greater Ministry Participation. The Sections applaud the Amendment Bill’s statements that the decision-making process for the application of South Africa’s competition laws should be kept within the existing apparatus, including the Competition Commission. The Sections agree that as far as the application of competition principles may be concerned, it is appropriate and follows international best practices to leave the application of competition principles to an impartial decision-making body with the requisite competition law experience and a right of...
judicial review of that body’s determination. Yet, this Amendment Bill contemplates greater involvement from this Ministry (and other executive bodies) in the decision-making process.

**Mergers.** The Sections point out that the proposed equalization of competition and public interest factors, such that both factors must support approval of a merger, raise questions and concerns for the South African economy that may warrant the Competition Commission’s taking more of a balancing approach involving an assessment of the relative strength of each factor. The legislative intent that a merger would be blocked if both factors are not satisfied could still be applied if the evidence as to each of these two factors were of equal strength and pointing in opposite directions. Alternatively, to the extent that this proposal is motivated by the concern that public interest factors are not given sufficient weight, another approach to to consider would be assigning responsibility for assessing public interest factors in a merger context exclusively to the political branches rather than the Competition Commission. The Sections also point out that one proposed aspect of the Amendment Bill may have unanticipated negative consequences for historically disadvantaged businesses.

**Monopolies.** The Sections agree with the distinction drawn by the Amendment Bill between the fact of a firm’s dominance in a market and its abuse of that dominance. The Sections also appreciate that the Amendment Bill reflects an understanding that a firm may become dominant in what may be a concentrated market due to economies of scale. Nonetheless, the Sections respectfully suggest that the Ministry take this opportunity to revisit the existing market share thresholds for abuse of dominance as well as the proposed evidentiary allocations of the burden of proof for excessive pricing and pricing discrimination. By doing so, the Ministry can help advance the competitiveness of South African businesses in international markets while still ensuring that the competitive process and the interests of consumers are protected under the touchstone of competition law—the consumer welfare standard.¹

**Market Study Powers**

In the first instance, the Amendment Bill enhances the ability of the Competition Commission to conduct market inquiries, including an analysis of market structure. The Amendment also enhances the ability of the Competition Commission to bring cases where such a market study uncovers anticompetitive business conduct. The Sections support these developments.

¹ As far as the Amendment Bill’s proposal to remove the “yellow card” warning procedure may function to allow the imposition of civil fines even for conduct that is thought to be anticompetitive under very narrow circumstances, such as vertical non-price restraints, the Sections respectfully encourage the Ministry either to reconsider removal of that procedure or to consider working with the Competition Commission on a revised civil fine structure that may better delineate those circumstances under which businesses are or should be on notice that their conduct is likely to be anticompetitive and hence warrants fines. See, e.g., American Bar Association Section of Antitrust Law and Section of International Law, Comments on Draft Guidelines Issued by the South African Competition Commission (Feb. 13, 2015), available at https://www.americanbar.org/content/dam/aba/directories/antitrust/at_comments_20130213_soaf.authcheckdam.pdf.
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Competition agencies in many jurisdictions possess and exercise these powers, including the United States Federal Trade Commission (“FTC”), the UK Competition and Markets Authority, and the European Commission. Section 6 of the FTC Act expressly grants the FTC the authority to conduct market studies, the power to use compulsory process as part of that authority, and the power to use those results to address found violations of competition law. For example, the FTC conducted what it called its Hospital Merger Retrospectives Project, an initiative whose goal was to study the post-acquisition prices of consummated hospital mergers “to determine whether particular hospital mergers have led to higher prices.” Based on that market study, the FTC brought a retrospective challenge to a health care provider merger.

The Amendment Bill also envisions that the Competition Commission can use its market study powers to investigate, report on, and remediate what it deems to be structural obstacles in an industry, specifically market concentration that cannot be explained by economies of scale, state support that disproportionately favors some companies over others, and barriers to entry by historically disadvantaged businesses. As far as the Amendment Bill proposes to enhance the Competition Commission’s powers to investigate and report on such structural obstacles, the Sections support the Amendment Bill. Competition enforcement bodies like the FTC and the European Commission have the power to investigate such structural issues so as to advocate for measures to inject more competition into a given market. Those market study powers are seen as being very beneficial for enforcement agencies, consumers, and the business community.

However, the Sections respectfully suggest that the power to remediate such structural obstacles should be left in the hands of the elected branch of government, the South African Parliament. Remedying market concentration that has any adverse effect, (which is the proposed standard in the Amendment Bill), including barriers to entry for historically disadvantaged business, involves consideration of a whole range of policy options that go beyond the divestiture remedy specifically mentioned in the Amendment Bill. Such authority is also far afield of the core competency of the Competition Commission, the assessment of competition and competitive effects based on economic data and analysis. Moreover, from an institutional perspective, political

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4 For example, “[t]he Federal Trade Commission’s (“FTC” or “the Commission”) authority extends beyond antitrust law enforcement to include unique tools for industry study and competition advocacy that allow it to construct a broader competition policy program. These non-enforcement tools are especially important during times of change, when technology and other developments can trigger significant disruptions in the business environment.” See Andrew I. Gavil, The FTC’s Study and Advocacy Authority in Its Second Century: A Look Ahead, 83 GEO. WASH. L. REV. 1902 (2015).

5 Id.
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decisions such as those contemplated by the Amendment Bill are best left to the political branches of government.

For example, such structural obstacles may be better remediated by changes in the laws to improve market access for historically disadvantaged firms, enhance the availability of lower priced options or diverse choices for services, or balance competition and consumer protection concerns so as to ensure the market in question operates in a fair manner. In turn, these changes in the law involve wider social and economic concerns and trade-offs that are better placed in the hands of legislatures rather than competition enforcers and judicial officers.6

Notably, the market studies conducted by the European Commission allocate responsibility for remedying such structural obstacles to the legislative processes of Member States or the European Union itself.7 Indeed, so far as divestitures in industries based on structural concerns outside of competition law may upset investment-backed expectations of foreign and domestic businesses engaged in commerce in South Africa, and raise issues about their impact on global commerce, the imposition of remedies when faced with such concerns is also best left to other legislative or executive processes in South Africa.8

Should the Ministry, however, wish to leave the Competition Commission with the power to remediate these structural obstacles, the Sections respectfully suggest that the Ministry consider delineating more fully the criteria by which these obstacles will be found to have an adverse effect. As the Ministry discusses, concerns as to the claimed impact of market concentration on inequality, wage growth, and competition have been well-reported.9 As the Ministry recognizes, however, concentration can be justified by the need for economies of scale.10

However, the assessment of the adverse effects of concentration can require more than an assessment of economies of scale.11 The Ministry itself notes in discussing a Competition

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Commission study of South African markets that concentration numbers may be of concern only when the use of the Hirschmann-Heirfindahl Index (“HHI”) in a relevant product and geographic market yields the kind of high numbers that would present a prima facie case that a proposed merger may be anticompetitive.12 And an assessment of the adverse impact of these structural obstacles in fact would require, at a minimum, the kind of analysis that would be similar to that applicable to prospective mergers, including:

- Whether the market concentration numbers as set out in the HHI had increased to the levels that would raise a concern as to a prospective merger;
- Whether the firms remaining in the market are providing better value for consumers due to technological and global changes;
- Whether the firms remaining acquired their market share due to internal growth that was fueled by competitive advantages such as product innovation; and
- Whether to the extent corporations are earning significant profits, there are barriers to entry that prevent entry by small or historically disadvantaged businesses who would otherwise be attracted into that market by those profits.13

The delineation of these factors would not only aid the Competition Commission in the investigation and remediation of concentration that presented such an adverse effect but also would provide the Tribunal with a defined standard to review the Competition Commission’s analysis and decision and thus enhance predictability, particularly where the inquiry may be a market-wide study.14

Greater Ministry Participation

The Sections applaud the Ministry for recognizing that it is important to due process concerns and to the credibility of South Africa’s competition laws that there be a neutral decision-maker that investigates and enforces those laws as well as an impartial judicial decision-maker that

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13 See, e.g., Shapiro, supra note 11.

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can review enforcement decisions. The Ministry expresses concerns that it will not have a means by which its voice, or the voices of other executive ministries, can be heard in inquiries, investigations, enforcement actions, and appeals. The Ministry therefore proposes a process by which it can be involved at every stage, including having the independent right to conduct a market inquiry and to appeal decisions of the Tribunal. This set of provisions appears to be motivated by concerns that the public interest will not be sufficiently addressed without the involvement of the Ministry and that the remediation of structural obstacles found in such market studies may involve socio-economic issues that go beyond the typical remit of a competition enforcement agency.

The Sections understand the Ministry’s perspective that it is best placed to evaluate public interest considerations. As the Organization for Economic Cooperation and Development has found, most jurisdictions employ a dual responsibilities model under which the competition authority conducts a standard competition analysis and a sector regulator or government agency then applies public interest considerations. This model is seen as ensuring better predictability and transparency.

While there are jurisdictions like South Africa where the competition enforcement authority conducts both a competition and a public interest analysis (i.e. the single authority model), none appear to employ a hybrid approach. The proposal to, in effect, allow for unbounded executive second-guessing of the decisions of competition enforcers and tribunals would, in effect, meld these models for the first time, and would be antithetical to those values recognized by the Ministry as being important to the credibility of competition enforcers and to addressing due process concerns. Indeed, businesses already have expressed concerns about the negative impact of public interest concerns on investment and business decisions that support economic growth because they increase complexity and legal uncertainty. The proposed hybrid approach would only heighten those concerns.

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15 See Ministry of Economic Development, supra note 10, at 22.
16 See id. at 22-23.
17 See id.
18 See id.
20 Id.
21 See id.
22 See id. at 2.
23 See Abbott and Tritell, supra note 14, at 4 (“Adopting procedures that promote the impartiality, efficiency and accuracy of antitrust decisions can help achieve basic competition goals. Procedures that allow agencies to obtain and test relevant evidence, as well as the legal and economic approaches and analyses that inform their decisions regarding infringement and remedy, can enhance significantly the overall quality of enforcement decisions. This facilitates vigorous competition within established legal constraints and ultimately enhances productivity and consumer welfare."
Mergers

The Sections also have reviewed the proposed revisions to the merger control provisions of the Competition Act, in particular the proposed amendments to Section 12A. Although the consideration of public interest factors in merger review by competition authorities may not be consistent with international best practices, the Sections do not intend to assess the merits of such factors in South African merger control in this submission. However, as described more fully below, the proposed amendments do raise some important questions, as well as at least one potentially negative—and presumably unintended—consequence for merging parties.

The Sections understand that the purpose of Section 7(a) of the amendments is to reflect “the settled, established position in South African case law that the competition and public interest tests for the approval of a merger are equal in status.” As the Ministry explains, “The first amendment of the merger control regime (clause 7(a)) reflects the settled, established position in South African case law that the competition and public interest tests for the approval of a merger are equal in status. This confirms the legislative intention that a merger must be justified on both competition and public interest grounds to be approved.”

However, this equalization of competition and public interest factors leaves unanswered questions of how these factors should be balanced by the Competition Commission if the merger’s impact cannot be easily quantified on one or both sides of the ledger or if the impact on one side of the ledger is disproportionate to the other. Procompetitive efficiencies such as quality improvements or furthering innovation may not always be easily quantified. Public interest factors such as the creation of additional barriers to small or historically disadvantaged businesses also may not always be easily quantified. And should a proposed merger be rejected if the procompetitive efficiencies from a merger far outweigh any adverse public interest impact, especially if that impact is highly contingent and occurs over a long period of time (e.g., impact on employment)? In turn, concerns about equalizing these factors are heightened by the findings of the OECD Secretariat that the use of public interest factors has resulted more often in anticompetitive mergers being cleared. Ultimately, viewing these factors as equal may create

Moreover, procedures that are—and are rightly perceived to be—accurate, efficient and impartial will enhance respect for competition law and its enforcement institutions and processes among counterpart agencies, within the business community, among consumers and by the general public.’’


26 Id.

27 See Org. of Econ. Coop, & Dev., Public Interest Considerations in Merger Control, Background Paper of the Secretariat, DAF?COMP/WP3(2016)3, at 11, ¶ 32 (June 14-15, 2016) (“The Secretariat’s research indicates that there are more examples of public interest grounds resulting in an anticompetitive merger being cleared than of a merger cleared by the competition authority being prohibited.”),http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm (last visited Jan. 19, 2018). Anticompetitive transactions can impose a variety
significant uncertainty for merging parties, for investment in the South African economy, and even for the Competition Commission, the Competition Tribunal, and the Competition Appeal Court.

In light of these considerations, the Sections respectfully suggest that the Ministry may want to refine its proposed amendment to recognize that competition and public interest factors may be balanced against each other by the Competition Commission, with deference being given to the competition enforcers and judicial bodies in how that balancing may take place: the greater the anticompetitive effects of a merger, the greater the public interest showing required to allow it; and the greater the procompetitive effects of a merger, the greater the public interest showing required to block it. In that rare situation where evidence supporting each factor is of equal strength and pointing in opposite directions, then it may be appropriate to provide, in accordance with the Ministry’s observations of legislative intent, that the merger should be rejected by the Competition Commission.

Ultimately, to the extent that this proposed change is motivated by the Ministry’s concerns that public interest considerations will not be given their proper due in a merger analysis, the Sections again suggest that it may be better to leave the application of public interest factors entirely in the hands of the Ministry.

The Sections support the proposed revisions to section 12(3)(c) of the Competition Act found in section 7(c) of the Amendment Bill. The deletion of the words “become competitive” and insertion of the words “effectively enter into, participate in and expand within the market” replaces a vague and generic reference with a more precise and specific reference, and in so doing provides merging parties, regulators and courts with greater transparency concerning the public interest grounds to be considered under section 12(3) of the Competition Act.

However, the Sections are concerned that the proposed new Section 12(3)(e) may have unintended negative consequences. The proposed language requires the consideration of “the promotion of a greater spread of ownership, in particular to the levels of ownership by historically disadvantaged persons in the firms in the market.”

On a plain reading, this text could reduce the liquidity of markets for vendors in general, and particularly for historically disadvantaged business owners. For example, a historically disadvantaged owner of a South African business wishing to sell that business to a foreign buyer, or a domestic South African buyer from a non-disadvantaged background, would be diminishing the “spread of ownership” by historically disadvantaged persons and thus reviewed negatively under the Act, since the acquired business would pass out of historically disadvantaged ownership. Although the Sections appreciate that this is likely to be an unintended consequence, the proposed new section 12(3)(e) could have a chilling effect on the sale of businesses owned by historically disadvantaged persons, by limiting the liquidity of the market (i.e., the pool of acceptable buyers)

of economic costs in the form of higher prices, reductions in output, reductions in quality, and reductions in innovation, among others. All of these adverse effects limit the development and growth of the South African economy and act to the detriment of South African consumers.

See id. at 18-19.
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to other historically disadvantaged persons—for a sale to other buyers would reduce, rather than increase, the number of historically disadvantaged business owners in the market.29

The Sections believe that this potential unintended consequence, and the uncertainty for vendors (and indeed, by extension, for buyers) that it creates, underscores the widely-held concerns in the international business and legal communities about the difficulty in defining, quantifying and applying non-competition-related criteria in the assessment of transactions under competition law statutes.

Abuse of Dominance

The goals of competition laws are the promotion of competition and the competitive process and markets, rather than the protection of competitors, to achieve the maximization of consumer welfare.30 The Sections applaud the recognition of the Ministry that unlawful conduct by dominant firms requires more than simply being dominant in a relevant product and geographic market.31

A. Reconsideration of Market-Share Thresholds

First, the Sections respectfully urge the Ministry to reconsider how the Competition Commission should determine that a firm is dominant in the first instance. The Amendment Bill retains the existing definition of a “dominant firm” in section 7 of the Competition Act. In particular, a firm is dominant in a market if: (a) it has at least 45% share of that market; (b) it has at least 35% share but less than 45% share of that market, unless it can show that it does not have market power; and (c) it has less than 35% share of that market but the Competition Commission can show that it has market power. The Sections respectfully submit that using market share thresholds to determine conclusively (in the case of (a)) or presumptively (in the case (b)) dominance is overinclusive.

Indicating what market share percentages are likely to suggest market power, without turning those percentages into a conclusive determination, can provide a useful metric for businesses in assessing the risk that their conduct (which may be procompetitive) may be

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29 The ability to liquidate assets in a free market is an important justification for allowing mergers to take place in the first instance. See James Turley, _Note: Antitrust, Section 7 of the Clayton Act Prohibits a Large Firm from Expanding into a Highly Concentrated, Product-Related Market by Acquiring the Dominant Firm in that Market, FTC v. Proctor & Gamble Co., 380 U.S. 568 (1967), 45 TEX. L. REV. 1409, 1416-17 (1967)

30 Brunswick Corp. v. Pueblo-O-Mat, 429 U.S. 477, 488 (1977) (“The antitrust laws ... were enacted for the protection of competition, not competitors.”) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))); _see_ Kirtsaeng v John Wiley & Sons, Inc., 568 U.S. 519, 537 (2013) (“American law too has generally thought that competition, including freedom to resell, can work to the advantage of the consumer”); _see, e.g._, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007) (restraints with “manifestly anticompetitive effects” are _per se_ illegal; others are subject to the rule of reason (internal quotation marks omitted)); 1 P. Areeda & H. Hovenkamp, _ANTITRUST LAW_ ¶ 100, p. 4 (3d ed. 2006) (“[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively’’')).

31 _See_ Ministry of Economic Development, _supra_ note 10, at 19.
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challenged as an abuse of dominance. In the United States, market shares of less than 50% are unlikely to give rise to monopolization concerns; under existing U.S. law, monopoly market power is unlikely to be found unless the company concerned has at least a 65% share of the relevant market. The European Commission is unlikely to find dominance in Article 102 of Treaty on the Functioning of the European Union unless a firm has a market share of at least 40% while market shares higher than that may be a “preliminary” and “useful first indication” to be interpreted in light of other relevant market conditions.

But that is different than using a precise market share, here 45% or more, as a conclusive determinant of dominance. In other jurisdictions, while high market shares in a relevant market are an important factor in determining the existence of market power, this is simply the beginning of the inquiry. Those other jurisdictions typically analyze a variety of evidence to determine whether significant market power in fact exists. Direct evidence, e.g., using data analysis to show supracompetitive price increases, and indirect evidence, e.g., an analysis of structural factors such as barriers to entry, may play significant roles in this analysis. Therefore, the Sections recommend that the Ministry consider proposing an amendment to section 7 of the Competition Act to remove the 45% market share threshold as a conclusive determinant of dominance.

Under existing section 7 of the Competition Act, while a market share of between 35% and 45% does not conclusively determine dominance, it imposes on the firm the onus of rebutting the presumption that it has market power. This departs from the approach taken in other jurisdictions. Indeed, as noted above, in other jurisdictions, to presume dominance on the basis of market shares alone requires market share percentages significantly higher than 35%. By imposing on a firm with

33 See, e.g., 2B PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 532c, at 250 (3d ed. 2007) (“[I]t would be rare indeed to find that a firm with half of a market could individually control price over any significant period.”); Bailey v. Allgas, Inc., 284 F.3d 1237, 1250 (11th Cir. 2002) (“[M]arket share at or less than 50% is inadequate as a matter of law to constitute monopoly power.”); Blue Cross & Blue Shield v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995); Eastman Kodak Co. v. Image Technical Services., 504 U.S. 451, 481 (1992); United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (87 percent); United States v. E.I. du Pont Nemours & Co., 351 U.S. 377, 379 (1956) (75 percent); Am. Tobacco Co., 328 U.S. at 781 (over 66 percent); United States v. Dentsply Int’l Inc., 399 F.3d 181, 188 (3d Cir. 2005) (75 to 80 percent predominant); United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (80 to 95 percent predominant). However, plaintiffs can successfully show attempted monopolization under U.S. antitrust law even with a market share of 33% if other market factors are present, such as the weakness of competitors, and a defendant’s conduct, such as a wave of acquisitions, suggests that monopolization of the relevant market is likely. See, e.g., In re Pool Prods. Distr. Mkt. Ant. Litig., 940 F.Supp. 367, 385-86 (E.D. La. 2013).
36 See, e.g., U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 2.1 (Aug. 19, 2010); see also, e.g., In re Pool Prods., 940 F.Supp. at 385-86.
a market share as little as 35% the onus of showing that it does not have market power, it significantly increases the difficulty for businesses of assessing the risk that their conduct may constitute an abuse of dominance.

Moreover, small, open economies like South Africa tend to have higher levels of market concentration and smaller numbers of competitors than larger economies. Such small, open economies may benefit from higher levels of market concentration than larger economies like the United States in order to compete in a globalized marketplace. As noted earlier, in the United States, monopolization cases often require 65% or greater for a finding of monopoly power. In this context, using a 45% market share as a threshold for a presumption of dominance, even a rebuttable one, may be too low for a small open economy like South Africa. Accordingly, the Sections recommend that the Ministry also give consideration to making the market share threshold for a rebuttable presumption of dominance higher than 45% (as opposed to simply removing the provision that makes such a presumption conclusive).

Lastly, the Sections find it problematic that firms with shares less than 35% may be found to be dominant based on some showing of market power. Notably, the International Competition Network defines dominance not as based on market power as such, but rather as “a high degree of market power both with respect to the level to which price can be profitably raised and to the duration that price can be maintained at such a level,” thereby equating dominance with “substantial market power.” Low market shares are inconsistent with substantial market power. Accordingly, we strongly recommend that Section 7 be amended so as not to find dominance where shares are below 35%.

B. Reconsideration of proposed amendments to excessive pricing provisions

The Amendment Bill introduces a new section 8(2), which requires a dominant firm to show that the prices it charged are reasonable if there is a prima facie case that it engaged in excessive pricing or required its supplier to sell at an excessively low price. The Ministry explains that the lack of successful prosecution of excessive pricing to date is largely due to the existing allocation of evidentiary burden between the Competition Commission and the dominant firm and this proposed change aims to address this issue. The Sections respectfully observe that the cure may be worse than the disease here:

- Under section 1 of the Competition Act, “excessive price” is defined to mean a price for a good or service which bears no reasonable relation to and is higher than the economic value of that good or service. In order to show a prima facie case of excessive pricing, the Competition Commission must first provide prima facie evidence that the price of the product or service bears no reasonable relation to its economic value. The proposed

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38 There may be instances in which conduct can be determined early in the course of an investigation to be procompetitive such that no inquiry into market power would be required. See American Needle, 560 U.S. at 203-04.
“reasonableness” test for which the dominant firm bears the evidentiary burden appears to be a duplication of the same “reasonableness” analysis to be done by the Competition Commission. The proposed section 8(2) appears to add little to the analytical framework of the “excessive pricing” provision.

- The Amendment Bill also introduces a new section 8(3), which requires the Competition Commission to publish guidelines setting out the relevant factors and benchmarks for determining whether a price is excessive. It appears that the guidelines referred to in the proposed section 8(3) will inform the Competition Commission’s policy as to whether it will establish its prima facie case that the price charged by the dominant firm bears no reasonable relation to the economic value of the product or service. However, there does not appear to be any requirement in the proposed section 8(3) that those guidelines explain how the dominant firm is to show that the price is reasonable.

- The Competition Commission’s initiative to publish guidelines on its policy regarding excessive pricing is meant to provide guidance to businesses on their compliance with the excessive pricing provision. However, because the Amendment Bill makes it clear that the guidelines are not binding on the competition authorities, this diminishes the legal certainty that the proposed section 8(3) is intended to provide.

- The reference to “required a supplier sell at an excessively low price” in the proposed section 8(2) contemplates that an abuse of dominance case may be brought based on an allegation of exercise of monopsony power. However, the exercise of monopsony power, unaccompanied by any specific business conduct, is not itself enumerated as a type of abuse of dominance conduct actionable under section 8. Nor does it fall into the definition of “excessive price” under the existing Competition Act.

The Sections believe it is problematic to shift the evidentiary burden of showing that prices were reasonable and not excessive, arguably the most difficult and contentious part of the excessive pricing analysis. Indeed, Section 21 of the Competition Act provides that the function of the Competition Commission is to, among other things, “investigate and evaluate alleged contraventions of Chapter 2 [of the Competition Act]” in respect of restrictive practices. A reversal of the evidentiary burden is inconsistent with this statutory mandate and would enable the Competition Commission to prosecute firms without having investigated the relevant facts of the case. Accordingly, the Sections recommend that the proposed section 8(2) be deleted.

Moreover, in relation to the excessive pricing provision in section 8(a), the Amendment Bill deletes the requirement that the excessive pricing be shown to be to the “detriment of consumers.” The Ministry explains the rationale of this proposed change: “excessive pricing may also affect businesses that buy inputs from dominant firms.”

If a dominant firm charges its downstream customers an excessive price, but this conduct has no detrimental impact on final consumers, e.g., there is no resulting increase in the price of the final product, no resulting reduction in the volume of the final product supplied to consumers, and no resulting negative impact on the quality of the final product supplied, then economic theory suggests that the upstream dominant firm’s excessive pricing conduct merely represents a reallocation of surpluses between the upstream dominant firm and its downstream customers with

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no impact on the consumer surplus of final consumers. This is not a situation of market failure that warrants intervention by amending competition laws.

In fact, the Sections’ understanding is that the “detriment to consumers” requirement has not been fully explored by the South African competition authorities. It appears that in the ordinary course, an excessive price charged to consumers is generally presumed to be to the detriment of consumers. Thus, there does not appear to be any systematic evidence that the requirement to show “detriment to consumers” has been an important obstacle to effective enforcement of the excessive pricing provision. Accordingly, the Sections suggest that the “detriment of consumers” requirement be retained in section 8(a).

C. Reconsideration of proposed amendments to price discrimination provisions

The Amendment Bill also proposes to reallocate the evidentiary burden between the Competition Commission and the dominant firm: price discrimination is presumed illegal unless the dominant firm can show that it is not likely to have the effect of preventing or lessening competition. This is a major departure from the approach taken in other jurisdictions, where the enforcement agency has the burden of establishing anti-competitive effect.

The Sections respectfully observe that price discrimination is one of the most complex areas of competition law, for two main reasons. First while price discrimination can be simply defined as a firm charging different prices to different consumers for the identical item, in practice price discrimination takes many different forms, including rebates, incentives, discounts, loyalty programs, coupons, product bundling, product tying, all of which are prevalent in a variety of industries and market environments. This makes it difficult to engage in a generalized analysis of price discrimination.

Second, price discrimination is not intrinsically anticompetitive and in fact is procompetitive or benign in many situations. There are many ways in which price discrimination can be procompetitive: for example, by bringing new consumers into the market through low prices; it can intensify competition between rival firms, because through price discrimination firms can compete for all customers whereas under uniform pricing firms would only compete for “marginal consumers;” it can provide incentive for firms to make long-term investments, including R&D, with the reward of higher profits. In certain circumstances, price discrimination can be anti-competitive, e.g., where the price discrimination is exploitative, distortionary or

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The main insight of economic literature on price discrimination is that its welfare effect is highly dependent on the particular circumstances of the market, including the nature of consumer preference, market structure, extent of vertical integration, and the type of price discrimination practice. Any assessment of the competitive impact of price discrimination in a given market requires an in-depth economic analysis, including modelling, with careful consideration of all relevant facts. In fact, there are ongoing debates in the economics and competition law literature about the competitive effects of certain types of price discrimination practices.

In light of these complexities, the Secretariat of the Organization of Economic Cooperation and Development advises, and the Sections agree, that competition agencies should “start with a default, but rebuttable, presumption that any given price discrimination scheme has a benign or beneficial impact on consumers.” Yet, the proposed amendment on this subject does the opposite. By imposing the evidentiary burden of showing the lack of any anti-competitive effect on the dominant firm, the Amendment starts with the presumption that price discrimination is anti-competitive, which is to be rebutted by the dominant firm. Given the complexity of price discrimination, a detailed self-assessment of the competitive effect of a practice of price discrimination is not an exercise that businesses can do in the ordinary course. It also decreases certainty and predictability, thereby hindering economic development, to expect businesses to engage in such self-assessment when academic debate about the competitive effects of certain price discrimination practices remains ongoing.

Creating a presumption that price discrimination is anti-competitive will significantly increase uncertainty for businesses. This is likely to discourage all forms of differential pricing, including where it is pro-competitive or benign. Similar to the discussion about excessive pricing above, the reversal of evidentiary burden in respect of price discrimination is also inconsistent with the investigatory function of the Competition Commission as mandated by statute.

43 Id. at ¶ 56.
