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Proposed Busa Briefing Paper:

The Review Of South Africa's Competition Law & Policy

1. EXECUTIVE SUMMARY

This briefing paper aims to stimulate debate around the review of South African competition law and policy. The paper identifies some of the suggested amendments to the Competition Act. The scope and application of the Competition Act, as well as its institutions and conceptual design are described. The paper suggests that the existing powers of the competition authorities have been improperly or inadequately used. Before granting them additional powers, it is necessary to build the capacity of these authorities.

2. BACKGROUND

- 2.1 BUSA through the Competition Task Team, under the Economic Policy Portfolio, BUSA maintains a keen interest in national and international developments in competition law. This briefing paper aims to stimulate debate around the review of South African competition law and policy, particularly given the opaqueness of the review process.
- 2.2 BUSA recognises the important role of competition law and policy as a means to enhance growth, development and transformation in South Africa. Appropriately designed and applied, competition law can contribute to the ordering of markets, thereby lowering transaction costs and increasing efficient and equitable outcomes.
- 2.3 BUSA also recognises that competition law and policy operate alongside and in conjunction with other laws and policies. These should all be aimed at creating stable and predictable environments for firms to be productive. This requires significant coordination between the authorities responsible for these laws and policies.
- 2.4 BUSA further recognises that South Africa faces a number of capacity constraints, at both the individual and institutional levels. This means that any review of a particular law and policy must not only reflect on the powers granted to the relevant institutions, but also the design, management, procedures and processes of these institutions.
- 2.5 BUSA is concerned that the current review of South African competition law and policy is being undertaken with only slight regard to other relevant laws and policies, and with little regard to the real capacity needs of the competition authorities.
- 2.6 BUSA is particularly concerned that the current reviewers of South African competition law and policy are too similar in learning and belief, possibly leading to hubris in their diagnosis and prescription.

This briefing paper aims to stimulate debate around the review of South African competition law and policy, particularly given the opaqueness of the review process.

3. ANTICIPATED AMENDMENTS

- 3.1 In his Budget Speech on 29 March 2006, the Minister of Trade and Industry, Mandisi Mphahla, said that high input costs for downstream value-addition or beneficiation of raw materials often arise from the anticompetitive pricing practices of monopolistic enterprises. The Competition Act would thus be strengthened to better deal with the high levels of concentration in certain sectors of the economy and the attendant uncompetitive outcomes. The Minister expressly linked competition policy with import parity pricing and beneficiation incentives.
- 3.2 More recently, in his briefing on the Economic, Investment and Employment Cluster's Program of Action (Cycle Three Report) on 29 August 2007, the Minister said that despite the improving level of competitiveness and the robustness of the competition authorities, there remain high levels of concentration in specific sectors of the economy and anti-competitive practices continue to characterise the structure of key markets and the conduct of market participants. According to the Minister, it is imperative to strengthen competition policies to address such behaviour in these markets.
- 3.3 The Minister then noted that a review of competition policy had been completed by the Department of Trade and Industry (DTI), which had consulted with other departments in the cluster. Based on these consultations, the DTI would forward to Cabinet for consideration its proposed amendments to the Competition Act. Although these proposals are not yet publicly available, these and other statements by some policy makers suggest that Government perceives the legislative process as the most appropriate mechanism to improve competition policy in South Africa.
- 3.4 It is anticipated that the Competition Act will be amended to allow the competition authorities to better investigate and prosecute anticompetitive conduct, particularly cartels. Furthermore, the Act will likely permit broad market inquiries where there are uncompetitive outcomes short of specific anticompetitive conduct. These inquiries will probably be aimed at inherited and complex monopolies in South Africa.
- 3.5 It also appears that the Act will be amended to increase penalties for firms found to have contravened the Act, as well as impose penalties on directors and individuals involved in prohibited conduct. It is not clear whether the latter means criminal sanction or strict civil liability and/or disqualification as a director.

- 3.6 Underlying the various statements by the Minister and other policy makers is a highly questionable assumption that the perceived failings of South African competition law and policy are the result of the competition authorities having insufficient power, rather than them improperly or inadequately using their existing powers.
- 3.7 This briefing paper questions this assumption. The Competition Act already contains a number of substantive and procedural provisions that have not been sufficiently used by the competition authorities. Furthermore, the Act was skilfully designed to address, but not be an unrealistic panacea for, the many challenges facing South Africa.

Review of a particular law and policy must not only reflect on the powers granted to the relevant institutions, but also the design, management, procedures and processes of these institutions.

- 3.8 This briefing paper argues that the suggested amendments will at best only have some palliative value. Although it is indeed appropriate to now review competition law and policy in South Africa, the real capacity needs of the competition authorities must to be more honestly addressed.
- 3.9 With the view to stimulating debate around the review, this briefing paper first describes the scope and application of the present Competition Act, as well as its institutions and conceptual design. The latter distinguishes between the enforcement and advocacy functions of the competition authorities, with the view to later arguing that the latter has been much neglected.
- 3.10 The paper then discusses the following issues: competition and development; capacity building; cartel investigations; market inquiries; penalties and offences; rules; guidelines; advocacy; industrial policy; and regional integration. The paper concludes that any review which does not better address these issues will be woefully deficient.

4. COMPETITION ACT

4.1 Scope and Application

- 4.1.1 The Competition Act must be understood within the context of South Africa's legacy of international isolation, domestic protectionism, economic exclusion, social inequality and political transformation. As a response to more radical proposals, a uniquely South African competition law was considered instrumental for effecting realistic change. In 1995, the DTI commenced a three year program of consultations with experts and stakeholders. This led to the publication of the *Guidelines for Competition Policy* in 1997 and the enactment of the Competition Act in 1998¹.
- 4.1.2 The Act expressly recognises that apartheid and other discriminatory laws and practices resulted in excessive concentrations of ownership and control within the economy, inadequate restraints against anti-competitive practices, and unjust restrictions on full and free participation in the economy by all South Africans. The Act further recognises 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; and that an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans (Preamble).
- 4.1.3 The objects of the Act are thus 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 South Africa (Preamble).
- 4.1.4 In a similar vein, the stated purpose of the Act is to promote and maintain competition in South Africa in order to promote the efficiency, adaptability and development of the economy; provide consumers with competitive prices and product choices; promote employment and advance the social and economic welfare of South Africans; expand opportunities for South African firms' participation in world markets and recognise the role of foreign competition in the South Africa; ensure that small and

¹ Sections 1-3, 6,11,19-43,78,79 & 84 came into effect on 30 November 1998. The remaining sections of the Act commenced on 1 September 1999.

medium-sized enterprises have an equitable opportunity to participate in the economy; and promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons (s 2).

4.1.5 The Act applies to all economic activity within, or having an effect within South Africa. The only exceptions relate to collective bargains and agreements, as well as conduct designed to achieve a non-commercial socio-economic objective or similar purpose (s 3).

4.2 Institutions

4.2.1 The Competition Act established three new competition authorities, each with distinct functions and independent of one another.

- The Competition Commission generally has an investigative and prosecuting function, although it may make determinations relating to exemption applications, as well as small and intermediate mergers (ss 19 to 25).
- The Competition Tribunal is an adjudicative body, making determinations on prohibited practices, including interim relief and consent orders, large mergers and referrals regarding small and intermediate mergers (ss 26 to 35).
- The Competition Appeal Court reviews decisions of and considers appeals against decisions of the Competition Tribunal. The Court has the status of the High Court and is constituted by a group of judges hearing cases outside their regular duties (s 36 to 39).

4.2.2 These authorities exercise their functions subject to the provisions of, *inter alia*, the Competition Act, the Constitution, the Promotion of Administrative Justice Act and the Promotion of Access to Information Act.

To allow the competition authorities to better investigate and prosecute anticompetitive conduct, particularly cartels.

4.3 Enforcement

Prohibited practices

4.3.1 The Competition Act mandates the Competition Commission to investigate and prosecute, and the Competition Tribunal to adjudicate on conduct prohibited under the Act.

4.3.2 In particular, the Act prohibits the following restrictive practices:

- An anti-competitive agreement, arrangement or practice between competitors unless pro-competitive gains are attributable to and outweigh the anti-competitive effect (s 4);
- An agreement between competitors that involves fixing prices or other trading conditions, dividing markets or collusive tendering (s 4);
- An anti-competitive agreement between a firm and its suppliers or customers, unless pro-competitive gains are attributable to and outweigh the anti-competitive effect (s 5); and
- The practice of minimum resale price maintenance, save that a supplier or producer may recommend a minimum resale price (s 5).

4.3.3 The Act also prohibits the following abuses by certain dominant firms² (s 8):

- Charging an excessive price to the detriment of consumers;
- Refusing to give a competitor access to an essential facility;
- Unless there are attributable and outweighing pro-competitive gains:
 - Impeding or preventing a firm entering into or expanding within a market;

² In terms of s 6, the substantive provisions of ss 7 and 8 do not apply to firms falling below certain value thresholds. Section 7 provides that a firm is dominant in a market if it has at least 45% of that market, at least 35% but less than 45% of that market unless it can show that it does not have market power, less than 35% of that market but has market power.

- Requiring or inducing a supplier or customer to not deal with a competitor;
 - Refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
 - 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;
 - Selling goods or services below their marginal or average variable cost; and
 - Buying-up a scarce supply of intermediate goods or resources required by a competitor.
- 4.3.4 The Act also prohibits certain dominant firms from engaging in price discrimination unless this only makes allowance for cost differences, meets competition or responds to market changes (s 9).
- 4.3.5 On application by a firm, the Competition Commission may exempt prohibited conduct that contributes to the maintenance or promotion of exports, the promotion of the ability of small businesses (or firms controlled or owned by historically disadvantaged persons) to become competitive, change in productive capacity necessary to stop decline in an industry, or the economic stability of any industry designated by the Minister of Trade and Industry (after consulting the Minister responsible for that industry). The Commission may also exempt prohibited conduct that relates to the exercise of intellectual property rights (s 10).
- 4.3.6 The Competition Commission may initiate or receive a complaint against an alleged prohibited practice, and must to direct an inspector to investigate the complaint as quickly as is practicable (s 49B). A complainant may apply to the Competition Tribunal for an interim order in respect of the alleged practice, whether or not a hearing has commenced into the practice (s 49C). If during, on or after completion of an investigation of a complaint, the Commission and the respondent agree on the terms of an appropriate order, the Tribunal, without hearing any evidence, may confirm that agreement as a consent order (s 49D). Otherwise, at any time after initiating a complaint, the Commission may refer the complaint to the Tribunal. Within one year after a complaint was submitted to it, the Commission must refer the complaint to the Tribunal if it determines that a prohibited practice has been established, or in any other case the Commission must issue a notice of non-referral to the complainant (s 50). In the latter event, the complainant may refer the complaint directly to the Tribunal (s 51).

Merger control

- 4.3.7 The Competition Act also mandates the Competition Commission to investigate certain mergers³, and the Commission or the Competition Tribunal to approve these mergers. The factors relevant to the consideration of mergers are set out in detail (s 12A).
- First, it is necessary for the authorities to establish whether the merger is likely to substantially prevent or lessen competition with reference to stated economic factors.⁴
 - Second, if a competition lessening effect is likely, the authorities must establish whether the merger will result in technological, efficiency or other pro-competitive gains that outweigh the competition lessening effect.
 - Third, notwithstanding the earlier two enquiries, the authorities must also assess the merger in the light of stated public interest factors.⁵
- 4.3.8 The Act furthermore provides for the notification and implementation of small, intermediate and large mergers (ss 13 and 13A), merger investigations (s 13B), and various merger proceedings (ss 14, 14A, 16, 17, 18).

³ Section 11 provides for small, intermediate and large category of mergers based upon various value thresholds. In terms of s 12, 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.

⁴ These are the following: the actual and potential level of import competition in the market; the ease of entry into the market, including tariff and regulatory barriers; the level and trends of concentration, and history of collusion, in the market; the degree of countervailing power in the market; the dynamic characteristics of the market, including growth, innovation, and product differentiation; the nature and extent of vertical integration in the market; 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 whether the merger will result in the removal of an effective competitor.

⁵ These are the following: the effects the merger will have on a particular industrial sector or region; employment; the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive; and the ability of national industries to compete in international markets.

Search and summons

4.3.9 In respect of both prohibited practices and merger investigations, the Competition Act sets out the Commission's powers of search and summons. In particular, provision is made for a judge or magistrate to issue a warrant for entry and search, alternatively for an inspector to enter and search even if not authorised by a warrant (ss 46 and 47). There are also provisions listing the Commission's powers of entry and search, as well as its required conduct during such entry and search (ss 48 and 49). The Act further provides for the Commission to summons a person for questioning or to deliver a specified object (s 49A).

Penalties and offences

4.3.10 A contravention of the prohibited practices and merger control provisions of the Competition Act can result in the Competition Tribunal making various orders, including interdicting a prohibited practice, ordering the reasonable supply or distribution of goods or services to end a prohibited practice, imposing an administrative penalty of up to 10% of a firm's annual turnover in South Africa, ordering divestiture, declaring conduct to be a prohibited practice for the purposes of civil actions for damages, declaring the whole or part of an agreement to be void, and ordering reasonable access to an essential facility (ss 58 to 60).

4.3.11 The Competition Act also provides for various criminal offences, including for disclosing confidential information, hindering the administration of the Act, failing to properly attend when summoned, failing to answer fully or truthfully, in various ways undermining any investigation or adjudication, and contravening or failing to comply with an interim or final order of the Competition Tribunal or the Competition Appeal Court. A person convicted of the last offence is liable 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. All other offences carry liability for a fine not exceeding R2 000.00 or imprisonment for a period not exceeding six months, or both a fine and imprisonment (ss 69 to 74).

4.4 Advocacy

4.4.1 The Competition Act also mandates the Competition Commission, and indirectly the Competition Tribunal, to undertake various advocacy activities.

4.4.2 More particularly, the Commission is responsible to (s 21) –

- implement measures to increase market transparency;
- implement measures to develop public awareness of the provisions of the Competition Act;
- 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 the Competition Act (see also s 82);
- participate in the proceedings of any regulatory authority;
- advise, and receive advice from, any regulatory authority;
- review legislation and public regulations over time, and report to the Minister of Trade and Industry concerning any provision that permits uncompetitive behaviour;
- report to the Minister on any matter relating to the application of the Competition Act; and
- enquire into and report to the Minister on any matter concerning the purposes of the Competition Act.

4.4.3 The Competition Tribunal is said to engage in advocacy by conducting itself informally, encouraging participation by interested stakeholders in its procedures and actively engaging with the media regarding its decisions (Lewis, 2004).

5. ISSUES FOR DISCUSSION

5.1 Competition and Development

5.1.1 Competition law and policy uses concepts of microeconomics, particularly industrial economics. The general aim of competition policy is allocative efficiency. This refers to the allocation of scarce resources so that the returns to society are maximised. Competition policy is also partly aimed at productive and dynamic efficiency. Productive efficiency refers to firms producing at near optimum costs, and dynamic efficiency to their rate of innovation. In developing countries, where there is often significant

poverty and inequality, competition policy often aims to balance efficiency with equitable considerations. Competition policy can also be aimed at adaptive efficiency. This refers to the propensity of a society's constraints to respond to political and economic feedback. Those with more productive, stable, fair, broadly accepted and flexible constraints are likely to develop faster than others (North, 2005).

- 5.1.2 Competition law and policy can be designed and implemented using different economic frameworks. In relation to mergers, an early framework was the Structure-Conduct-Performance paradigm. This refers to a direction of causality moving from structure, to conduct, to performance. Structure refers to the number and size of firms in a market. Conduct to the behaviour of firms, whether competitive or anticompetitive, whether they collude with each other or abuse their control of all or part of a market. Performance includes profit levels, efficiency, economies of scale, etc. There is an ongoing debate in the industrial economics literature as to the validity of this paradigm, particularly the issue of causality. Various schools of thought have developed their own theories on causation. The implications of the choice of paradigm are serious. Using the wrong paradigm can lead to incorrect merger decisions, with grave implications for the competitiveness of an economy (Theron, 2001).
- 5.1.3 Some policy makers seem to want to apply the Structure-Conduct-Performance paradigm to prohibited practices, purportedly to further the growth and development objectives of the Competition Act. Seemingly unable to prove anticompetitive conduct, these policy makers would still like to conclude that certain concentrated markets lead to uncompetitive outcomes. This approach is problematic in a number of respects. First, it is questionable whether a paradigm designed for prospective analysis should even be applied to retrospective assessments. Second, it remains contested whether or not concentrated markets necessarily lead to uncompetitive outcomes, or whether these are the result of efficiency or scale. Third, and arguably most worrisome, is that this analysis provides a convenient cover for a radical agenda of State intervention beyond merely addressing market failures or trade-offs between efficiency and equity. Indeed, some might even suspect this is a cynical ploy to use market regulation to undermine the very existence of markets.
- 5.1.4 Although the inclusion of public interest considerations in competition law and policy might be questioned, their inclusion in the Competition Act is generally accepted. Clearly, there are challenges in the identification, scope, sequence and weight of these considerations. Furthermore, their inclusion requires that the competition authorities be sufficiently independent, transparent and accountable so that their decisions are ultimately credible. These substantive, procedural and institutional considerations aside, the inclusion of public interest considerations alongside traditional competition factors does not necessarily lead to uncertainty and unpredictability in markets. This would be the case if the Competition Act is amended to allow the competition authorities to restructure concentrated markets on whimsical assumptions. Using competition law and policy for growth and development purposes requires a more sophisticated approach.

5.2 Capacity Building

- 5.2.1 It is generally agreed that South Africa's macroeconomic policies have created a foundation for its further growth and development. It is now necessary to focus on microeconomic issues, including long-term institutional capabilities. The public sector has witnessed the loss of many professionals, in part due to the lure of higher salaries in the private sector. This has resulted in capacity deficits in the shrinking public sector. In addition, it is said that "the operational environment of the public sector lacks efficiency, coordination and systemic dynamism" (Abedian, 2007).
- 5.2.2 In both respects, this is no less so in respect of the competition authorities. The Competition Commission, in particular, has experienced significant staff losses. A number of senior positions have been vacated, many now remaining vacant or occupied by relatively inexperienced individuals. Some reports suggest that these losses are not only due to higher salaries in the private sector but more systemic problems within the Commission. This has rendered the Commission ineffective and discredited the Competition Act more than any presumed power deficiencies. There is clearly an urgent need to now build the capacity of the competition authorities, particularly the Commission.
- 5.2.3 Capacity building is not a novel concept, although the term has been appropriated by many multilateral institutions and non-governmental organisations as part of their development programs. Capacity building is more than developing the skills of individuals. It also recognises the importance of building institutions. These individuals and institutions operate within particular societies, markets and polities, imbedded in which are distinct opportunities and challenges. Capacity building thus requires an interdisciplinary approach and recognises the specificity of any one initiative to a locale.
- 5.2.4 Designing a capacity building initiative for competition authorities must appreciate that competition policy interacts with other

economic policies, as well as some social and political policies. Similarly, competition law is informed by constitutional law, administrative law, company law and the laws of evidence and procedure. In addition, regard must be had to design, management, procedures and processes of these authorities. This last subset of considerations is increasingly important as competition authorities necessarily engage with other public authorities.

- 5.2.5 The early years of the Competition Act witnessed significant emphasis on merger control and less on prohibited practices. There was a view that a competition culture was more likely to emerge in an environment of cooperation rather than conflict (Lewis, 2004). In recent years, the Competition Commission appears to have adopted a new approach. Not only has it begun to investigate and prosecute alleged prohibited practices, but it is reportedly more challenging in merger investigations.
- 5.2.6 Unfortunately, this vigour appears to be more the result of incompetence, lack of professionalism and ideological zeal, than giving proper effect to the purpose and objects of the Competition Act. Many firms complain that merger investigations are unnecessarily lengthy due to obviously irrelevant information being sought and convoluted theories proposed by the Competition Commission. This has a chilling effect on the economy, particular where international mergers lead to direct foreign investment.
- 5.2.7 On some occasions it appears that certain competition officials believe themselves immune from the constraints not only of the Competition Act, but also the Constitution and Promotion of Administrative Justice Act. If competition law and policy is to be credible and the Competition Commission effective, this vigour needs to be better directed. This requires improved leadership from the Commissioner, Deputy Commissioners and Divisional Managers.

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5.3 Role of Parliament

- 5.3.1 This apparently cynical disregard for constitutional precepts is also reflected in the manner in which Parliament has been emasculated in the design and implementation of South African competition law and policy. Although DTI and competition officials do appear before Parliamentary Portfolio and Select Committees, this is often perfunctory and with insufficient interrogation by the members. One reason may be that competition law and policy is perceived by many members as complex or esoteric and best left to the experts. This is a worrisome abdication of Parliament's oversight of the DTI and competition authorities. In time, this could undermine the richness of the Competition Act, which has been admired in many jurisdictions for its features.
- 5.3.2 Another reason for Parliament being so undermined might be the Competition Commission and Competition Tribunal's membership of the International Competition Network (ICN). The ICN is a network of competition authorities from developed and developing countries which facilitates substantive and procedural convergence in competition law enforcement. Members produce recommendations or "best practices" through their involvement in working groups. Annual conferences and workshops provide opportunities to discuss working group projects and their implications for enforcement. Where the ICN reaches consensus on recommendations, individual competition authorities decide whether and how to implement these recommendations.
- 5.3.3 The ICN originated out of recommendations made by the International Competition Policy Advisory Committee (ICPAC), a group formed in 1997 by then US Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel Klein. ICPAC was commissioned to address global competition problems in the context of economic globalisation and focused on issues such as multi-jurisdictional merger review, the interface between trade and competition, and the future direction for cooperation between antitrust agencies. In February 2000, ICPAC called on the US to explore the creation of a "Global Competition Initiative" to be directed toward "greater convergence of competition law and analysis, common understanding and common culture". This call was heeded in subsequent forums and on 25 October 2001, top competition officials from 14 jurisdictions, including South Africa, launched the ICN.

Designing a capacity building initiative for competition authorities must appreciate that competition policy interacts with other economic policies, as well as some social and political policies. Similarly, competition law is informed by constitutional law, administrative law, company law and the laws of evidence and procedure.

5.3.4 Besides possibly emasculating Parliament in this move towards international consensus, the Competition Commission and Competition Tribunal's membership of ICN raises complex governance issues. The ICN can be described as a "trans-governmental regulatory network", comprised of national competition officials exchanging information, coordinating national policies, and working together to address common problems. For some, this heralds a new and attractive form of global governance, enhancing the ability of States to work together to address common problems without the centralised bureaucracy of formal international institutions. For others, however, a network such as the ICN represents "a vast technocratic conspiracy, a shadowy world of regulators bent on de-politicising global issues in ways that will inevitably benefit the rich and powerful at the expense of the poor and the weak" (Slaughter, 2003).

5.4 Cartel Investigations

5.4.1 The identification and prosecution of cartels has become one of the highest enforcement priorities of the competition authorities. A cartel involves an agreement or concerted practice between two or more competitors to engage in fixing of prices and/or trading conditions, dividing markets and/or collusive tendering. Cartel behaviour is increasingly being seen by the competition authorities as tantamount to theft or fraud. In an increasing number of countries, cartel behaviour is now a criminal offence and can result in personal liability for directors.

5.4.2 There has not yet been a contested cartel case before the Competition Tribunal. The only case in which cartel participants reached an amicable settlement with the Competition Commission related to fuel surcharge matter where SAA was fined R20 million. However, recent trends show a significant increase in the level of fines imposed by the Tribunal for other contraventions of the Competition Act. In the motor manufacturers case, General Motors was fined R12 million and DaimlerChrysler R8 million. SAA has also again been fined R45 million and more recently Mittal R692 million. The Commission recently announced investigations into suspected cartels in the following industries: milk; bread; milling; scrap metal; infrastructure and construction; and freight forwarding.

5.4.3 The Commission has several options at its disposal in investigating cartels. These include initiating a complaint in relation to suspected conduct, issuing a summons requiring individuals to appear to answer questions or deliver a specified object, entering and searching premises (whether or not in terms of unannounced "dawn raids") or by granting leniency and/or immunity to compliant firms.

Dawn raids

5.4.4 Dawn raids are a frequent occurrence in the EC, but to date have been little used in South Africa. In 2000, the Competition Commission raided the offices of Pretoria Portland Cement but was subsequently rebuked by the Supreme Court of Appeal (SCA) for its conduct. In 2004, the Commission informally "raided" the offices of the Airlines Association of Southern Africa. This year the Commission raided the offices of The New Reclamation Group (Pty) Ltd, as well as several freight forwarding companies. The latter was in coordination with the European Commission and the US Department of Justice.

Corporate Leniency Policy

5.4.5 The Competition Commission's Corporate Leniency Policy (CLP) was introduced in February 2004. It currently only provides guidance and is not binding. The objective of the CLP is to stop, detect and prevent cartels. In other words, it does not apply to rule of reason or vertical per se prohibited conduct. The CLP offers total or conditional immunity to applicants that assist the Commission identify and prosecute cartels. To qualify, applicants must come forward before the Commission initiates an investigation. Only a member that is "first through the door" will qualify for immunity. Conditional immunity is a precursor to total immunity and is granted at the initial stage of investigation. Total immunity is granted after an investigation and only if the applicant has met all the Commission's requirements.

- 5.4.6 These requirements are the following: the applicant must honestly provide the Commission with complete and truthful disclosure of all evidence, information and documents in its possession; the applicant must offer full, expeditious and continuous cooperation with Commission's investigation; the applicant must cease its cartel activity; the applicant must not have been the instigator of the cartel activity, or coerced other firms to be part of the activity; and the applicant must not alert former cartel members that it has applied for leniency. The CLP also requires applicants to make written submissions in order to be considered for immunity. This leads to tension between a firm's need for certainty before disclosing potentially prejudicial evidence, versus the Commission's need for securing sufficient evidence to prosecute other members of the cartel.
- 5.4.7 In May 2007, the ICN's Cartels Working Group published a report in which it made a number of suggestions to better coordinate cartel enforcement between various jurisdictions. These include the following: greater exchange of information between agencies; greater coordination generally between agencies; that more jurisdictions adopt effective leniency programs; convergence between leniency programs to encourage and facilitate multiple leniency applications; requiring applicants to identify other jurisdictions in which they have applied for immunity; and encouraging cooperation from cartel members who do not qualify for leniency by rewarding them in the form of reduced fines.
- 5.4.8 In September 2007, the Competition Commission announced that the CLP would be amended due to concerns with the unfettered discretion of the Commission, as well as the limited number of applications for immunity. The Commission's discussion paper suggests the following: giving statutory recognition to the CLP by incorporating it into the Competition Act; removing those portions in the CLP that permit the Commission an unfettered discretion; permitting oral submissions in support of an application for leniency; permitting the instigator of a cartel to qualify for leniency; implementing the use of "markers"; and creating a dedicated unit in the Commission to deal with leniency applications.
- 5.4.9 The detail of the discussion paper is currently being scrutinised in various forums. A more general questions should, however, not be forgotten. At such an early stage in its existence, is it appropriate for the Competition Commission to be making trade-offs of the kind envisioned by the CLP? It is arguable that the Commission can better grow and mature, and learn to appreciate its function and constraints, through the "pain" of investigating and prosecuting cases in the ordinary course. While such a pragmatic response to alleged prohibited conduct promises plaudits in the short term, it does little to develop the skills of the competition officials and more generally build the capacity of the competition authorities.

Characterisation

- 5.4.10 The increased vigour of the Competition Commission towards cartels may have been undermined by the decision of the SCA in the case of American Natural Soda Ash Corporation and another v Competition Commission of South Africa and others. This case concerned a US corporation constituted by various soda ash producers which had joined together to export soda ash. Botash contended that Ansac was a cartel that fixed prices. Both the Competition Tribunal and the Competition Appeal Court found that the Ansac agreement contravened the per se prohibition against price fixing and that no evidence was admissible regarding the nature of the agreement.
- 5.4.11 On appeal however, the SCA stated that "not every arrangement between competitors entailing the ultimate supply of goods necessarily falls into that category". The SCA went on to say that "to the extent that [the Tribunal's] ruling precludes evidence to "characterise" the conduct in issue in order to determine whether or not the [price fixing] prohibition covers that conduct at all, its ruling was premature and thus incorrect and liable to be set aside."
- 5.4.12 The SCA's reasoning arguably conflated the distinction between rule of reason and per se prohibitions and improperly transposed the characterisation test from US jurisprudence where the per se standard is the product of the judiciary and not the legislature. This decision is likely to result in even more uncertainty and unpredictability for firms as to whether certain agreements or arrangements between competitors are prohibited under the Competition Act.

5.5 Market Inquiries

- 5.5.1 Some policy makers argue that competition law and policy has failed, in part, by focusing on anticompetitive conduct and not on uncompetitive outcomes of particular markets. In essence, these officials seem to want to use the extensive search and summons provisions of the Competition Act, as well as its various penalty provisions, to achieve other policy objectives.
- 5.5.2 Supposedly following "best practice" in more developed jurisdictions, these market inquiries would occupy the middle ground between investigations and prosecutions on the one hand, and general advocacy activities on the other. Market inquiries in some

jurisdictions require one or other jurisdictional fact, such as showing an adverse effect on competition, before an inquiry can be initiated. Given the relative immaturity of the competition authorities, it is questionable how such vague concepts will be interpreted and the powers of the Competition Act invoked. There is a risk that these powers will be abused for political purposes, alternatively that the authorities will be captured by market participants with vested interests.

- 5.5.3 Also, a number of constitutional and institutional questions arise. For example, can these types of powers even be used to effectively investigate and prosecute firms when otherwise not contravening the Competition Act? What information will be provided to affected firms, and what opportunities will these firms have to be represented and heard? What will be the effect of any decision following an inquiry? Which authority will conduct an inquiry and which will have oversight? What are the likely reputational consequences for affected firms and what are their rights of recourse when injured?
- 5.5.4 It should be remembered that in terms of the advocacy provisions of the Competition Act, the Competition Commission is already empowered to undertake market inquiries and make recommendations to the Minister of Trade and Industry. The fact that it has apparently not yet done so speaks more of its own institutional needs than any power deficiencies.

5.6 Penalties and Offences

- 5.6.1 It is also argued that existing penalties under the Competition Act do not serve as an adequate deterrent and must be increased. Given the nature and extent of the relevant provisions of the Act, this begs the question whether lack of deterrence is due to the level and form of the penalties, or rather the processes and procedures of the competition authorities. Indeed, it is arguable that any such deterrence is undermined by perceptions that the Competition Commission is incompetent, unprofessional or overzealous in its investigations, or that the Competition Tribunal is held easy hostage to the litigation ploys of respondents and intervening parties.
- 5.6.2 There are suggestions that the Competition Act will be amended to allow penalties to be imposed on directors and others involved in prohibited conduct. Although there is doubt as to whether this will entail criminal sanction or strict civil liability and/or disqualification as a director, a number of questions arise regarding the constitutionality of such an approach, the identity of the relevant prosecuting authority and the forum in which these prosecutions will be held. Furthermore, it is unclear the extent to which these sanctions will be aligned with the provisions of current and draft corporate legislation and governance codes. Although reference has been made to developments in other jurisdictions, these should not be transported to South Africa without proper regard for their legal, institutional and practical propriety.

5.7 Rules

- 5.7.1 The emphasis on strengthening the powers of the competition authorities in relation to cartel investigations, market inquiries, and penalties and offences, neglects a number of arguably obvious failings in South African competition law and policy. One of these is the rules of the competition authorities. The success of any institution, particular those with investigative, prosecuting and adjudicative functions, depends on its processes and procedures.
- 5.7.2 Questions have been asked as to whether the current rules enhance or impede the authorities in the exercise of their respective mandates. For example, although the Competition Act allows the Competition Tribunal to conduct its hearings informally or in an inquisitorial manner (s 52), hearings are more formalistic and adversarial than was ever contemplated by the legislature. Although rules of natural justice must obviously prevail, the Competition Tribunal does not appear to have successfully grappled with the challenge of given effect to this constitutional precept, while also performing in terms of the approach suggested by the legislature.
- 5.7.3 One reason for this might be that the Competition Tribunal uses the jurisprudence of the High Court Rules when deciding procedural issues. Another might be that the Competition Tribunal Rules provide that, if in the course of proceedings a question arises as to the practice or procedure to be followed in cases not provided for by the Rules, a Tribunal member may have regard to the High Court Rules (Rule 55).
- 5.7.4 The rules of the competition authorities can be amended relatively easily. The Competition Act provides that the Minister of Trade and Industry, in consultation with the Competition Commissioner, and by notice in the Government Gazette, may prescribe regulations for matters relating to the functions of the Commission, including procedures (s 21). Similarly, the Minister, in consultation with the Chairperson of the Competition Tribunal, may prescribe such regulations for the Tribunal (s 27).

5.8 Guidelines

- 5.8.1 A further obvious failing has been the seemingly obstinate refusal by the Competition Commission to publish any truly useful guidelines. The few so-called “Practice Notes” that have been issued are of little general application. The Competition Act provides that the Commission may prepare guidelines to indicate the Commission’s policy approach to any matter within its jurisdiction in terms of the Act. Any such guidelines must be published in the Government Gazette and are 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 the Act (s 79).
- 5.8.2 The attitude of the Competition Commission has been that competition authorities in the US and the EC operated for several decades without guidelines and that there is no reason for the Commission to be rushed into articulating its policy approach. The Commission has missed a unique opportunity to develop the competition culture of South Africa with this defensive position. The process of preparing and publishing guidelines can itself play an important role in educating market participants about the benefits of competition law and policy. It might also lead to more certain and predictable market outcomes. Far more good might come of this adopting a more refined approach to rule making and guidance than bluntly strengthening the powers of the competition authorities.

5.9 Advocacy

- 5.9.1 Another failing in South African competition law and policy has been the Competition Commission’s inability to design and implement a coherent and effective advocacy program. Competition advocacy is defined as “those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition” (ICN. 2002). A number of issues arise from this definition.
- 5.9.2 First, although advocacy is distinguished from enforcement, this does not mean that each involves independent activities. Rather, the two are interrelated. Appropriate enforcement of competition law and the publication of enforcement decisions contribute to the credibility of advocacy activities. Similarly, advocacy encourages competition law enforcement. Greater awareness of competition increases the number of complaints against anticompetitive conduct. Firms are also more likely to voluntarily comply with competition law and cooperate with competition authorities during their investigations. In addition, policy makers are more likely to provide competition authorities with adequate resources.
- 5.9.3 Second, the relationship between competition authorities and other public authorities is important. Competition might not only be harmed by private conduct, but often too by the conduct of public authorities. In addition to prosecuting private anticompetitive conduct, competition authorities should thus also question public restraints on competition. This includes calling for the removal of unnecessary anticompetitive regulations, or at least the acceptance or retention of those least harmful to competition. These advocacy activities could take place in relation to policy, legislation, adjudication, privatisation, regulatory reform and sector regulation.
- 5.9.4 Third, the relationship between competition authorities and the broader public is also important. Advocacy activities should also be aimed at improving the “competition culture”, which is understood to mean the “awareness of economic agents and the public at large about competition rules” (ICN. 2002). It also refers to the acceptance of competition law and policy, as well as an understanding of the benefits of competition. Competition authorities can increase the levels of awareness, acceptance and understanding through official media, mass media, specialist media, academic and public studies, conferences, workshops and presentations.
- 5.9.5 The 2003 OECD Report on Competition Law and Policy in South Africa noted that the Competition Commission paid less attention to advocacy than it did to enforcement. The Report found that the Commission’s legislative review process and related coordination with DTI was ineffective. Furthermore, the fact that much of the Commission’s research supported competition law enforcement possibly undermined the effectiveness of its advocacy activities. The Report also noted that while the consumer constituency was weak, private interests were well represented. This highlighted the need for a more effective competition advocacy by the Commission.
- 5.9.6 However, the concept of competition advocacy must be interrogated. For example, a quantitative evaluation metric still needs to be devised to support the positive qualitative assessments of competition advocacy. It is also not clear whether only competition authorities should undertake competition advocacy, and if not how this function should be managed between

various authorities (Evenett, 2006). Furthermore, generalised discussions of competition advocacy do not offer ready solutions to overcome institutional constraints, including the design and implementation of specific advocacy programs. Two issues requiring the Competition Commission's urgent attention are industrial policy and regional integration.

5.10 Industrial Policy

- 5.10.1 The definition, purpose and form of industrial policy is highly contested. In general, it refers to various governments measures to influence the outcome of markets. These measures are broadly distinguished between external market interventions, product market interventions and factor market interventions. Some of these measures could affect competition between firms and shift resources away from their optimum allocation. This can lead to tensions between competition authorities and those officials implementing an industrial policy. It can also result in complex relations between the two, particularly when competition authorities are required to pursue productive and dynamic efficiencies, as well as various public interest considerations (Evenett, 2007).
- 5.10.2 This is no less so in South Africa, where competition policy is seen to be an important component of industrial policy. The DTI recently published its long awaited National Industrial Policy Framework, as well as the related Industrial Policy Action Plan. The Framework is said to play an important role in achieving Government's goals of accelerating gross domestic product growth to over six percent by 2010, and halving unemployment and poverty by 2014. The Framework does not purport to be a blueprint for South Africa's industrialisation process, instead focusing on the principles and processes that will inform government's interventions.
- 5.10.3 The Framework sets out 13 Strategic Programs, three of which are relevant for this discussion. Trade policy (SP 3) and competition policy (SP 5) are identified as import components of industrial policy. Given the relationship between these and other policies, the Framework also recognises the importance of coordination, organisation and capacity for the implementation of industrial policy (SP 13). This supports the central argument in this paper that more attention needs to be paid to building the capacity of the competition authorities than simply strengthening their powers.
- 5.10.4 Unfortunately, the Framework loses credibility in repeating the mantra of many policy makers that there is anticompetitive conduct in a number of concentrated markets. Notwithstanding the introduction of the Competition Act, the post-apartheid economy is said to have witnessed the horizontal unbundling of various conglomerates and their "vertical re-bundling" in a number of sectors. This supposedly maintained the high levels of concentration in the economy and resulted in anticompetitive conduct. The Framework asserts there is a need to strengthen competition policy in order to address some of the unique features of the South African economy. One notable feature is South Africa's relative geographic isolation and the practice of import parity pricing. The Framework states that this practice increases input costs and constrains downstream beneficiation.
- 5.10.5 This approach is called into question by Dani Rodrik of Harvard University. Prof Rodrik suggests that the disappointing growth and employment trajectory of the South African economy since its democratic transition requires, inter alia, micro-economic policies that encourage private investment and entrepreneurship in new areas where South Africa can develop comparative advantage. This requires greater discipline in targeting policy interventions on plausible, identified sources of market failures instead of on vague and economically meaningless objectives (such as greater domestic beneficiation or higher value added). In support of the central thesis of this paper, Prof Rodrik points out that a better institutional structure is needed to ensure political leadership and coordination at the top and strategic collaboration at the bottom with business and other stakeholders.
- 5.10.6 The competition authorities can deal with industrial policy in different ways. First, they can argue in their public pronouncements that there is no inherent tension between competition law and industrial policy measures promoting national champions. Second, the competition authorities can argue that industrial policy measures should directly target a stated objective or market failure, and that the preferred measure is the one which creates the smallest distortion to resource allocation. Third, they can document and publicise their contributions to the industrial policy objectives. Fourth, and more controversially, industrial policy objectives can influence the choice of competition law enforcement cases. Fifth, the competition authorities can use various metrics to assess the conduct of firms (Evenett, 2007). The first three options highlight the increasingly important role for competition advocacy and the need to build the capacity of the Competition Commission, in particular, to undertake this.

5.11 Regional Integration

- 5.11.1 Despite political and economic forces driving the integration of markets in southern Africa, the Competition Commission has failed to appreciate that this should be central to its advocacy activities. Under the heading "Common Policies", the 2002 SACU

Agreement provides in Article 40 that the Member States agree that there shall be competition policies in each Member State. In addition, the Member States agree to cooperate with each other with respect to the enforcement of competition laws and regulations. Accordingly, the textual simplicity of Article 40 (competition policy) is inversely proportional to difficult questions regarding its meaning, relationship to other provisions in the SACU Agreement, as well as its relationship to policies in each Member State.

- 5.11.2 For example, what is the relationship between Article 2 (objectives) and Article 40? Is the obligation to have competition policies in each Member State informed by the objective of facilitating cross-border movement of goods (Mathis. 2005)? Conversely, is the requirement that Member States cooperate with each other in the enforcement of their respective competition laws limited to this objective? In short, was it intended that Article 40 only deal with competition issues arising from inter-state trade or also competition issues within each Member State?
- 5.11.3 Furthermore, is the obligation to have competition policies (and arguably competition laws) in each Member State informed by the objective of enhancing the economic development of the Member States? More particularly, due to their differences does this allow Member States to use different exceptions, exemptions and public interest criterion in their respective competition laws? If so, how will this affect cooperation on competition law enforcement and indeed the development of a common industrial policy under Article 38 of the SACU Agreement?
- 5.11.4 Regarding the relationship between Article 40 and Article 41 dealing with unfair trade practices between Member States, does the term “unfair trade practices” mean something more than conduct harmful to consumers? In particular, was it intended to also prevent Member States abusing any accepted variations in their respective competition policies? Alternatively, did the Member States intend to introduce measures against conduct that is not anti-competitive but which otherwise frustrate the objectives of the 2002 SACU Agreement (Mathis. 2005)?
- 5.11.5 These questions demonstrate that competition policy in the 2002 SACU Agreement is far from being clearly understood. This makes it difficult to coordinate competition policy with the other common policies referred to in the SACU Agreement, particularly industrial policy. The situation is further complicated by policy developments within the Member States. For example, South Africa now places greater emphasis on industrial policy in its growth and development strategies, with competition and trade policy playing a supportive role. The core aims of the National Industrial Policy Framework are to diversify the economy beyond its traditional dependence on commodity exports, move towards a more knowledge-based economy, and promote more labour absorbing and inclusive growth.
- 5.11.6 From a SACU perspective, the challenge is to ensure that South Africa’s industrial policy supports the industrial policies of Botswana, Lesotho, Namibia and Swaziland (BLNS) and thereby the SACU common industrial policy. This means that South Africa’s competition policy must not only complement its own industrial policy but also these other industrial policies. Coordinating regional and national policies towards the objectives of the 2002 SACU Agreement will require considerable technical proficiency, particularly since there is the risk of compounding rather than removing regional distortions. A pragmatic approach is to identify the most appropriate institutions to unravel these complexities, even if the requisite proficiency still needs to be acquired. This implies coordinating regional and national policies through existing institutions rather than setting up new ones (McCarthy. 2005a).
- 5.11.7 One institution that could play a role in respect of the many complexities of competition policy in SACU is the Competition Commission. A properly designed and implemented advocacy program offers a way to coordinate regional and national policies towards the objectives of the 2002 SACU Agreement. However, in order to address competition policy in SACU, the Commission must identify institutions with whom it could engage. These might include the SACU institutions, the Minister of Trade and Industry and the International Trade Administration Commission (ITAC), and BLNS National Bodies.
- 5.11.8 However, the Competition Commission does face several obstacles. For example, it appears to have limited access to the SACU institutions and must apparently do so through the Minister of Trade and Industry and ITAC. In seeking to influence the policy mandates of the Council, as well as its decisions on customs tariffs, rebates, refunds or drawbacks and trade related remedies, the Minister of Trade and Industry would presumably need to speak for the Commission in Council proceedings (Article 8). Similarly, it seems that ITAC would have to represent the Commission before the Tariff Board and Secretariat (Article 14). The National Bodies of BLNS remain to be established and once so it is unclear whether and how the Commission will be able to engage directly with these institutions.

- 5.11.9 The Competition Commission also has no real counterparts in BLNS with whom it could engage. In Namibia, the Competition Act was enacted in 2003 but the Competition Commission is not yet operational. In Swaziland, the Competition Bill was passed by Parliament in 2006 but has not been presented to the King for Royal Assent. The legislative process is even less advanced in Botswana where an UNCTAD layman's draft competition law was only submitted to the Government in June 2006. In Lesotho, UNCTAD helped prepare a Competition Policy Statement which was issued in April 2006 and has now been only partially endorsed by the Government. (Pryor, 2007).
- 5.11.10 However, these obstacles also offer advocacy opportunities for the Competition Commission. It could support the enactment of competition laws and the establishment of competition authorities in BLNS which do not undermine Article 40 of the 2002 SACU Agreement. In time, the Commission could comment on the draft competition laws of BLNS, make recommendations on institutional design and staffing, and promote complementary methods of enforcement and advocacy. The Commission could also assist SACU and the Member States monitor compliance with provisions in international trade agreements relevant to national competition laws and policies. This could further contribute to an emerging consensus on a regional competition policy.
- 5.11.11 The Competition Commission might also direct its advocacy activities at the common external tariff. For example, it could try influence the outcome of the SACU Council of Ministers when the latter approves customs tariffs, rebates, refunds or drawbacks (Article 8). These measures can be adjusted in two ways, both originating with the National Bodies. First, after receiving requests for tariff changes, the National Bodies must carry out preliminary investigations and recommend any necessary changes to the Tariff Board (Article 14). Based on the directives given to it by the Council, the Tariff Board must then recommend to the Council the level and changes to tariff (Article 11). Second, the National Bodies may of their own accord study, investigate and determine the impact of tariffs in their jurisdiction, periodically propose changes deemed necessary, and make recommendations to the Commission through the Secretariat (Article 14).
- 5.11.12 The Competition Commission could also try influence trade remedy proceedings. In 2006, ITAC published draft Amended Antidumping Regulations. Section 20 proposes that the Minister of Trade and Industry, upon the advice of ITAC that an investigation raises public interest considerations, to direct ITAC to determine whether there are reasonable grounds to conclude an antidumping duty would not be in the public interest. ITAC's determination of the public interest must be based on any relevant factor. The draft regulations specifically refer to whether the antidumping duty has or will substantially lessen or prevent competition in South Africa. This is a similar test to the one set out in the Competition Act but does beg the question whether the Commission and not ITAC could better evaluate the issue.
- 5.11.13 The Competition Commission could furthermore support SACU's international trade negotiations. These increasingly cover not only tariff matters but also trade-related issues such as customs procedures, safety standards, technical and other domestic regulations, as well as more contentious topics such as investment, competition, government procurement, labour, the environment and human rights. Member States must establish a common negotiating mechanism to undertake negotiations with third parties (Article 31). This mechanism must accord with terms of reference decided by the SACU Council of Ministers, which in turn must accord with the Council's general tariff and overall policy decisions (Article 8). However, all these suggestions require that the current capacity needs of the Commission are addressed. This is a far more important issue that granting it more powers.

6. CONCLUSION

- 6.1 This briefing paper is intended to stimulate debate around the review of South African competition law and policy. Before identifying several issues for further discussion, it described the scope and application of the present Competition Act, as well as its institutions and conceptual design. From this discussion it is clear that the Act provides extensively for the enforcement functions of the competition authorities, while the provisions dealing with competition advocacy are few. This does not detract from the importance of the latter's role in the design of the Act.
- 6.2 The paper also identified some of the suggested amendments to the Competition Act. These are that the Act will be strengthened so as to allow the competition authorities better investigate and prosecute anticompetitive conduct, particularly cartels. Furthermore, the Act will likely permit broad market inquiries where there are uncompetitive outcomes short of specific anticompetitive conduct. It also appears that the Act will be amended so as to increase the penalties for firms found to have contravened the Act, as well as impose penalties on directors and individuals involved in prohibited conduct.

- 6.3 The paper questions the general assumption that the perceived problems with South African competition law and policy are the result of the competition authorities having insufficient power. Instead, it suggests that their existing powers have been improperly or inadequately used. There has also been insufficient attention paid to building the capacity of the authorities. This undermines the growth and development objectives of the Act, as well as South Africa's nascent constitutional democracy.
- 6.4 In identifying other neglected failings of South African competition law and policy, the paper makes a number of suggestions for improvement. Building the capacity of the competition authorities does not only require more resources, but improved design, management, procedures and processes. It also requires a review of the rules of the authorities, as well as extensive consultation around guidelines.
- 6.5 The Commission, in particular, needs to formulate a coherent and effective advocacy program which recognises the supporting role of competition policy for industrial policy, yet also the risks of industrial policy for competition policy. Furthermore, this program must appreciate the relationship between competition policy and trade policy, particularly the relevance of regional integration. Industrial policy and trade policy could now become the reference for useful advocacy activities.
- 6.6 In short, the review of competition law and policy in South Africa must address institutional failings than power issues. This necessarily entails performing a regulatory impact assessment in which likely costs and benefits are scoped. Not following this suggested approach will render the review woefully defective, contribute to the ineffectiveness of the competition authorities, particularly the Competition Commission, and undermine the credibility of the Competition Act.

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