SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

Voorheen bekend as AfriSake

**TO: THE PORTFOLIO COMMITTEE ON ECONOMIC DEVELOPMENT**

**ATTENTION: Mr Peter-Paul Mbele**

**Secretary of the Committee on Economic Development**

**DELIVERED: VIA EMAIL**

**pmbele@parliament.gov.za**

**DATE: 2018-08-17**

---

**Comment on the Competition Amendment Bill, 2018, published for public comment by the Portfolio Committee on Economic Development**

---

# Table of Contents


INTRODUCTION ........ 3

I. Commissioning of an independent research report ........ 3

SECTION 1: THE NATURE OF COMPETITION ........ 4

1.1 Competition as a market process ........ 4

1.2 The Nature of Competition Policy ........ 5

1.3 Racial transformation ........ 7

SECTION 2: UNINTENDED CONSEQUENCES ........ 8

2.1 The truism of unintended consequences ........ 8

SECTION 3: CONSTITUTIONAL CONCERNS ........ 9

3.1 The Constitution must be read as a whole ........ 9

3.2 The right to equality and the limitation of rights ........ 11

(a) Law of general application ........ 11

(b) Reasonable and justifiable ........ 12

(c) Open and democratic society ........ 12

(d) Human dignity ........ 14



t. 012 880 1951 | diens@sakeliga.co.za

58 Union Ave / Unielaan 58, Kloofsig, Centurion, SA | Posbus 17216, Lyttleton, 0140



Direkteure: A. Brink, D.J. de Villiers, B. du Plessis, P.J. le Roux, Dr. C.P. Lerm, D.J. Pretorius, M.B. Pretorius, N.H. Vlok, P.A. Naude

(e) Equality ..... 14
(f) Freedom ..... 15
(g) Nature of the right ..... 16
(i) Nature and extent of the limitation ..... 17
(j) Relation between the limitation and its purpose ..... 17
(k) Less restrictive means to achieve the purpose ..... 17
3.3 The cumulative 'right to enterprise' in terms of the Constitution ..... 17
SECTION 4: COMPETITION AMENDMENT BILL, 2018 ..... 19
4.1 How the Bill ignores the nature of competition ..... 19
4.2 Application of section 36 of the Constitution ..... 21
(a) Law of general application ..... 21
(b) Reasonable and justifiable ..... 21
(c) Open and democratic society ..... 21
(d) Human dignity ..... 22
(e) Equality ..... 22
(f) Freedom ..... 22
(g) Nature of the right ..... 22
(h) Importance and purpose of the limitation ..... 22
(i) Nature and extent of the limitation ..... 23
(j) Relation between the limitation and its purpose ..... **Error! Bookmark not defined.**
(k) Less restrictive means to achieve the purpose ..... 23
4.3 The Bill is rife with ambiguity and its delegation of power goes too far ..... 23
4.4 Intervention in merger proceedings involving foreign acquiring firms ..... 23
CONCLUSION ..... 24
REQUEST TO MAKE ORAL SUBMISSIONS TO THE PORTFOLIO COMMITTEE ..... 24



Direkteure: A. Brink, D.J. de Villiers, B. du Plessis, P.J. le Roux, Dr. C.P. Lerm, D.J. Pretorius, M.B. Pretorius, N.H. Vlok, P.A. Naude

**INTRODUCTION**

The Portfolio Committee on Economic Development published the Competition Amendment Bill, 2018 (the 2018 bill hereafter) for public comment. Sakeliga (formerly known as AfriBusiness) had previously submitted extensive comment on the Competition Amendment Bill, 2017, on 31 January 2018.

The following submission is adapted from our previous submission to the Department of Economic Development. Most of our previous criticisms remain and new concerns are raised. Our present submission reconfirms our broad concerns.

Firstly, the 2018 bill and its 2017 predecessor do not take cognizance of the nature of competition and underlying economic principles and workings of dynamic markets in the real world.

Secondly, the bill will produce unintended consequences destined to be invariably detrimental to individuals as consumers but also as producers.

Thirdly, we seriously question the treatment of important constitutional considerations evident in the bill.

Fourthly, along with other objections, we object to the implicit inclusion of racial transformation into competition policy. We argue that other means less restrictive to commerce, must rather be followed for this purpose.

## I. Commissioning of an independent research report

Furthermore, Sakeliga remains critical of the economic impact of competition policy in South Africa. We are of the opinion that the impact of competition policy has not been completely, fairly and independently assessed.

We deem a rigorous independent investigation by national and international economic subject matter experts independent of government and the competition commission and competition tribunal to be necessary.

We are presently in the process of raising funds in order to commission a large-scale economic research project to independently evaluate the impact of the largest interventions of the competition commission and tribunal on South Africa's commercial environment.

Where appropriate we will be using the information gathered in this report in support of our members whom we deem to be unfairly and adversely affected by competition policy. We will also to draw attention to this important matter in the public arena.

## SECTION 1: THE NATURE OF COMPETITION

### 1.1 Competition as a market process

Our views on the nature of competition is outlined in Section 4 of our previous commentary on the 2017 bill.

Briefly we outline again a summary of our main statement on the nature of competition. We maintain that competition develops as a natural outflow of the ever-fluid process of entrepreneurship in real-life markets. Apart from ensuring the contestability of markets, through the removal of legal obstacles, legal privileges, and monopolies in the public sector – all of which we regard as mostly of government's own making – competition requires little promotion through government policy.

We say this on the basis of the fact of entrepreneurs continually striving to provide consumers with goods and services they prefer. This is the basis of entrepreneurial success in contestable free markets. Even in relatively free markets the only way to attain and maintain any significant (and often precarious) market position is by serving consumers very well. In that sense a large market share is a reward for producing goods and services many people want to consume. Moreover, we deem it necessary to again emphasize the words of Sylvestor Petro referenced in our previous submission.

> "A free competitive market is not a condition which requires for its existence large numbers of producers. It only requires freedom on the part of all people to produce if and when they wish. If the unlikely situation should exist that in a certain line of production a single firm could most economically satisfy the whole market, then, of course, you would have a condition which might be called monopoly. But this is not the aspect of monopoly that people fear. **What really disturbs people about monopoly is not that a single person or firm has control over a commodity but that force, compulsion, or special privilege has been used to keep other people out**".[1]

Profits signal to entrepreneurs where resources are most urgently desired by consumers. This implies a **market process** of economic adjustment and entrepreneurship. Notions and evaluations of "static equilibrium conditions" is not very helpful when we regard the market as continually adjusting to changing conditions, technologies and consumer preferences.

However, in interventionist economies, legal barriers to entry are often established and do support conditions for harmful monopolies to arise. We consider these legal privileges as

[1] Petro, S. "Do Antitrust Laws Preserve Competition?". (1958). 5 *The Freeman.* 410. Our emphasis.

problematic and part and parcel in sustaining harmful regulatory monopolies in important sectors. It is these factors that, in our view, require the attention of competition authorities.

For this reason we emphasize again David Solomon's statement, quoted in our previous submission, which argues that:

> *"[G]overnment's competition policy should be to remove the artificial props presently supporting these giant state monopolies and to subject them to competition from international colossi. [By] merely avoiding the erection of artificial barriers to entry, the government can facilitate an environment in which new and surprising changes in market structure can take place. No bill, [A]ct or tribunal is needed to accomplish this."*

We, therefore, support the repeal of laws and regulations which grant economic privileges to special interest groups and industries with regulatory government monopolies to subject these industries to market competitors.

### 1.2 The Nature of Competition Policy

It should be noted from the onset that even among economists competition policy has always been contentious. Policy prescription on competition policy also differ widely among many pundits in the field. However, even mainstream "neo-classical" economists have raised important criticisms on many of the accepted notions of the competition policy and its enforcement.

We briefly highlight some of these critiques to illustrate:

- Non-regulatory 'monopolies' may actually be beneficial for innovation and progress. Businesses making monopoly profits are able to invest those profits into new technologies and product development, which in the end may benefit consumers.
- In the absence of regulatory privileges a big market share is a reward for serving consumers' preferences. This is important, especially when we consider that, as we have argued in our previous submission, *"it is better to think of competition not as rival firms selling similar goods or services, but rather as individual firms competing with every possible other use of the consumer's money, which includes saving.[2]"*
- Even just the potential for competition may play a role in driving businesses to keep prices down. In markets with few regulatory monopolies enterprises must

[2] AfriSake. COMMENT ON THE COMPETITION AMENDMENT BILL, 2017 AS PUBLISHED IN THE GOVERNMENT GAZETTE 41294, NOTICE NO. 1345 ON 1 DECEMBER 2017

remain ever vigilant of new competitors and new technologies, which may upset a market at any time.

- Lastly, we emphasize that competition authorities do not have complete knowledge about all the dynamic, interrelated and multifaceted conditions of markets. For this reason, even well-intended interventions may go awry and cause failures of intervention, which harm consumers and producers (government failure as apposed to market failure).

From a strict natural rights perspective, however, each individual should have as much freedom as possible in the peaceful ownership, use and disposal of their property, including property owned in businesses. Dominique Armentano cogently illustrates a natural rights perspective of property as follows:

> "This [natural rights] perspective would hold that it is right to own and use property; it is right to employ that property in any manner that does not infringe on anyone else's property rights; it is right to trade any or all of that property to anyone else on any terms mutually acceptable; and that it is right to keep and enjoy the fruits of that effort."[3]

At this juncture one has to be explicit about what competition policy assumes. Either by regulating prices, breaking up supposed monopolies, penalizing or restricting mergers or other commercial agreements, among others, governments assume the right to apply regulatory force to direct the utilization of private property and the market allocation of economic resources.

While regulators and governments assume – correctly or incorrectly – that governments do have the right to regulate private property through competition policy, we assume the exercise of this power cannot be arbitrary or absolute. For instance, while many consumers may appreciated an increase in the supply of services such as live music, which *ceteris paribus* should drive down the price and increase the quantities of these services provided, it would be gravely wrong, however, for bureaucrats to force musicians to increase their supply music services against their will through coercive state action. One must be careful not to allow competition policy to become vehicles of such wrongful coercion.

It is reasonable and perhaps even constitutional to suggest that any policy that interferes with the free and peaceful conduct of individuals on markets either as consumers ***or as producers*** must be thoroughly, reasonably and morally justified. Equality under our

[3] Armentano, Dominick T. Antitrust and Monopoly: Anatomy of a Policy Failure (Independent Studies in Political Economy) (p. 8). Independent Institute. Kindle Edition.

constitution, we suppose, should mean that both consumers **and producers** deserve equal treatment under the law.

A misapplication of competition policy clearly runs the risk of infringing on what some economists term the "self-sovereignty of individuals"; that is the right of individuals to exercise reasonable control over his or her person, actions and property. We deem it important to emphasize the self-sovereignty of both consumers **and producers** as a prerequisite for the formulation of reasonable rules for economic conduct.

Where such policies are develop, we contend, the onus should be on regulators to ensure that the rights of individuals both as consumers and as producers are protected and and not harmed in competition policy. In this context, we deem it necessary to emphasize the constitutional cumulative right to enterprise (cf. Section 3.1).

Referring back to the words of prof. Duncan Reekie, mentioned in our first submission, we again point to what we consider as a reasonable basis for competition policy. Reekie notes that:

> "[C]ompetition policy should be aimed at 'making markets work'. This is done by 'deregulating product and labour markets' and by 'removing government-imposed special favours resulting in entry barriers to industries and occupations'. This policy should, furthermore, commit South Africa to international free trade and privatise monopolistic State-owned enterprises by 'restoring the rights of ownership to the citizens of the country."[4]

### 1.3 Racial transformation

It is our contention that the 2018 bill continues and expands the folly of seeking the use of competition policy for the purposes of racial transformation. In the preamble of the bill it is suggested that the bill proposes to *"to protect and stimulate the growth of small and medium businesses and firms owned and controlled by historically disadvantaged persons"*.

In our estimation, competition policy is the wrong regulatory instrument to use for this purpose for at least three reasons. Firstly, in our estimation government has many other means less harmful to commerce than burdening producers with the potential for costly and likely dubious litigation for anti-competitive behaviour. We emphasize this point by again referring to our previous submission:

---

[4] Reekie, DW. *Monopoly and Competition Policy*. (2000, 2nd ed). Johannesburg: Free Market Foundation. 20.

> "Government can **subsidise** firms owned by historically disadvantaged persons without violating the rights of other firms. Ideally, government can **liberalise** the economy thoroughly by getting rid of red tape and State monopolies, thereby making entry for all firms, especially small firms inevitably owned by historically disadvantaged persons, easier. Finally, government **can continue encouraging** firms to transform, without threatening or actually using the violence force of law to compel it."[5] (Emphasis added in bold.)

Secondly, we are of opinion that the racialized nature of the bill will mean that competition policy with the inclusion of implied racial considerations for anti-competitive behaviour will become increasingly arbitrary and unfair. Businesses may transgress provisions of the 2018 bill with no reasonable way of knowing it (cf. Section 4.1).

Thirdly, we think the bill is going to force businesses in important sectors to increasingly make decisions on the grounds of less efficient non-market considerations. This may mean less efficient production of goods and services and harm to consumer welfare through a less efficient output of goods and services.

## SECTION 2: UNINTENDED CONSEQUENCES

*[The following section is reproduced as is from our previous submission.]*

### 2.1 The truism of unintended consequences

The law of unintended consequences is an economic truism which dictates that every political interference in the market will, despite its intention, yield detrimental consequences that were likely unforeseen by the interventionists. These detrimental consequences will usually not be limited only to the targeted persons – private monopolies or big businesses in the case of competition policy – but will accrue to consumers.

Claude-Frederic Bastiat articulated the law of unintended consequences, writing that an intervention in the economy does not only give rise to one consequence, but to a series of consequences. "Of these effects, the first only is immediate; it manifests itself simultaneously with its cause – *it is seen*. The others unfold in succession – *they are not seen*: it is well for us if they are *foreseen*". Bastiat continued, arguing that the difference between a good and a bad economist is that the good economist takes account of all the

[5] AfriSake. COMMENT ON THE COMPETITION AMENDMENT BILL, 2017 AS PUBLISHED IN THE GOVERNMENT GAZETTE 41294, NOTICE NO. 1345 ON 1 DECEMBER 2017

consequences, and the bad economist merely takes account of the first, visible consequence.[6]

This was echoed years later by Henry Hazlitt, who wrote that economics can be reduced to one "lesson", and that lesson is:

> "The art of economics consists in looking not merely at the immediate but at the longer effects of any act or policy; it consists in tracing the consequences of that policy not merely for one group but for all groups."[7]

An example of this law is seen in the increasing of corporate taxes. While the intention behind increasing the corporate tax rate is to increase government revenue for more social spending, the unintended consequences are that those companies subject to the increase will delay wage increases and likely increase the cost of their goods or services. Most worryingly, it may also induce them to delay employing more people. Only the increase in government spending on social services will be 'visible', and will certainly be touted by the government. The job losses and higher prices, however, which usually set in over time, won't immediately be traceable back to the increase in the corporate tax rate.

Absent the increased corporate tax rate, these companies will once again have more money at their disposal to pay their employees and lower prices.

## SECTION 3: CONSTITUTIONAL CONCERNS

[The following section is reproduced as is from our previous submission.]

### 3.1 The Constitution must be read as a whole

Chaskalson J wrote for the majority of the Constitutional Court in *S v Makwanyane* that a provision of the Constitution "must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular" other provisions in the chapter of which it is a part.[8]

This means that no part of the Constitution is left unaffected by other parts of the Constitution, especially the provisions of section 1 of the Constitution, which provide for

---

6 Bastiat, F. "What is Seen and What is Not Seen". In Ruper, C (ed). *The Economics of Freedom*. (2010). Arlington: Students For Liberty. 1.

7 Hazlitt, H. *Economics in One Lesson*. (2008 ed) Auburn: Ludwig von Mises Institute. 5.

8 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 10.

the broad constitutional basis of South Africa. These provisions are said to permeate the whole Constitution. Per Chaskalson J in *Minister of Home Affairs v NIRCO*:

> “The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution.”[9]

Section 1 of the Constitution provides:

> “Republic of South Africa
>
> 1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality **and the advancement of human rights and freedoms.**
>
> (b) **Non-racialism** and non-sexism.
>
> (c) **Supremacy of the constitution and the rule of law**.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.” (my emphasis)

The emphasised portions of section 1 above proscribe racial discrimination absolutely, and makes freedom – the idea that individuals and groups of individuals must have the ability to make decisions for themselves without interference – an imperative in South African public policy.

Section 1(a) provides that the “advancement of … freedoms” is a value upon which South Africa is founded. This foundational value has the effect of strengthening every right in the Bill of Rights, as discussed below, which cumulates into a right to enterprise. Whether or

---

9 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) at para 21.

not South Africans should be free to make their own choices is not a question government gets to ask – it is a founding value and an imperative.

Non-racialism is, similarly, a Founding Provision and not a right in the Bill of Rights. Its absence from the Bill of Rights means that it is not available to limitation under section 36 of the Constitution, which enables the section 9 right to equal protection of the law to be limited. Thus, while equality between South Africans can be limited, racial equality is a constitutional imperative insofar as public policy relates.

This point is further reinforced by section 1(c), which provides for the co-equal supremacy of the Constitution and the Rule of Law.

The Rule of Law as a "meta-legal doctrine"[10] means in part that everyone subject to the law shall be governed by the same law, and not separate laws for separate people. If the latter occurs, the 'rule of man' reigns at the order of the day, whereby politicians and bureaucrats arbitrarily assign legal advantages to themselves and their constituencies at the expense of other citizens. The Rule of Law does not exist in such a state of affairs. Thus, there are two founding values which prohibit racial and sexist discrimination, *in addition to* section 9 of the Constitution, which theoretically allows for discrimination on *other* grounds.

### 3.2 The right to equality and the limitation of rights

No right in the Bill of Rights is absolute, including the section 9 right to equality. The right may be limited through the application of section 36 of the Constitution. The following headings discuss all the requirements that allow a limitation of rights.

#### (a) Law of general application

O'Dowd writes that a law of general application "excludes enactments aimed at particular individuals" or institutions. He goes further, noting that it might also exclude "laws applying only to particular groups". Indeed, O'Dowd writes that the laws enacted by the pre-1994 regime and the laws of Hitler's Germany which applied along racial and ethnic lines, cannot qualify as a law of general application.[11] This makes sense on a historical interpretation of the Constitution.

[10] Von Hayek, FA. *The Constitution of Liberty*. (1960). Chicago: The University of Chicago Press. 311.

[11] O'Dowd, MC. *South Africa as an "Open Society"?* (1998). Johannesburg: Free Market Foundation.



Direkteure: A. Brink, D.J. de Villiers, B. du Plessis, P.J. le Roux, Dr. C.P. Lerm, D.J. Pretorius, M.B. Pretorius, N.H. Vlok, P.A. Naude

**(b) Reasonable and justifiable**

Professor Etienne Mureinik wrote that the Bill of Rights was intended to bring about a "culture of justification", as opposed to the "culture of authority" that pre-existed it. He continued, writing:

> "[The Bill of Rights] is a compendium of values empowering citizens affected by laws or decisions to demand justification. If it is ineffective in requiring governors to account to people governed by their decisions, the remainder of the Constitution is unlikely to be very successful. The point of the Bill of Rights is consequently to spearhead the effort to bring about a culture of justification. That idea offers both a standard against which to evaluate [the Bill of Rights] and a resource with which to resolve the interpretive questions that it raises".[12]

A limitation can only be justified if it is aimed at giving effect to a legitimate governmental purpose. This is determined by whether or not what government is doing is sanctioned by the Constitution. (This is based on the principle of constitutionalism of *that which is not allowed is prohibited* for governments.)

The Founding Provisions and the values therein mentioned are crucial in determining whether a course of action of government qualifies as legitimate. Government has no mandate that may operate outside the framework set by these values.

**(c) Open and democratic society**

After determining whether the limitation is reasonable and justifiable, there is the added inquiry of whether they are reasonable and justifiable *in an open and democratic society* based on certain principles. What, then, does the notion of an 'open and democratic society' mean?

The judiciary has not undertaken the exercise of precisely defining what is meant by this phraseology. In *S v Jordan and Others*, the court variously simply assumed that there are other societies around the world which prohibit prostitution, and that those societies are open and democratic, without any further ado.[13]

The open society concept, however, cannot be divorced from the thinking of Karl Popper, who popularised the idea and brought it into the mainstream.

---

12 Mureinik, E. "A Bridge to Where? Introducing the Interim Bill of Rights". (1994) 10 *South African Law Journal*. 32.

13 *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC). See, for instance, paras 56, 89-93, 104, and 116.

Stephen Thornton writes that the notion of an open society "can be brought about only if it is possible for the individual citizen to evaluate critically the consequences of the implementation of government policies, which can then be abandoned or modified in the light of such critical scrutiny — in such a society, the rights of the individual to criticise administrative policies will be formally safeguarded and upheld, undesirable policies will be eliminated in a manner analogous to the elimination of falsified scientific theories, and differences between people on social policy will be resolved by critical discussion and argument rather than by force."[14] Ronald Levinson defined the conception as "an association of free individuals respecting each other's rights within the framework of mutual protection supplied by the state, and achieving, through the making of responsible, rational decisions, a growing measure of humane and enlightened life".[15]

The ruling party in South Africa generally agrees with this conception of an open society. In its statement of principles that should underlie South Africa, under the heading "Open society", the ANC writes that the "Constitution should guarantee the free articulation of differences within the framework of equal rights and tolerance", and that the notion "requires guarantees for the free functioning of non-governmental organisations, such as religious bodies, trade unions, sporting and cultural associations, subject only to respect for fundamental human rights as set out in the Constitution". It continues, writing that non-governmental organisations "should be encouraged", but not forced, "to collaborate with the Government in furthering the aims of the Constitution, without thereby compromising their identity or independence".[16]

O'Dowd undertook an analysis of section 36's inclusion of this concept.

He notes, firstly, as will be pointed out below as well, that section 36 provides for the limitation of rights, not their abolition. Writes O'Dowd, "Only something which exists has limits. Clearly to abolish something is not to limit it". He continues, crucially noting that by limiting something one is doing "something around its edges", not going "to the heart of it".[17] The consideration of the *nature* and *extent* of the limitation below makes this point as well.

---

14 Thornton, S. "Karl Popper". (2016). *Stanford Encyclopedia of Philosophy*. Stanford: Stanford University.

15 Levinson, RB. *In Defense of Plato*. (1957). Cambridge: Cambridge University Press. 17.

16 African National Congress. "Constitutional Principles for a Democratic South Africa". (1991). Available online: http://www.anc.org.za/content/constitutional-principles-democratic-south-africa/.

17 O'Dowd (note 11 above) 9.

**(d) Human dignity**

The limitation must be justifiable in an open society based on human dignity. Human dignity is mentioned as a founding value in section 1(a) and a value underlying the Bill of Rights in section 7(1). It is also a standalone right in section 10 of the Constitution, which provides that everyone "has inherent dignity and the right to have their dignity respected and protected". Human dignity is also listed as a non-derogable right during states of emergency in section 37, implying that even under the worst of conditions government may not infringe on this right. Finally, section 39 provides that the courts must promote an open and democratic society based on *inter alia* human dignity when interpreting the Bill of Rights.

In *Prince v President of the Law Society of the Cape of Good Hope* the court noted, as it has done often before, that freedom "is an indispensable ingredient of human dignity".[18]

The Department of Justice, in explaining the essence of the section 10 protection of human dignity, writes:

> "Everyone has an inherent (inborn) dignity and the right to have his or her dignity respected and protected. **No person should be perceived or treated merely as instruments or objects of the will of others.** Every person is entitled to equal concern and to equal respect. This right is related to our constitutional purpose of establishing a society in which all human beings will be given equal dignity and respect."[19] (my emphasis)

Every person is an end in and of themselves, and not a tool to be used in others' pursuits or desires. O'Dowd largely echoes this, arguing that the essence of human dignity is the ability to make one's own decision as regards one's own welfare, and that the constitutional protection of human dignity "places limits – rather narrow limits – on the legitimacy of paternalist or 'nurse maid' activities of the state".[20]

**(e) Equality**

The limitation must be justifiable in an open society based on equality. Equality is mentioned as a founding value in section 1(a) and a value underlying the Bill of Rights in

---

18 *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) at para 49.

19 Department of Justice and Constitutional Development. "What does the South African Constitution say about your Human Rights?" (2014). 9. Available online: http://www.justice.gov.za/brochure/2014_ConstitutionRights.pdf/.

20 O'Dowd (note 11 above) 11.

section 7(1). It is also a standalone right in section 9 of the Constitution, which provides *inter alia* that everyone "is equal before the law" and that equality "includes the full and equal enjoyment of all rights and freedoms". Finally, section 39 provides that the courts must promote an open and democratic society based on *inter alia* equality when interpreting the Bill of Rights.

Within the context of the open society concept, O'Dowd quotes Karl Popper's conception of equality. He writes:

> "In any case, Popper is quite clear what 'equality' means in an open society.
>
> > 'It cannot of course be denied that human individuals are, like all other things in our world in very many respects, very unequal. Nor can it be doubted that this inequality is of great importance and even in many respects highly desirable. But all this simply has no bearing upon the question of whether or not we should decide to treat men, especially in political issues, as equals, or as much like equals as possible – that is to say, as possessing equal rights and equal claims to equal treatment.' (Vol. 2, p. 234)
>
> That is the kind of equality that has priority in the open society. It is also the kind that is clearly fully compatible with freedom (formal freedom – as we have established). So that is the kind of equality to with Section 36 refers."

**(f) Freedom**

The limitation must be justifiable in an open society based on freedom. Rights and freedoms are mentioned as a founding value in section 1(a) and a value underlying the Bill of Rights in section 7(1). Freedom is also the unifying feature of the Bill of Rights, as will be discussed under 3.3 below. Finally, section 39 provides that the courts must promote an open and democratic society based on *inter alia* freedom when interpreting the Bill of Rights.

In a minority judgment of *Du Plessis and Others v De Klerk and Another*, Madala J said *inter alia* that it "is traditionally accepted that Bills of Rights are intended primarily to correct imbalances between the excesses of government power and individual liberty".[21]

[21] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at para 154.

Within the context of freedom of expression specifically, but a strong endorsement of the constitutional protection of freedom in general, Mokgoro J wrote in *Case v Minister of Safety and Security*:

> "… freedom of speech is a *sine qua non* for every person's right to realise her or his full potential as a human being, free of the imposition of heteronomous power. Viewed in that light, the right to receive others' expressions has more than merely instrumental utility, as a predicate for the addressee's meaningful exercise of her or his own rights of free expression. It is also foundational to each individual's empowerment to autonomous self-development."

The following five requirements of section 36 are the five listed factors contained in section 36(1)(a)-(e):

**(g) Nature of the right**

The core right in section 9 is the right to equal protection of the law, contained in section 9(1). Section 9 does provide that there may be fair kinds of discrimination that the nature of the right would not proscribe, however, fairness cannot be assessed outside of the influence of the Founding Provision of non-racialism and non-sexism.

Equality at law is of central importance in South African constitutionalism. If the Constitution is to be conceived of as a 'bridge' from a culture of authority to a culture of justification, as insinuated by Mureinik above, then it can also be conceived of as a bridge from unequal treatment at law to equal treatment at law. Indeed, this is, or at least is supposed to be, the central characteristic of South Africa's new democratic dispensation.

**(h) Importance and purpose of the limitation**

The court noted in *Prince* that even if an international obligation compels government to engage in the limitation of rights, the Constitution will always reign supreme in the final analysis of the justifiability of the limitation.[22] While a limitation may thus be important for some social or international objective, the limitation cannot be seen in a vacuum unaffected by other values and provisions in the Constitution. Furthermore, for a limitation to have importance, it must be rationally related to a legitimate governmental purpose.

[22] *Prince* (note 26 above) at para 53.

t. 012 880 1951 | diens@sakeliga.co.za
58 Union Ave / Unielaan 58, Kloofsig, Centurion, SA | Posbus 17216, Lyttleton, 0140

Direkteure: A. Brink, D.J. de Villiers, B. du Plessis, P.J. le Roux, Dr. C.P. Lerm, D.J. Pretorius, M.B. Pretorius, N.H. Vlok, P.A. Naude

**(i) Nature and extent of the limitation**

The greater the extent of the limitation, the more difficult it will be for government to justify. If the 'limitation', however, has the effect of completely extinguishing the right, its extent would have gone too far, as section 36 provides for the limitation and not denial of rights.

**(j) Relation between the limitation and its purpose**

This requirement mandates that a limitation be rational, i.e. that the limitation is in fact capable of achieving its desired outcome. Merely asserting that "it will", is insufficient. There must be a rational basis for believing that the limitation will achieve its outcome. One way of showing such a rational basis is by conducting Socio-Economic Impact Assessments (SEIAs), as mandated by policy from the Department of Planning, Monitoring, and Evaluation.[23]

**(k) Less restrictive means to achieve the purpose**

If there are ways to achieve the governmental purpose without limiting the right in question – or limiting it to a lesser extent – government must prefer those alternatives. If such alternatives are in fact available, a suggested limitation of rights must fail.

Indeed, section 7(1) provides that the Bill of Rights is one of the cornerstones of South Africa's democracy, and section 7(2) provides that government "must respect, protect, promote and fulfil the rights in the Bill of Rights". Furthermore, section 39(1)(a) provides that the judiciary, when interpreting the Bill of Rights, "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".

These provisions, taken together, strongly imply that government cannot simply prefer a limitation over an alternative that does not limit rights, because of political expediency or bureaucratic preference. If there is a less restrictive alternative, it *must* be preferred over the limitation contemplated.

**3.3 The cumulative 'right to enterprise' in terms of the Constitution**

There exists a cumulative right to enterprise in the Constitution that becomes clear once the principle enunciated by Chaskalson J is truly appreciated – that the Constitution must

[23] Department of Planning, Monitoring, and Evaluation. "Socio Economic Impact Assessment System (SEIAS)". (2015). Available online: http://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/Pages/default.aspx/. See also DPME. "Socio-Economic Impact Assessment System (SEIAS) – Guidelines". (2015). 3.

be read as a whole. The right to enterprise means that South Africans may, free from the interference of government and other actors, voluntarily go about their own business. This right to enterprise consists of various rights in the Bill of Rights (informed by the section 1(a) commitment to the advancement of freedoms):

Section 10 – the right to human dignity. In *Ferreira v Levin*, Ackermann J wrote:

> "Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. **Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked.** To deny people their freedom is to deny them their dignity."[24] (my emphasis)

Section 12 – freedom and security of the person – especially sections 12(1)(a) and (c). These provisions provide that nobody may be deprived of freedom without just cause and that everyone has the right to be free from violence from both public and private sources. Violence must be understood as including the threat of violence, which underlies any new law or regulation such as the provisions of the Competition Amendment Bill.

Section 13 – freedom from slavery, servitude and forced labour. If South Africans are guaranteed the right to be free from slavery – forced employment – the converse is also logically true: South Africans are to be free from forced *un*employment as well, which is often the result of well-intended government policy.

Section 14 – the right to privacy. The right to privacy implies that persons or groups of persons may go about their businesses without the interference or surveillance of others – including and especially government – if they do so without violating others' rights.

Section 18 – freedom of association. This right entitles everyone to associate (or disassociate) with whoever or whatever they wish on whatever basis. The provision was formulated without any provisos or qualifications and is therefore absolute insofar as it is not limited by section 36. South Africans may freely associate or disassociate as long as they do not violate the same right of others or any of the other rights in the Bill of Rights. Competition policy has a tendency to violate the freedom of association of enterprises, and, in the case of the Competition Amendment Bill, provides for forced racial association and disassociation.

Section 21(1) – freedom of movement. The freedom to move – leave, return, roam – is a vital element of enterprise.

Section 22 – freedom of trade, occupation and profession. The freedom to choose one's trade, occupation, and profession is, along with the property rights provision, the core of

[24] *Ferreira v Levin* 1996 (1) SA 984 (CC) at para 49.

the right to enterprise. Section 22 provides that government may *regulate* (not *prohibit*) the *practice* (not the *choice*) of a profession. The regulation of practicing a particular profession cannot be so severe as to prohibit it.

Section 23 – labour relations. The Constitution guarantees the right of employees and employers to associate with trade unions and employers' organisations.

Section 25 – the right to property. There can be no right to enterprise, and no enterprise *per se*, without private property rights. Section 25, along with the freedom of trade, occupation and profession, forms the core of the right to enterprise and is a *conditio sine qua non* for South Africa's prosperity. A right to property supposes that the owners of the property in question may do with that property as they see fit, insofar as they do not violate the rights of others.

## SECTION 4: COMPETITION AMENDMENT BILL, 2018

### 4.1 How the Bill ignores the nature of competition

The Bill – indeed, South Africa's entire competition policy regime – betray a lack of understanding of how competition and the principles of economics operate. The legal notion of "abuse of dominance" is problematic, as it hinders enterprises from legally protecting or enjoying their own property rights. This is inevitably detrimental to consumers, who must bear the brunt of the increase in operating costs of those companies. Competition is impossible without respect for property rights.

Clause 5 further prohibits in the proposed section 8(1)(d)(v) firms from *"buying-up a scarce supply of intermediate goods or resources required by a competitor"*. This provision ignores entirely the nature of competition and disrespects the right to enterprise of entrepreneurs. Requiring competitors to assist one another, directly or indirectly, perversely undermines government's own goal of stomping out collusion and ensuring the market is competitive. This provision should be removed from the Bill.

Perhaps most distressingly, in the proposed section 8(2), the Bill provides that if *"there is a prima facie case*" of abuse of dominance through excessive pricing or requiring suppliers to sell at low prices, the "firm must show that the price was reasonable". This amounts to a reverse-onus of proof imposed without justification, and violates the section 1(c) constitutional commitment to the Rule of Law. The Rule of Law requires that fundamental principles of due process be adhered to, including that the party which originates the case must prove it. This is furthermore a principle of the South African laws of civil and criminal procedure. This provision should be removed from the Bill.

Clause 6, in its proposed addition of section 9(3), states that *"When determining whether the dominant firm's action is prohibited price discrimination, the dominant firm must show that its action does not impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to participate effectively."* It is unclear how a firms could satisfy this burden of proof: how does a firm "prove" that its action does not impede small and medium businesses and firms and firms controlled by historically disadvantaged persons to participate effectively. Indeed, if the nature of competition is appreciated, all a firm would need to show is that it is not violating the property rights of its competitors or that it is not in some way making the market uncontestable. But the Bill does not have an appropriate appreciation for the nature of competition.

Moreover, how can the bearer of the burden of proof distinguish between firms that are and are not owned by historically disadvantaged persons, given that juristic persons cannot exhibit any supposed racial characteristics? An accountancy firm in Randburg owned by a white individual and an accountancy firm in Randburg owned by a black individual will not experience the conduct of a larger accountancy firm in Sandton any differently from one another. This provision's irrationality combined with its implied racialism renders it unconstitutional, and consequently it should be removed from the Bill.

**4.2 How the Bill's racism is unconstitutional**

The Bill contains various provisions with aims of a racial nature, put in the phraseology of "historically disadvantaged person(s)". Section 3(2) of the principal Act, however, defines this phrase as *inter alia* individuals (or an association of individuals, the members of which were) unfairly discriminated against on the basis of *race* before the interim Constitution[25] was enacted. It is unclear if this "unfair discrimination" had to be through law or otherwise. All these provisions are unconstitutional by virtue of section 1(b) and (c) of the Constitution, and should be removed from the Bill.

Clause 7, in its proposed amendment to section 10(3)(b)(ii), proposes to introduce an exemption from the application of chapter 2 of the principal Act. This provision thus provides that the Commission may grant an exemption to firms for their uncompetitive practices if those practices promote *"effective entry into, participation in and expansion within a market"* by small and medium businesses owned by historically disadvantaged persons. In plain English, this provision rewards uncompetitive practices which have the effect of advancing a group along racial lines. In other words, far from encouraging or

[25] Constitution of the Republic of South Africa Act (200 of 1993).

protecting competition, uncompetitive practices are indirectly encouraged. This provision, the racialism of which renders it unconstitutional, should be removed from the Bill.

Mergers which will have the effect of promoting a *"greater spread of ownership"* in the market by historically disadvantaged persons will, according to clause 9 in its proposed amendment to section 12A(3), be considered as in the "public interest" by the Commission. This amendment is both ambiguous (i.e., what does "greater spread of ownership" constitute?) and racialist, and should be removed from the Bill.

### 4.3 Application of section 36 of the Constitution

The argument may be made that section 1 of the Constitution cannot be directly relied upon to hinder government from introducing racialist provisions into law, as section 1 serves merely to 'influence' but not dictate the kinds of provisions that may legally be enacted. The argument will inevitably be made that interventions to advance the interests of historically disadvantaged persons along racial lines are justified in terms of section 36 of the Constitution – the limitation of rights provision – which limits the section 9 right to equal protection of the law.

What follows is an application of the requirements of section 36, as discussed above, to the racialism contained in the Bill:

#### (a) Law of general application

The Bill is, for the most part, a law of general application. It, however, fails to be a law of general application in those provisions where like firms are treated unlike, by mere virtue of having owners or shareholders of a different race. Clause 7, for instance, is not a law of general application.

#### (b) Reasonable and justifiable

There are reasons for the Bill, as contained in its addended memoranda. However, as will be submitted below, the Bill, in light of the Founding Provisions, is not reasonable and justifiable in an open and democratic society founded on human dignity, equality, and freedom.

#### (c) Open and democratic society

The Bill falls foul of the notion that in an open society, firms and other voluntary associations should not be forced to participate in the ideological aims and desires of government. As long as these firms operate in line with the Constitution, in an open society

they cannot be forced into the business of government. They can, however, as the ruling party noted in 1991, be encouraged to so partake. We submit thus that to accord with this requirement in section 39, the Bill's language of compulsion must be changed to language of choice.

**(d) Human dignity**

The Bill uses people and the firms they associate with as pawns in a scheme of racial social engineering. It fails to see all persons, regardless of race, as ends in and of themselves who may not merely be tools in governmental social projects.

**(e) Equality**

The Bill fails to comply with the requirement of equality by its nature.

**(f) Freedom**

This law does not even factor in considerations of freedom. The freedom of enterprises and South Africans to conduct themselves according to their own wishes is dispensed with from the very start.

**(g) Nature of the right**

The right to equality, as repeatedly pointed out in this submission, is not merely a right. Equality is also a Founding Provision of our constitutional order. The concept of equality is explicitly mentioned several times throughout the Constitution. It is of central importance to South Africa's democracy, yet is effortlessly set aside in the Bill.

**(h) Importance and purpose of the limitation**

The purpose of the limitation is to ensure a "greater spread of ownership" among historically disadvantaged persons. The ambiguity of this notion makes its importance suspect.

We can, however, concede that making entry into the market by disadvantaged individuals and communities easier is an important goal, although using this noble goal to limit rights is not the appropriate way to go about it. If firms are left alone to compete, freely, without undue interference from law or regulations, entry to the market will be easier as a matter of course.

**(i) Nature and extent of the limitation**

The nature of the limitation is racial discrimination enforced by law. Its extent also borders on almost completely extinguishing the right to freedom of association and to equality.

**(j) Less restrictive means to achieve the purpose**

The list of less restrictive means to achieve the purpose of the limitation is virtually boundless. Government can subsidise firms owned by historically disadvantaged persons without violating the rights of other firms. Ideally, government can liberalise the economy thoroughly by getting rid of red tape and State monopolies, thereby making entry for all firms, especially small firms inevitably owned by historically disadvantaged persons, easier. Finally, government can continue encouraging firms to transform, without threatening or actually using the violence force of law to compel it.

Using the force of law to limit the right to equality is disproportionate and fails at every step of the section 36 inquiry.

**4.4 The Bill is rife with ambiguity and its delegation of power goes too far**

Clause 10 introduces a section 15(1)(b), which gives the Commission the power to *"make any appropriate decision regarding any condition relating to the merger ..."*. The essence of this provision is repeated in clause 11's introduction of a section 16(3)(b) as regards the orders of the Competition Tribunal. This assignment of untethered discretionary power is too generous to comply with section 1(c) of the Constitution. The provision should either be removed from the Bill, or criteria more clearly defining and restraining the kinds of decisions the Commission or Tribunal may make should be introduced.

Clause 22, which introduces a section 43A(2), provides that in the context of market inquiries, an "adverse effect on competition" would be present "*if any feature, or combination of features, of a market for goods or services impedes, restricts or distorts competition in that market".* Section 43A is titled "Interpretation and Application of this Chapter", and is supposed to function as an aide to regulators, lawyers, firms, and ordinary South Africans in determining how the law functions. It does the opposite with this provision. The provision is indeterminate and conceivably allows any interpreter to conclude that any "feature" somehow contributes to preventing, restricting, or distorting competition. This provisions should either be removed from the Bill or clarified.

**4.5 Intervention in merger proceedings involving foreign acquiring firms**

Clause 13 of the bill introduces a Section 18A into the principle act. In essence the section establishes a presidential committee which must consider the "whether the

implementation of a merger involving a *foreign acquiring firm* may have an adverse effect on the national security interests of the Republic". The proposed section 18A(4)(a) to (h) introduces a number of factors which the President of South Africa must take into account to determine the potential impact of a merger transaction on national security interests. 18A(4)(c) and (d) proposes considerations of factors such as "safety, security or economic wellbeing" and the impact of foreign merger transactions on "the supply of important *goods or services* to citizens" or to the government. These considerations are too broadly defined and could mean that virtually all mergers with foreign acquiring firms may potentially have to be evaluated by the presidential committee established by clause 18A. These factors should be narrowed substantially.

**CONCLUSION**

The Competition Amendment Bill is one of many legislative interventions which fall foul of the Constitution and its commitment to the Rule of Law. Furthermore, the Bill, seemingly without any awareness of the fact by its sponsors in the background note or the explanatory memorandum, succumbs to the law of unintended consequences. Replete with good – if naïve – intentions, it will like its principal Act, the Competition Act, further retard innovation and economic growth.

Finally, its disregard for the freedom of ordinary South Africans reveals a dirigist spirit typical of authoritarian and central planning regimes.

The Bill continuously refers to barriers to entry and distortions of competition in the market without realising or acknowledging that South Africa's only significant barrier to entry and distortion of competition in the market is policy intervention by government. Small firms will thrive and market competition will be plentiful if government simply allows it to be.

** Drafted in collaboration with Sakeliga, by Martin van Staden (LL.B.)**

**REQUEST TO MAKE ORAL SUBMISSIONS TO THE PORTFOLIO COMMITTEE**

Sakeliga herewith requests an opportunity to make oral submissions on the 2018 bill to the Portfolio Committee on Economic Development.



Direkteure: A. Brink, D.J. de Villiers, B. du Plessis, P.J. le Roux, Dr. C.P. Lerm, D.J. Pretorius, M.B. Pretorius, N.H. Vlok, P.A. Naude

Yours truly,

______________________

GERHARD VAN ONSELEN
Senior Researcher
Sakeliga