RULE OF LAW PROJECT

a division of the

FREE MARKET FOUNDATION

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SUBMISSION TO THE

ECONOMIC DEVELOPMENT DEPARTMENT

ON THE

COMPETITION AMENDMENT BILL, 2017

Johannesburg PO Box 4056 | Cramerview 2060 | **Tel** 011 884 0270 | **Email** martinvanstaden@fmfsa.org
NPO No 020-056-NPO | PBO & Section 18A(1)(a) No 930-017-343

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1. Executive summary

The Competition Amendment Bill, and South Africa's competition policy regime in general, is permeated by a fundamental misunderstanding of the economics of competition and of the Rule of Law.

The Bill, like an increasing number of laws and regulations, is of a racialist character; assigns excessive discretionary powers; its provisions are ambiguous and unclear; and it seeks to oust the jurisdiction of the Supreme Court of Appeal, each of which falls foul of the commitment to the Rule of Law found in section 1(c) of the Constitution.

Competition in the marketplace is not stimulated by active government interference in the affairs of firms and entrepreneurs. This leads to price distortions caused by increased compliance costs and warped incentives. Whereas ordinarily entrepreneurs would seek to profit by providing consumers with the goods and services they desire at a better quality or speed than their rivals, now these entrepreneurs also need to satisfy the ideological and arbitrary whims of the bureaucracy.

For competition to flourish, government must start a process of dismantling anti-competitive legislation and regulations, and of dismantling State-sponsored or -owned monopolies that force private competition out of those respective industries. Competition is not created by government, but comes about in a market free of excessive interference. The role of government should simply be to ensure no firms use force or fraud to deny market entry to their potential rivals.

The Free Market Foundation has made various recommendations in the submission to bring the Bill in line with the nature of competition and the Rule of Law.

Prepared by:

Martin van Staden	Eustace Davie	Prof Robert W Vivian
Legal Researcher	Director	Member
Free Market Foundation	Free Market Foundation	FMF Rule of Law Board of Advisors

2. Free Market Foundation and Rule of Law Project

The Free Market Foundation (FMF)[1] is an independent public benefit organisation founded in 1975 to promote and foster an open society, the Rule of Law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations, and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction, and greater human welfare.

The FMF's Rule of Law Project is dedicated to promoting a climate of appreciation throughout South Africa, among the public and government, for the Rule of Law; continually improving the quality of South African law; identifying problematic provisions in existing and proposed laws, and, where feasible, advocating rectification.

3. Introduction

According to Christo Hattingh, competition "is the method by which consumers judge whether prices are 'too high'", and businesses that charge too much for their goods or services will inevitably lose customers and face closure.[2] The FMF's former chairman, the late Michael O'Dowd, wrote that entrepreneurs have "to produce goods or services that other people want to buy. Where competition comes in, is that he will not be able to sell his product if others do a substantially better job of producing it than he does. He does not have to defeat the competition, but he does have to keep up with it".[3]

Consumers themselves are seldom, if ever, complainants in competition cases. Usually, other firms in the market lodge complaints, especially where a competing firm is said to be "abusing its dominant position". In ordinary language this term generally means that the competitors cannot compete with the accused supplier and have asked for protection from the government agency that implements the legislation. If the agency (in this case, the Competition Commission) grants the protection, consumers sooner or later have to pay higher prices. Competition law is based on suspect economics and

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1 www.freemarketfoundation.com

2 Hattingh, C. "Competition Commission supposedly saves South Africans". (2017). *Free Market Foundation*. Available online: http://www.freemarketfoundation.com/article-view/competition-commission-supposedly-saves-south-africans/.

3 O'Dowd, MC. *The O'Dowd Thesis and The Triumph of Democratic Capitalism.* (1996). Johannesburg: Free Market Foundation.

consumers will benefit considerably when the legislation is repealed and no longer available for the protection of less efficient competitors.

On 1 December 2017, the Minister of Economic Development published the Competition Amendment Bill, 2017, for public comment. The Bill proposes to amend the Competition Act,[4] by *inter alia* providing "for the promotion of competition and economic transformation through addressing the de-concentration of markets" and protecting and stimulating "small businesses and firms owned and controlled by historically disadvantaged persons".

While the Bill contains various problematic provisions, the Competition Act itself and the very nature of competition regulation is problematised throughout this submission.

4. The Constitution and competition policy

4.1 Constitutional protection of enterprise

The Constitution of the Republic of South Africa, 1996,[5] contains various provisions, especially in the Bill of Rights, that protect the freedom of South Africans to determine their own destinies. This can be summed up in the notion of freedom of choice, or freedom of enterprise.

The most important provision underlying the other provisions is that found in section 1 of the Constitution – the Founding Provisions. Section 1(a) provides that South Africa is founded on "[h]uman dignity, the achievement of equality and the advancement of human rights **and freedoms**" (my emphasis). This provision permeates all the provisions of the Bill of Rights by virtue of being a founding value.[6]

Other provisions relevant to freedom of choice within the context of enterprise include the following:

Section 7(1) provides that the Bill of Rights "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and **freedom**" (my emphasis). Section 9(2) provides that the right to equality "includes the full and equal enjoyment of **all rights and freedoms**" (my emphasis).

Section 10 provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". According to the Department of Justice and Correctional Services, this means that

4 Competition Act (89 of 1998).
5 Henceforth "the Constitution".
6 This phenomenon will be explored in more depth in the discussion on the Rule of Law below.

"[n]o 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".[7]

Section 12(1)(a) provides that everyone has the right "not to be deprived of freedom arbitrarily or without **just** cause" and section 12(1)(c) guarantees the right of everyone "to be free from all forms of violence from **either public or private sources**" (my emphasis).

Section 13 prohibits "slavery, servitude or forced labour", the converse of which will also be true: forced unemployment or labour disassociation.

Section 14 guarantees the right to privacy, meaning private affairs should not be interfered with or monitored without consent.

Section 18 provides that "[e]veryone has the right to freedom of association". This right means that natural or juristic persons may associate or disassociate with whomever they wish and cannot be forced by law or other coercive means to associate or disassociate.

Section 22 provides that all citizens have "the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law". The language of the provision is clear, in that the *practice*, but not the *choice*, of profession may be *regulated,* but not *prohibited*. To read prohibition into regulation would make the entirety of the provision and the 'right' redundant. No provision in the Constitution may be construed as being redundant or inconsequential.

Section 25 guarantees the right of everyone to be secure in their property unless the property is expropriated for a public purpose or in the public interest with compensation. No expropriation may be arbitrary. Expropriation of property can affect any entitlement of ownership, meaning that regulating away someone's ability to decide what to do with their property – without the property vesting in someone else – would qualify as expropriation.

4.2 Not protecting purchasers' fundamental constitutional rights[8]

Usually when one thinks of the role of the state and protection of fundamental rights, one thinks of laws such as those against theft. These laws prohibit individuals from violating the fundamental rights of others.

Competition laws are different; they govern aspects such as price setting. One would think that as part of owning property the owner has the right to sell his own property at his own price and to do so

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7 http://www.justice.gov.za/brochure/2014_ConstitutionRights.pdf/.

8 This section has been reproduced from Vivian, RW. "Constitutionality of South Africa's competition policy". (2011). Free Market Foundation Occasional Paper. 4-5.

cannot be illegal. The person who purchases the goods or services agrees to the price and thus setting the price has no intrinsic unlawful aspect about it. If the prices are too high new suppliers (including imports) can enter the market or consumers could substitute the goods in question for others at a lower price.

The system has a self-correcting element inherent within it. Competition laws cannot be justified on the basis that the state is protecting purchasers' fundamental rights. To bring competition policy within the conceptual basis for governing prices, it is necessary to argue that where persons act in concert to set prices they impose an externality of purchases.[9]

4.3 The purposes of the Competition Act[10]

The so-called 'laws' set out in the legislation governing competition are anything but clear. Despite the fact that the economic goals of competition are obvious, these are not captured by the South African legislation.[11] In fact, the Competition Act fails to define any clear legal objectives. A similar position used to prevail in America, as explained by Mr Justice Robert Bork.[12]

When he first entered the field of competition law he despaired at its state. This position persisted until the goals became more clearly defined. He concluded that "the exclusive goal of antitrust adjudication is the maximization of consumer welfare." Once this was understood, he became optimistic that competition law, anti-trust in America, could become workable.

South Africa has yet to learn this.

In contrast to the clear single objective that competition law should have, the purposes of competition law in the Competition Act as set out in section 2 are confused and contradictory. If one goal is achieved, another will be violated. The goals or purposes of the Competition Act as summarised in section 2, being to promote and maintain competition in order to –

> "a) promote the efficiency, adaptability and development of the economy
>
> b) provide consumers with competitive prices and product choices
>
> c) promote employment and advance the social welfare of South Africans

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9 Arguing that inadequate competition imposes externalities leads to a justification for government intervention to achieve the optimization of Pigou's welfare economics. These issues are explained in greater detail below in the section economics of competition.

10 This section has been reproduced from Vivian (footnote 5 above) 6-8.

11 The failure to do so is not confined to South Africa.

12 Bork is not only an authority on competition law because he wrote a book on the subject, but also because he spent many years in the field of competition law.

d) expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic

e) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy

f) promote greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons"

Not only do these fail to provide any achievable goal, they are not even traditional statements of law, i.e. Austin's commands by the sovereign to be obeyed, as for example, "Thou shalt not steal". These are more akin to generalised contradictory ideological or policy statements. They also do not benefit the consumer by lowering prices, which is what competition achieves.

Take, for example, the case of a foreign retailer, that wishes to buy a local retain chain, the Wal-Mart type of acquisition.[13] From a competition point of view, the matter should only be of concern if there was belief that prices will increase because of lack of competition. There is no suggestion that this is the case. The concern is the opposite, that prices will decline. In this case, consumer welfare will increase. The acquisition, in law, should thus clearly be approved as meeting goal (b).

An argument can be made that the purchase will also 'promote efficiency' (part of goal (a)) since it will provide goods at a lower price and should be approved for this reason. It is, however, less clear what is meant by "adaptability and develop the economy". Since this has no clear meaning, the acquisition may well be arbitrarily rejected as the institutions within the competition regime assign whatever meaning they choose to these meaningless words.

However, also, it can be argued that the acquisition will not directly "promote employment" (goal (c)) since by promoting efficiency (goal (a)) this may well result in fewer employees. The two goals in (a) and (c) are thus contradictory. What is meant by social welfare (also forms part of goal (c)) has no clear specific legal meaning and thus it cannot be said the acquisition will achieve all of the requirements of goal (c).

Further, it is unclear what must be done "to expand opportunities for South African participation in world markets". This implies South African suppliers distributing South African products to other parts

[13] It is not clear that this acquisition is significant from a competition point of view. The acquisition does not reduce the number of competitors in the market. It is an entry into the market of a foreign retailer. The acquisition is merely the method to facilitate entrance into the market.

of the world. There is no suggestion that this acquisition will achieve this and thus goal (d) will not be met.

Further, it is not at all clear what this provision has to do with competition, since it is a matter for world trade organisations and international trade treaties. This is thus not only a contradictory goal, it duplicates other pieces of legislation and institutions. Larger organisations can usually lower prices because of economies of scale and thus to link competition to the promotion of small and medium enterprises (goal (e)) is such a contradictory goal that if goal (d) is seriously to be considered as a goal, consumer prices will never be reduced. Large enterprises would be able to set their prices at the level of small and medium enterprises and enjoy the fruits of regulatory capture. If goal (e) is seriously pursued, the very purpose of competition can be abandoned. Goal (f) is equally problematic since it is not at all clear what competition policy has to do with spread of ownership or "previously disadvantaged persons".

It should thus be clear that the set of goals set out in section 2 will always be contradictory, not objectively achievable; in short, the legislation does not contain clear laws of general application. The competition regime cannot be said to operate within the Rule of Law. It is all a matter of discretion.

Laws, taking Austin's view, are supposed to be clear, unambiguous commands of the sovereign. It is clear that the specific legislative provisions in section 2 clearly fail this test since they have no clear or discernible legal meaning.[14] What this section is, is vague legislation devoid of any clear legal meaning which grants the 'state' the power to do anything it chooses, when it comes to competition. It is thus not surprising that competition matters have become increasingly expensive and protracted as conflicting goals are pursued.

4.4 The 'public interest' problem[15]

When it comes to more specific provisions, things do not get much better. Dealing with mergers, one aspect is whether or not the merger can or cannot be justified on "substantial public interest grounds" (section 12A(2)(b)). This is a different goal from those set out in section 2 and is not consistent with those confusing objectives.

Laws are usually made by Parliament in the public interest to protect fundamental rights. An Act of Parliament should not have a provision requiring an administrative body to make decisions in the

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14 This section sets out the objectives of the Act. Clearly, if the objectives of the Act cannot be set out, it is unlikely that Act can be successfully implemented. If one does not know what one is doing, do not be surprised if the endeavour is a failure.

15 This section has been reproduced from Vivian (footnote 5 above) 8.

public interest since this is what Parliament does when making laws, and to put that into legislation means Parliament delegates its legislative function to a subsidiary body.

Public interest grounds set out in the section include effect on (a) employment (b) small business, or a firm controlled by historically disadvantaged persons. These are much the same as discussed above and are conflicting and contrary to the goal of competition: reducing prices.

If, for example, a merger will result in significantly lower prices, reducing the costs imposed on consumers, but this reduction will also reduce employment, then the merger can be stopped. This results in increased costs to the consumer. This is a form of transaction tax imposed on consumers. In any event, the mere fact that a decision is required to be made by individuals and not in accordance with laws, makes it clear that the competition regime does not function in terms of the Rule of Law.

4.5 Competition laws are not laws of general application[16]

Specifically excluded from the operation of the Competition Act is the supply of labour (section 3). In other words, labour can and does violate all the principles of competition.

It is interesting to note that there appears to be a worldwide trend for government labour costs to be well in excess of private sector labour costs, and these costs are the main drivers of government deficits. In both South Africa and the United States of America, it is estimated that the average labour costs of the public sector are 45 percent higher than those in the private sector. In the United States, it is the federal labour costs which are well in excess of the private sector costs.

The Competition Act is thus not clear and not of general application. Laws without any clear meaning end up as cases without end. Referring to antitrust cases in the US, Mr Justice Bork who prosecuted these cases for a long time noted:

> "The trial of such a case can go on endlessly … battalions of lawyers. Young lawyers became middle-aged lawyers without working on any other case. Junior associates displayed great ingenuity and energy to avoid being drawn into such black holes. The waste of time, money and talent was staggering".[17]

5. The Rule of Law

Section 1(c) of the Constitution provides that South Africa is founded upon the supremacy of the Constitution and the Rule of Law. Section 2 provides that any law or conduct that does not accord with

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16 This section has been reproduced from Vivian (footnote 5 above) 8-9.

17 Bork, R. *The Antitrust Paradox: A Policy at War with Itself.* (1993). 432.

this reality is invalid. This co-equal supremacy between the text of the Constitution and the doctrine of the Rule of Law remains underemphasised in South African jurisprudence, but it is important to note for the purposes of this submission.

One of the Constitutional Court's most comprehensive descriptions of what the Rule of Law means was in the case of *Van der Walt v Metcash Trading Ltd*.[18] In that case, Madala J said the following:

> "[65] The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:
>
> 1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
>
> 2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.
>
> 3. the legal protection of certain basic human rights.
>
> [66] The concept of the rule of law has no fixed connotation but its broad sweep and emphasis is on the absence of arbitrary power. In the Indian context Justice Bhagwati stated that:
>
> 'the rule of law excludes arbitrariness and unreasonableness.'
>
> I would also add that it excludes unpredictability. In the present case that unpredictability shows clearly in the fact that different outcomes resulted from an equal application of the law."[19]

The Rule of Law thus:

- Permeates the entire Constitution.
- Prohibits unlimited arbitrary or discretionary powers.
- Requires equality before the law.
- Excludes arbitrariness and unreasonableness.
- Excludes unpredictability.

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18 *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC).

19 At paras 65-66. Citations omitted.

The Good Law Project's *Principles of Good Law* report largely echoed this, saying:

> "The rule of law requires that laws should be certain, ascertainable in advance, predictable, unambiguous, not retrospective, not subject to constant change, and applied equally without unjustified differentiation."[20]

The report also identifies four threats to the Rule of Law,[21] the most relevant of which, for purposes of this submission, is the following:

> "[The Rule of Law is threatened] when laws are such that it is impossible to comply with them, and so are applied by **arbitrary discretion** […]"

Friedrich August von Hayek wrote:

> "The ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal." [22]

What is profound in Von Hayek's quote is that he points out that *the* Rule of Law is not the same as *a* rule of *the* law. Indeed, any new Act of Parliament or municipal by-law creates and repeals multiple 'rules of law' on a regular basis. The Rule of Law is a doctrine, which, as the Constitutional Court implied in *Van der Walt*, permeates all law, including the Constitution itself.

Albert Venn Dicey, known for his *Introduction to the Study of the Law of the Constitution*,[23] and considered a father of the concept of the Rule of Law, wrote that the Rule of Law is "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government".[24]

Dicey writes "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint".[25] He continues, saying the Rule of Law means "the absolute supremacy or predominance of regular law as opposed to the

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20 Good Law Project. *Principles of Good Law.* (2015). 14.
21 Good Law Project (footnote 15 above) 29.
22 Von Hayek, FA. *The Constitution of Liberty.* (1960). 206.
23 Dicey, AV. *Introduction to the Study of the Law of the Constitution.* (1959, 10th edition).
24 202-203.
25 Dicey (footnote 18 above) 184.

influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government".[26]

The opposition to arbitrary power should not be construed as opposition to discretion in and of itself. Officials use discretion to determine which rules to apply to which situation, and thus some discretionary power is a natural consequence of any system of legal rules. However, the discretion must be exercised per criteria which accord with the principles of the Rule of Law, and the decision itself must also accord with those principles.

A common example of arbitrary discretion is when a statute or regulation empowers an official to make a decision "in the public interest". What is and what is not "in the public interest" is a topic of much debate, and empowering officials to apply the force of law in such a manner bestows upon them near-absolute room for arbitrariness. The "public interest", however, can be one criterion among other, more specific and unambiguous criteria.

The fact that some discretion should be allowed is a truism; however, the principle that officials may not make decisions of a substantive nature still applies. Any decision by an official must be of an enforcement nature, i.e. they must do what the legislation *substantively* requires. For instance, an official cannot impose a sectoral minimum wage. The determination of a minimum wage is properly a legislative responsibility because it is of a substantive nature rather than mere enforcement. Unfortunately, the Basic Conditions of Employment Act[27] gives the Minister of Labour the authority to make "sectoral determinations" – which includes determining a minimum wage – which is a clear violation of the Rule of Law and the separation of powers.[28]

6. Non-racialism

6.1 The right to equality

Section 7 of the Constitution provides that government must "respect, protect, promote and fulfil the rights in the Bill of Rights". Government cannot create new fundamental rights from thin air, especially if they potentially conflict with existing rights in the Constitution. Indeed, section 39(2) provides that when legislation is interpreted the spirit, purport, and objects of the Bill of Rights must be promoted. Thus, government has the constitutional obligation to protect and fulfil *those rights which appear in the text of the Bill of Rights as it stands*, which span sections 7 to 39.

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26 Dicey (footnote 18 above) 198.

27 Basic Conditions of Employment Act (75 of 1997).

28 Section 51.

Section 9 of the Constitution, which contains the right to equality, along with the Promotion of Equality and Prevention of Unfair Discrimination Act,[29] provide the basis upon which racial policy interventions are apparently built in South Africa.

Section 9(1) is the foundation of the provision and provides the general principle: Legal equality between all people of whatever race and whatever sex.

Section 9(2) provides that the government must ensure that there is full and equal enjoyment of all rights and freedoms. The "rights" and "freedoms" this provision refers to are those rights which *already appear* in the Constitution, as the discussion on section 7 above indicates.

Section 9(2) also provides that the government must enact "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination".

The following provision, section 9(3), provides that government may not discriminate unfairly against anyone based on race, sex, and various other grounds. "National legislation must be enacted to prevent or prohibit unfair discrimination", according to section 9(4), and discrimination based on race or sex "is unfair unless it is established that the discrimination is fair", according to section 9(5).

6.2 The Equality Act

The Equality Act was enacted to give effect to section 9 of the Constitution. It is the "national legislation" required by section 9(4), and is the statute that defines what "unfair discrimination" means.

Section 14 of the Act provides that it "is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons".

Some of the factors which the Act lists in determining fairness or unfairness are:

- The context of the discrimination.
- Whether the discrimination reasonably and justifiability differentiates between people based on objectively-determinable criteria, intrinsic to the activity in question.
- Whether the discrimination impairs or is likely to impair the human dignity of the complainant.
- The impact of the discrimination on the complainant.

[29] Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000). Henceforth "the Equality Act".

- The position of the complainant in society (whether they suffer from patterns of disadvantage).
- The nature and extent of the discrimination.
- Whether the discrimination is systemic in nature.
- Whether the discrimination has a legitimate purpose.
- Whether the discrimination achieves its purpose.
- Whether there are less disadvantageous means to achieve said purpose.

These factors, accumulatively, essentially mean that a court will need to consider the context of the activity in question, the persons – both complainant and respondent – and the discrimination itself, to determine whether the discrimination is fair.

For example, if a film studio is making a movie about Nelson Mandela, a white woman auditioning to play the role of Mandela can be fairly discriminated against, because the fact that the studio needs a black man to play the part is *intrinsic* to the activity. Rejecting this woman for the part would also not impair her human dignity in the context, given that she likely expected to be rejected, and that the discrimination was not an affront to her identity. Instead, the discrimination was simply logical and had nothing to do with her as a person.

The court interpreting the case of apparent discrimination will need to go down this list of factors in the Equality Act and exercise its discretion to determine whether or not unfair discrimination has taken place.

6.3 The constitutionality of positive interventionism

Many people argue that affirmative action is unconstitutional because it violates the right to equality in section 9 of the Constitution.

This, however, amounts to reading the Constitution under the haze of confirmation or selection bias.

Section 9(2) of the Constitution unequivocally gives government the power, and indeed the obligation, to engage in positive intervention in society to achieve substantive – rather than merely formal – equality. In the 2004 case of *Minister of Finance v Van Heerden*,[30] Moseneke J said for the majority of the Constitutional Court that without such a positive obligation on government "to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the

[30] *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC).

constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow".[31]

If affirmative action is regarded as unconstitutional, section 9(2) of the Constitution becomes redundant. This would mean a complete misinterpretation of the Constitution and amount to the court or reader of the document replacing what the Constitution provides with their own opinion; and will amount to the rule of man rather than the Rule of Law.

6.4 The Founding Provisions

Where in this elaborate scheme, however, are the Founding Provisions – the Rule of Law and South Africa's section 1(b) commitment to non-racialism and non-sexism?

As Madala J implied, the Founding Provisions permeate the Constitution, including the section 9 right to equality. Non-racialism is *engrained within the fabric of section 9*, as it is within the rest of the Constitution. When the legislature set out to define what "unfair discrimination" means in the Equality Act, it should have understood that it cannot remove section 9 from the blanket of non-racialism within which it was wrapped by default.

The Constitutional Court has in various cases affirmed this principle.

In *SAPS v Solidarity*,[32] Moseneke J said that South Africa's "quest to achieve equality must occur within the discipline of our Constitution".[33] And in *Bel Porto v Premier of the Western Cape,*[34] Chaskalson J said that the "process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights".[35]

The Constitutional Court has, however, often made leaps of logic without further ado. The very next line by Chaskalson J was that "in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others".

Nowhere does the Constitution provide or imply that the achievement of equality for some must necessarily or "inevitably" come at the expense of others. This is an example of the leap in logic known as the zero-sum fallacy. It is clearly implicit in Chaskalson's statement that equality is a limited resource

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31 At para 31.

32 *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC)

33 At para 30.

34 *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 (3) SA 265 (CC).

35 At para 7.

which must be distributed. To make the have-nots equal with the haves, the haves must in some way be disadvantaged.

This, of course, is not only legally false, but economically false as well. The achievement of equality need not be at anyone's expense because wealth can be created anew. More importantly, however, the achievement of equality *may not be* at anyone's expense on the basis of race or sex.

If the Constitutional Court is essentially incorrect in this interpretation, then what does the Constitution *actually* provide in section 9(2), and does it prohibit affirmative action entirely?

The Constitution is not a classical liberal constitution, unlike that of the United States. This is evident from the welfare rights provided for in the Bill of Rights. This fundamentally means that the Constitution does envision a role for government to try to uplift the poor and marginalised in society, whereas a classical liberal constitution would leave that in the hands of the people themselves and market forces.

Section 9(2), furthermore, clearly allows government to positively intervene in society to achieve "full and equal enjoyment of all rights and freedoms" in the Bill of Rights. The Constitution, however, expressly provides, not once, not twice, but *thrice*, that such intervention cannot be of a racial or sexist character. It goes to great lengths to condemn racialism.

In section 1(b), the Constitution provides that South Africa is *founded* on the value of non-racialism. Section 7(1) provides that the Bill of Rights *enshrines* the rights of *all* people and *affirms* the value of equality. Section 9(3) provides that unfair discrimination based on race is prohibited unless the discrimination is fair. And the determination of the fairness of discrimination *cannot* take place without due regard to the founding value of non-racialism.

Section 9(2), on this understanding, enables the State to engage in affirmative action on non-racial and non-sexist grounds – in other words, affirmative action for *anyone* and *everyone* who has been prejudiced by unfair discrimination.

This will, at the end of the day, still be overwhelmingly beneficial for black South Africans, but it cannot exclude white South Africans or South Africans of whatever other race who have similarly been victims of unfair discrimination.

Furthermore, this understanding of pursuing equality will ensure that it does not benefit some at the expense of others.

The allowance of government interventions based on race renders section 1(b) of the Constitution completely redundant, as it loses all meaning if government and the Constitutional Court can simply 'interpret' it as allowing such interventions.

Racial policy intervention is precluded not only by the Rule of Law principle that all must be bound by the same law, but by the very text of the Constitution itself, despite the Constitutional Court having interpreted it otherwise.

7. The economics of competition

7.1 Surreal competition policy and debate[36]

The debate about competition in South Africa has an air of scurrility about it. In South Africa, the major price increases have not come from products sold in the private sector such as the price of bread. This is not the problem; it is the cost of government controlled monopolies and costs imposed by government institutions which are the problem. These include the cost of electricity which is escalating beyond what many will be able to afford, and in many cases now exceeds the cost of accommodation. An example includes the cost of municipal services, which provide questionable value and which has long exceeded what most pensioners can afford; private firms having to compete with loss making government institutions subsidised out of taxpayers' funds. Under these circumstances, a government institution set-up to administer competition between private sector companies has a surreal air about it.

Further in the debate about competition, involving private companies operating in terms of Adam Smith's exchange economy, an issue which is completely forgotten is that the central problem facing the world today is not the few companies which operate at a profit but the large number of governments which operate at deficits. It is not profits which are the problem but government deficits. The stability of the world economic system is currently threatened by the deficits of countries such as Greece, Portugal, Spain, Italy. In addition to which can be added the United States of America and UK, all producing unmanageable deficits. These deficits threaten the stability of the banking systems of many countries, to an extent which cannot even be determined at this stage.

Under these circumstances it is odd to imagine a government attempting to manage private sector competition in a manner that will be beneficial to consumers.

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[36] This section has been reproduced from Vivian (footnote 5 above) 3-4.

7.2 Prices, consumer surplus and consumer welfare[37]

From the economic theory of competition, one could argue that the purpose of competition is, where prices are artificially manipulated, to reduce prices to the level which would be set by a competitive market. These prices tend to produce fairly low economic profits. Market prices are usually lower than the price individual consumers would negotiate. Market prices thus are beneficial to consumers; they produce a surplus for consumers; Alfred Marshall's consumer's surplus. Pigou argued the markets would also produce the greatest economic welfare; hence Bork's conclusion that the goal of government intervention can only be to maximise consumer welfare; Pigou's economic welfare. The goal of competition policy would thus be simple enough, but this is not what the Competition Act does nor is it contained within the goals set in the Act.

Competition lowers the price of goods and services to consumers. The absence of competition results in the converse, prices increase and suppliers, in the extreme, tend to make monopoly profits. Alfred Marshall, Cambridge's famous economist pointed out that many consumers[38] will be prepared to pay a higher price than the price which is competitively set. The additional price, the price between that set by the competitive market and the price actually paid, produces what he called the consumer's surplus.

The purpose of competition law should be aimed at producing the maximum consumer surplus. The consumer surplus and recognising budgetary constraints, taken together, also optimises what can be referred to as consumer welfare, from welfare economics.[39] From economic theory it can be said that the purpose of the competition policy should be to maximise consumer welfare. The purpose of competition policy should, exclusively, be maximising consumer welfare.

8. Problematic provisions in the Competition Amendment Bill

8.1 In general

South Africa's competition policy regime, built around the Competition Act, is problematic in general. It does not afford adequate respect or recognition to the economics of competition nor does it live up

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37 This section has been reproduced from Vivian (footnote 5 above) 5-6.

38 'Many' because of the operation of the law of supply and demand, as the price increases the quantity decreases. With an increase in price not all consumers will remain in the market. Consumers are also subject to budgetary constraints. As consumers are forced to spend more on some goods and services they have less to spend on others. High consumer prices may drive other goods and services out of the market.

39 Welfare economics is attributable to Marshall's successor, AC Pigou (1877-1959). Welfare economics, has made a substantial conceptual contribution is some aspects of economics but has never been successfully developed into a completely practical coherent economic theory.

to the values underlying the Constitution. It does not have clear measurable objectives, and to the extent that it does, these are contradictory. A firm can be compelled to comply with one only to find it has contravened another. It is not internally consistent, nor consistent with the rest of the legal system. The regime and Competition Act itself is flawed from the perspective of constitutionalism, good law, and economics.

8.2 Unlawful racialism

The notion of 'historically disadvantaged persons' permeates the Bill. While phrased in a way so as to appear non-racial, the term is defined in section 3(2) of the Competition Act as someone who is part of a category of persons who was discriminated against *on the basis of race* before the interim Constitution was enacted. This invariably makes the notion a racialist one, which brings the Bill into constitutionally-unsound territory. It is impossible to imagine that a firm can take action to address 'historically disadvantaged persons' without, at the same time, being accused of breaching the Act and the Constitution. So, for example, if the firm favours the 'historically disadvantaged person' by selling at a lower price, other consumers could complain of discrimination or predatory pricing or indirect predatory pricing and so on. It is unlikely the average firm has the skills to discriminate on the basis of race without being caught in an intractable minefield of conflicting provisions in a wide range of legislative and regulatory instruments.

Among others, these amended provisions include the amended section 9(3), 10(3)(b)(ii), 12A(3)(c) and (e), 43C(2), and 59(3)(a). These provisions should be removed from the Bill.

8.3 Discretionary powers

In the proposed new section 8(1)(d)(viii) the Bill provides that it would be an exclusionary act for a firm to require "a supplier to sell at an excessively low price". What is and what is not an "excessively low price" is not defined, meaning that the Commission is given unbridled discretion in determining whether a given price is "excessively" low or not. This absolute discretion without criteria or guidance falls foul of the constitutional commitment to the Rule of Law and should be removed from the Bill.

In the proposed new section 15(1)(b), the Bill gives the Competition Commission the power to "make any appropriate decision regarding any condition relating to" mergers. This discretionary power is not constrained by any objective legal criteria nor are there any guiding provisions to which the Commission should adhere when making these decisions. The same power, in essence, is given to the Competition Tribunal, an executive and not judicial body, in the proposed new section 16(3)(b). This absolute discretion falls foul of the Rule of Law and should be removed from the Bill.

In the proposed new section 21(1)(gA), the Bill gives the Commission the responsibility to "develop a policy regarding the granting of leniency to any firm", and in the proposed new section 21(1)(gB), the Bill empowers the Commission to "grant or refuse applications for leniency".

The new section 49E governs the granting of leniency. It provides in the proposed new section 49E(1) that the Commission must develop and publish a "policy on leniency, including the types of leniency that may be granted, criteria for granting leniency, the procedures to apply for leniency and the possible conditions that may be attached to a decision to grant leniency." In the proposed section 49E(2), the Bill provides that the Commission "may grant leniency, with or without conditions".

The above provisions violate the Rule of Law requirement that criteria be included in legislation to guide officials in the making of decisions. These provisions turn this on its head, and empower the officials, themselves not bound by criteria, to impose criteria on applicants for leniency. This discretionary power is absolute, meaning that any kind of ridiculous or excessively strict criteria can be imposed. The fact that the Commission may arbitrarily create different "types of leniency" further opens the door to corruption and the possibility of abuse. That leniency may also seemingly be refused on whatever grounds the Commission determines for itself is further indicative of the problematic nature of these provisions. They should be removed from the Bill.

8.4 Ambiguity and lack of clarity

In the proposed amendment to section 8(1)(a), the qualification that "an excessive price" be "to the detriment of consumers" is removed. In its place, firms are now simply prohibited from charging "an excessive price". The reasoning for this change is suspect. Government asserts that it "is not only consumers that should be protected from excessive prices, but all firms involved in commercial transactions". All firms involved in commercial transactions, however, *are consumers*. It is thus unclear why the deletion is being effected. It is, furthermore, a dangerous amendment as the Competition Commission will now be able to penalise firms for charging what it subjectively believes to be "excessive prices" even if those supposedly "excessive prices" are not to the detriment of consumers! The original version of the provision should be retained and the amendment removed from the Bill. Alternatively, as it is now proposed, a dominant firm will be prohibited from charging an excessive price, which by itself is a meaningless phrase. The stated objective of the Bill is to prevent monopoly rents (pages 9. 19, 63 and 67). It is odd, that if this is the primarily objective of the competition regime, monopoly rents do not appear anywhere in the proposed legislation. To be consistent, the new wording should prevent excessive prices which result *in monopoly profits*.

In the proposed addition of a section 8(1)(d)(iv), the Bill makes it an "exclusionary act" for a firm to buy "goods or services on condition that the seller accepts an unreasonable condition unrelated to the object of a contract". This is not explained in the Bill's explanatory memorandum. This lack of clarity on what this provision means will have inappropriate consequences if the provision is enacted. Surely a seller will not accept a "condition" if that condition is "unreasonable"? Who determines whether a condition is reasonable – the person who accepts or rejects the condition, or the Competition Commission? If the latter, the Bill fails to set out why the Commission has now been granted the authority to decide on behalf of all the parties to a contract whether the conditions in that contract are "reasonable"? In South African law, it is the ordinary courts of law which have the authority to determine the reasonableness of contractual provisions, and only if it is asserted by a party to the contract that a condition was against public policy. This provision appears to, but due to its unexplained content we cannot know if it does, grant the Commission an unreasonable amount of power to intervene in affairs which do not concern it. The provision should thus be removed from the Bill.

In the proposed amendment to section 8(1)(d)(v) the Bill introduces three new undefined phrases. It will now be an exclusionary act if a firm sells their goods or services below their "relevant cost benchmark", which includes the "average avoidable cost" or the "long run average incremental cost". Besides the fact that these terms are unclear and undefined, the provision will prohibit selling goods and services at *lower* prices – which the memorandum terms "predatory pricing". One of the beneficial consequences of competition is to drive down prices for consumers. This provision serves to undermine the nature and economics of competition. Unless clarity is introduced to this proposed provision, it should be removed from the Bill.

In the proposed new section 9(2)(a) the Bill provides that firms which can prove their price discrimination "is not likely to have the effect of preventing or lessening competition" will be excused from the prohibition on price discrimination in section 9 of the Act. It is unclear how such a standard of proof can be satisfied. How is "the effect" of "price discrimination" on "competition" measured? This lack of clarity should be addressed by including clear guidelines on how firms can go about proving something like this, or the provision should be removed from the Bill.

The proposed amendments to chapter 4A, which deals with market inquiries, are rife with unclarity.

The Bill attempts to bring about clarity by introducing a new section 43A(2), in the interpretation clause of the chapter, which provides that an "adverse effect on competition is established if any feature or combination of features of a market for goods and services prevents, restricts or distorts competition in that market".

The Bill then goes on to provide in the new section 43C(1) that the Competition Commission must decide in a market inquiry "whether any feature, or combination of features, of each relevant market for any goods or services prevents, restricts or distorts competition within that market".

The new section 43A(2), which was intended to bring clarity to the chapter, achieves the opposite. It fails to explain how competition can be "distorted", and as far as prevention and restriction of competition goes, it fails to factor in the fact that all prevention and restriction of competition is done by government, policy, and legislation, instead of other market actors. But due to the lack of clarity on what this provision means, the Competition Commission can hypothetically conclude that any market conduct either "prevents, restricts or distorts" competition. Without criteria for the Commission to adhere to in the determination of an adverse effect on competition and more clarity in the interpretation provision, these two amendments fall foul of the Rule of Law and should be removed from the Bill.

8.5 Ousting the jurisdiction of the Supreme Court of Appeal

In clause 33's proposed amendment to section 15(4), the Bill proposes the oust the jurisdiction of the Supreme Court of Appeal in favour of the Constitutional Court. It is difficult to find words strong enough to voice objection to this clause.

In the history of law, there have been hard won triumphs which contributed fundamentally to the prosperity of the modern society. These are normally lumped together as the Rule of Law. This can be broken down into constituent parts: the triumph of the English common law and the triumph of the Supreme Court. After several centuries, the United Kingdom finally removed its highest court from the legislative House of Lords to constitute it for what it is, the Supreme Court.

The common laws are laws of general application common to the entire country; in England common to the realm. Statute law, as contained in this Bill, are a violation of the common law. These are particular laws for particular problems. The common law developed because cases are presided over by ordinary judges, randomly assigned to cases, sitting in ordinary courts of the land. There is an appeal to higher courts, again applying the common law presided over by ordinary judges sitting in ordinary courts assigned randomly to cases. Specialist courts and specialist judges are an anathema. The great triumph has been the Supreme Court which has jurisdiction and final say over all matters of law.

The competition regime has been based, right from the beginning, on the objective of undermining the Rule of Law. An early proposition was that judges of the Competition Appeal Court would be economists – not highly experiences jurists, the usual requirement for judges. The court would also

not be an ordinary court of the land and would not be presided over by ordinary judges. The product is dedicated specialist judges presiding over specialist courts applying specialist laws, or, as the motivation to the Bill often states, “competition jurisprudence”. This entire system is an anathema. The Constitutional Court is not a supreme court; it is a constitutional court. Clauses 33, 34 and 35 oust the jurisdiction of the Supreme Court and foists functions of the Supreme Court onto the Constitutional Court. These provisions should be removed from the Bill.

9. Conclusion

Whenever the government interferes in the economy, it distorts prices. Instead of simply focussing on trading and trying to make a profit, firms must spend more on compliance costs and advisors to deal with legislation and regulations, which in turn means, to keep the prices of their goods and services within a range acceptable to the consumer, they end up with less money to spend on hiring more workers or increasing wages. At worst, it often means most firms need to increase their prices regardless of a market-induced desire to lower them in competition with rival firms.

There is no legitimate economic function for an agency that has been set up to improve competition, other than to remove all government-created barriers to entry into business and hindrances to more efficient methods of doing business. This would include barriers that prevent foreign firms from competing in local markets. In carrying out its deregulatory mandate, such an agency would have to pay close attention to property rights, which should be the ultimate determinant as to who should be allowed to do what with a product. Indeed, as Bork once remarked, “the exclusive goal of antitrust adjudication is the maximization of consumer welfare”, and this is only possible in an environment of economic freedom.

Prepared by:

Martin van Staden	Eustace Davie	Prof Robert W Vivian
Legal Researcher	Director	Member
Free Market Foundation	Free Market Foundation	FMF Rule of Law Board of Advisors