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ACT NO. 21 OF 2022

Competition Act, 2022

An Act to make provision for the promotion and protection of competition by establishing a Competition Commission; prohibiting certain restrictive agreements and the abuse of dominant position; establishing a system of merger control; facilitating competition advocacy; and related matters.

Enacted by the Parliament of Lesotho.

PART I - PRELIMINARY

Short title and commencement

1. This Act may be cited as the Competition Act, 2022 and shall come into operation on such a date as the Minister may, by notice publish in the Gazette.

Interpretation

2. In this Act, unless the context otherwise requires -

“agreement” means any form of agreement between enterprises which is implemented or intended to be implemented in Lesotho or in a part of Lesotho, and includes an oral agreement, a decision by an association of enterprises, or a concerted practice and part of an agreement;

“assets” means assets of an enterprise, of all kinds, including physical assets, businesses, shares and other market and financial securities, brands and intangible assets including goodwill, intellectual property rights and skills;

“bid rigging” means a horizontal agreement between enterprises where -

- (a) one of the parties to the agreement agrees not to submit a bid or tender in response to a call for bids or tenders; or
- (b) the parties to the agreement agree upon the price, terms

or conditions of a bid or tender to be submitted in response to a call for bids or tenders;

“Board” means the Board of Commissioners constituted and appointed under section 6;

“Commission” means the Competition Commission established under section 4;

“Chairperson” means the Chairperson of the Commission;

“Commissioner” means a person appointed under section 6;

“company” means a body corporate incorporated or registered in accordance with the Companies Act 2011, and includes a company incorporated or registered outside Lesotho;

“concerted practice” means a practice involving conduct or communication between competitors falling short of an actual agreement but restricting or lessening competition between them;

“confidential information” means trade, business or industrial information that belongs to an enterprise, which has an economic value and is not generally available to, or known by other enterprises;

“consumer” means a user of a product or service supplied by an enterprise in the course of business, and may be another enterprise that uses the product or service supplied as an input to its own business as well as a wholesaler, retailer and final consumer”;

“Court” means the Commercial Court;

“document” includes data or information recorded in written, electronic or any other form;

“dominant position” means a situation in which one or more enterprises possess such economic strength in a market as to make it possible for the enterprise to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors;

“enterprise” means a person or group of persons whether or not incorporated, that engages in commercial activities for the production, supply, distribution of goods or the provision of any service;

“essential facility” means an infrastructure or resource that cannot reasonably be duplicated, without access to which competitors cannot reasonably provide goods or services to their customers;

“Chief Executive Officer” means the Chief Executive Officer of the Competition Commission appointed under section 8;

“financial year” means the period beginning on the 1st April and ending 31st March;

“goods” includes buildings and other structures;

“group” in relation to an enterprise which is a company, means the company, any other company that is its holding company or subsidiary and any other company that is a subsidiary of the holding company;

“hearing” means a hearing convened by the Commission to receive representations or submissions from concerned persons and to examine the parties or other persons on matters being considered by the Commission;

“horizontal agreement” means an agreement between enterprises each of which operates, for the purpose of the agreement, at the same level of the market and would normally be actual or potential competitors in that market;

“market” in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable or otherwise competitive with the goods or services;

“Minister” means the Minister responsible for trade and industry;

“per se” in relation to a prohibited practice, means a practice prohibited in all circumstances so that it is not necessary for the Commission to demonstrate that it has anti-competitive effects;

“premises” includes land, any building, structure, vehicle, vessel, aircraft or container;

“price” includes a charge of any description;

“professional association” means the controlling body established by or registered under any law, or recognised by the Commission as fulfilling similar functions on behalf of its members, in respect of the professions specified in Schedule 2;

“published” means published in the Gazette, in a newspaper widely circulating in Lesotho or any other media platforms;

“Registrar General” means the Registrar of Intellectual Property Rights;

“Regulator” means a regulatory body or agency, or a Government department or agency, which exercises functions of prudential or economic regulation on the basis of statutory powers;

“resale price maintenance” means an agreement between a supplier and a dealer whose object or effect is directly or indirectly to fix a minimum selling price to be used by the dealer when reselling a product or service to customers;

“services” includes the carrying out and performance on a commercial basis of any engagement, whether professional or not, other than the supply of goods, but does not include the rendering of any services under a contract of employment;

“small and medium sized enterprises” means an enterprise which employs between 6 and 21 employees including the owner, with an annual turnover of less than M1,000,000.00 and an enterprise which employs between 21 and 50 employees including the owner, with an annual turnover of less than M5,000,000.00 respectively;

“subsidiary company” has the meaning given to it under the Companies Act 2011; (import definition from the companies Act);

“supply” includes, in relation to -

- (a) goods, the supply, including re-supply by way of sale, exchange, lease, hire or hire-purchase of the goods; and
- (b) services, the provision by way of sale, grant or conferment of the services; and

“vertical agreement” means an agreement between enterprises each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and relates to the conditions under which the parties may purchase, sell or resell certain goods or services.

Application of Act

3. (1) This Act -

- (a) applies to an economic activity within, or having an effect within, Lesotho; and
- (b) binds the State insofar as the State, or an enterprise owned wholly or in part by the State, engages in trade or business for the production, supply or distribution of goods or the provision of any service within a market in Lesotho that is open to participation by other enterprises.

(2) Notwithstanding subsection (1), the State is not subject to any provision relating to criminal liability.

(3) Subject to subsection (4), Part III does not apply to an agreement or conduct which relates to the protection, exercise, licensing or assignment of rights under, or existing by virtue of laws relating to copyright, design rights, patents or trademarks or other intellectual property rights.

(4) Where the Commission has reasonable grounds to believe that an agreement or conduct falling within the terms of subsection (3) involves a practice that -

- (a) is prohibited under this Act; or
- (b) involves a disproportionate restriction or prevention of competition,

it may conduct an investigation or enquiry where appropriate, and after consultation with the Registrar General, or relevant Intellectual Property Rights Office advise the Minister of any adverse effects on competition in relation to the agreement or conduct.

(5) The Minister may, after receiving the advice under subsection (4), by notice published in the Gazette, declare that the agreement or conduct in question is no longer excluded from the application of this Act.

(6) The Commission and the Registrar General, in ensuring effective co-ordination of their functions in connection with the possible anti-competitive consequences of the exercise of industrial and intellectual property rights, may enter into a memorandum of understanding or any other cooperative arrangement.

(7) This Act does not apply to the matters listed in Schedule 1.

(8) The Minister may, in consultation with the Commission, by notice published in the Gazette, provide for one or more additional exclusions in this section or in Schedule 1 or for the amendment or removal of such exclusions.

(9) Where a provision of any other law dealing with competition issues is inconsistent with the provisions of this Act, the provisions of this Act shall supersede.

PART II - COMPETITION COMMISSION

Establishment of Commission

4. (1) There is established the Competition Commission.

(2) The Commission shall be -

- (a) a body corporate capable of suing and being sued and, subject to the provisions of this Act, of performing such acts as a body corporate may by law perform; and
- (b) impartial and independent in the performance of its functions.

The Board of Commissioners

5. (1) The affairs of the Commission shall be managed by a Board of Commissioners who may exercise all the powers and perform all the duties of the Commission subject to the provisions of this Act.

(2) The Board may delegate any of its functions to the Chief Executive Officer.

(3) The Board of Commissioners shall be gender sensitive.

Composition and appointment of the Board of Commissioners

6. (1) The Board shall consist of 7 Commissioners with expertise in industry, trade, economics, law, accountancy, consumer affairs or public administration and at least one of the commissioners shall be a legal practitioner with at least 5 years practising commercial law.

(2) The Commissioners shall be appointed by the Minister by notice published in the Gazette, following an open and competitive process, managed by an independent panel convened for that purpose.

(3) The Commissioners shall, following their appointment, elect a Chairperson and a Vice Chairperson.

(4) The Minister shall cause the names of the Commissioners to be published in a Gazette.

(5) The Secretary of the Board of Commissioners shall be the Head of the Legal Division of the Commission.

Functions of the Commission

7. (1) The Commission shall -

(a) promote and protect competition;

(b) monitor, regulate, control acts or behaviour likely to adversely affect competition;

-
- (c) following an investigation referred under this Act, issue such orders or directives it deems necessary to ensure competition;
 - (d) provide persons engaged in business with information regarding their rights and duties under this Act and generally act as an advocate for competition in Lesotho;
 - (e) provide information for the guidance of consumers regarding their rights under this Act;
 - (f) undertake studies and make available to the public reports regarding the operation of the Act;
 - (g) advise the Minister on such matters relating to the operation of this Act as may be requested by the Minister, review this Act and any other legislation which inhibit fair competition and make proposals to the Minister for the amendment of such legislation;
 - (h) co-operate with regional and international bodies engaged in the enforcement of competition law and the promotion of a competition culture;
 - (i) harmonise and ensure consistent application of competition principles in all sectors;
 - (j) advise the Minister on -
 - (i) activities excluded from the operation of this Act, if it considers continued exclusion unjustifiable;
 - (ii) the actual or likely anti-competitive effects of current or proposed Government legislation or actions, including proposals to privatise publicly-owned enterprises or to dispose of publicly-owned assets, and make recommendations to the Minister, for the avoidance of the anti-competitive effects; and

- (iii) international agreements relevant to competition matters and to this Act;
- (k) do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act;
- (l) exercise strategic oversight over the activities of the Commission;
- (m) conduct hearings with parties on competition matters;
- (n) adjudicate on whether any agreement or conduct constitutes an infringement of the prohibitions set out in this Act and make necessary orders or directives;
- (o) determine, where appropriate, what penalty or remedy should be applied;
- (p) adjudicate on whether, and on what conditions an approval for a merger may be given;
- (q) effect and authorise market inquiries and determine what action is required following a market inquiry;
- (r) issue directives, guidelines and rules of procedure relating to implementation of this Act;
- (s) publish guidelines and procedural rules for hearings;
- (t) take any steps required to enforce compliance with its orders, directives or any provision of this Act;
- (u) manage the Commission's resources, including its staff, in an efficient and cost-effective way; and
- (v) investigate any conduct, act or agreement that may constitute an infringement of the prohibitions set out in this Act;
- (w) co-operate with and assist any association or body of persons to develop and promote the observation of the

standards of conduct for the purpose of ensuring compliance with the provisions of this Act;

- (x) receive the notification of a merger and gather information to facilitate the assessment of the merger;
- (y) monitor compliance with any penalty or remedy imposed by the Commission and with any other requirement of this Act; and
- (z) conduct any market inquiry.

(2) The rights and obligations of the Commission, and the performance of its functions, shall not be affected by any vacancy or any defect in the appointment of one of the Commissioners.

Powers of the Commission

8. (1) For the purposes of carrying out its functions under this Act, the Commission shall have power to -

- (a) appoint the Chief Executive Officer and such other members of staff as the Commission considers necessary for the performance of its functions under this Act;
- (b) summon and examine witnesses;
- (c) call for and examine documents;
- (d) administer oaths;
- (e) require that any document submitted to the Commission be verified by affidavit;
- (f) commence or adjourn any investigation from time to time; and
- (g) do anything relevant to the performance of its functions.

(2) The Commission may hear oral submissions from any person who, in its opinion, will be affected by an investigation under this Act, and shall so hear the person if the person has made a written request for a hearing, showing

that the person is an interested party likely to be affected by the result of the investigation or that there are particular reasons why that person should be heard orally.

(3) The Commission may require a person engaged in business or a trade or such other person as the Commission considers appropriate, to state such facts concerning services or goods manufactured, produced or supplied by the person as the Commission may think necessary to determine whether the conduct of the business in relation to the goods or services constitutes an anti-competitive practice.

(4) If the information specified in subsection (3) is not furnished to the satisfaction of the Commission, it may make a finding on the basis of the information available before it.

Tenure of office

9. (1) A Commissioner shall hold office for a period of 3 years from the date of appointment and shall be eligible for re-appointment for a period of 3 years.

(2) A Commissioner may resign by a signed notice to the Minister.

(3) The Minister may remove a Commissioner from office if the Commissioner is -

- (a) unable to perform his duties due to the inability arising from infirmity of body or mind;
- (b) convicted of a misconduct or a criminal offense;
- (c) an un-rehabilitated insolvent; or
- (d) a member of Parliament or partisan.

(4) Where a Commissioner vacates office or resigns from office before the expiry of office term, the Minister shall appoint another Commissioner under this Act and subsection (1) shall apply to that Commissioner.

Disqualification for appointment as a Commissioner

10. A person shall not be appointed as a Commissioner if he -
- (a) is a minor, or a person of unsound mind; or
 - (b) has in terms of any law in any country-
 - (i) been declared insolvent and has not been rehabilitated or discharged; or
 - (ii) made an assignment to, arrangement or composition with his creditors which has not been rescinded or set aside;
 - (iii) been convicted of fraud or any offence involving dishonesty;
 - (c) is a member of Parliament; or
 - (d) is removed from office of trust because of misconduct.

Conduct of Commissioners and disclosure of interest

11. (1) A Commissioner shall not -
- (a) engage in any activity that may undermine the integrity of the Commission;
 - (b) participate in any deliberations concerning a matter in which the Commissioner has a financial or other personal interest; or
 - (c) use any confidential information obtained in the performance of his functions as a Commissioner to procure, directly or indirectly, a financial or other advantage either personally or for any other person.
- (2) The Chairperson shall, in writing disclose to the Minister any direct or indirect financial interest which the Commissioner has or acquires in

any business carried on in Lesotho or elsewhere or in any body corporate carrying on any business in Lesotho or elsewhere.

(3) A Commissioner who has or acquires any financial or other personal interest, either directly or indirectly, in any matter which is before the Commission for discussion and determination shall -

- (a) immediately and fully disclose the interest to the Chair person; and
- (b) withdraw from any further discussion or determination by the Commission of that matter.

(4) A Commissioner who fails to comply with this section commits an offence and is liable on conviction to a fine of M50, 000 or imprisonment for a term of one and a half years or both, and may be disqualified from membership of the Commission.

Remuneration of Commissioners

12. A Commissioner shall be paid such allowances as the Minister may, in consultation with the Minister responsible for finance, determine.

The Chief Executive Officer

13. There shall be a Chief Executive Officer of the Commission who shall be appointed by the Commission through a competitive process.

(1) The Chief Executive Officer shall hold office, on such terms and conditions of employment as the Commission may determine, and shall be eligible for re-appointment.

(2) The Chief Executive Officer shall be an ex officio member of the Commission.

(3) The Chief Executive Officer shall -

- (a) subject to the direction of the Commission, be responsible for the day-to-day management of the Commission; and

-
- (b) in consultation with the Commission, be responsible for the direction of the affairs and transactions of the Commission, the exercise, discharge and performance of its objectives, functions and duties, and the general administration of the Commission;

4. A person shall not be appointed the Chief Executive officer of the Commission unless that person has -

- (a) vast experience in competition issues;
- (b) proven leadership ability;
- (c) management experience in the areas of both personnel and budget control.

Meetings of the Commissioners

14. (1) The Board shall meet once every 3 months.

(2) The Chairperson may convene a special meeting.

(3) The Board may invite any person to attend and participate, but not vote, at such a meeting.

(4) The first meeting of the Board shall be convened by the Minister and presided over by the Chairperson and subsequent meetings shall be convened by the Chairperson.

(5) The Chairperson shall preside at all subsequent meetings, and the Vice Chairperson shall preside in the absence of the Chairperson.

(6) A quorum for the meeting of the Board shall be 5 Commissioners.

(7) Decisions of the Board shall be by majority votes of Commissioners present and voting.

(8) The presiding person shall have a deliberative vote and in the case of an equality of votes, a casting vote.

(9) The Chief Executive Officer shall not vote at meetings of the Board.

(10) A resolution passed outside a meeting of the Board shall be valid if -

(a) it is signed or assented to by a majority of Commissioners; and

(b) proper notice of the proposed resolution was given to all Commissioners.

(11) Subject to this section, the Board shall determine its own rules of procedure.

Funds of the Commission

15. (1) The funds of the Commission shall consist of -

(a) amounts as may be appropriated by the Parliament;

(b) fees which the Minister may prescribe by notice published in the Gazette;

(c) grants and contributions from other sources;

(d) penalties the Commission may impose pursuant to provisions of this Act and

(e) any other fees the Commission may charge for services rendered or pursuant to provisions of this Act or the regulations.

(2) The Commission shall use the funds to perform its functions under this Act.

Annual and audit reports

16. (1) The Chief Executive Officer shall -
- (a) not more than 6 months after the end of the financial year, submit a budget for annual operations to the Minister; and
 - (b) keep proper records of accounts for operations of the Commission.
- (2) The Auditor General shall audit the books of accounts of the Commission.
- (3) The Chief Executive Officer shall, within 6 months after the end of the financial year, submit to the Minister, the Auditor's report and a report on the activities of the Commission.
- (4) The Minister shall, within 60 days of receipt of the reports, cause copies of the reports, records of accounts and the Auditor's report, to be tabled before Parliament.
- (5) After the reports have been tabled in Parliament pursuant to subsection (4), the Chief Executive Officer shall cause the reports to be published for public information.

**PART III - CONTROL OF RESTRICTIVE AGREEMENTS
AND ABUSE OF DOMINANT POSITION**

Interconnected enterprise

17. For the purpose of this part, enterprises are interconnected if one of them is a subsidiary of the other or both of them are subsidiaries of the same enterprise.

Prohibition of horizontal agreements

18. (1) A horizontal agreement is prohibited, and void, to the extent that it involves any of the following practices -

- (a) directly or indirectly fixing a purchase or selling price or any other trading conditions;
- (b) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
- (c) bid rigging, except in the circumstances described in subsection (2).

(2) Where the circumstances are such that any person requesting a bid or tender is informed of the terms of the horizontal agreement before the bid is made, the agreement referred to in subsection (1) may be permitted.

(3) Subsection (1) does not apply if parties to the agreement are interconnected enterprises.

Prohibition of vertical agreements

19. (1) A vertical agreement is prohibited, and void, to the extent that it involves resale price maintenance.

(2) Notwithstanding subsection (1), a supplier or producer may recommend a minimum resale price to the reseller of a good or a service provided that -

- (a) the supplier or producer makes it clear to the reseller that the recommendation is not binding; and
- (b) if the product has its price stated on it, the words “recommended price” shall appear next to the stated price.

(3) Subsection (1) does not apply if the parties to the agreement are interconnected enterprises.

Severability

20. Where an agreement containing provisions by which the agreement is brought within the terms of section 18(1) or 19(1) also contains other provisions, those other provisions shall not be prohibited and shall continue to have effect to the extent that they are capable of having effect in the absence of the prohib-

ited provisions.

Other horizontal and vertical agreements

21. (1) An agreement other than a horizontal or vertical agreement, between enterprises, except interconnected enterprises, is subject to prohibition if, following investigation by the Commission -

- (a) the agreement is found to have the object or effect of preventing or substantially lessening competition in a market for any goods or services in Lesotho; or
- (b) no exemption is available under this Act .

(2) Without prejudice to the general application of subsection (1), the subsection shall apply to any agreement which -

- (a) limits or controls production, market outlets or access, technical development or investment;
- (b) applies dissimilar conditions to equivalent transactions with other trading parties, which places them at a competitive disadvantage; or
- (c) makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Share of supply threshold for investigating restrictive agreements

22. (1) The Commission may carry out an investigation or enquiry into a horizontal or vertical agreement if it is satisfied that the parties to the agreement -

- (a) in the case of a horizontal agreement, together supply 20% or more, or acquire 20% or more, of goods or services of any description in a relevant market in Lesotho; or

- (b) in the case of a vertical agreement, individually supply or acquire, at either one of the two levels of the market that are linked by the agreement, 20% or more of goods or services of any description in a relevant market in Lesotho.

(2) The Minister may amend the threshold specified in subsection (1) by notice published in a Gazette.

Abuse of dominant position

23. (1) Conduct on the part of one or more enterprises is prohibited if, following investigation or enquiry by the Commission, such conduct is determined to amount to an abuse of a dominant position in a market in Lesotho.

(2) Without prejudice to the general application of subsection (1), abuse of dominance refers to any action by an enterprise or enterprises in a dominant position to prevent, restrict or distort competition or to exploit that dominance, abuse of a dominant position and includes -

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties;
- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts; or
- (e) denying access to an essential facility.

Share of supply threshold for establishing existence of dominant position

24. (1) The Commission may determine that a position of dominance exists if -

- (a) 30% or more of the said goods or services are supplied or acquired by one and the same enterprise; or
- (b) 60% or more of the said goods or services are supplied by three or fewer enterprises, or are acquired by three or fewer enterprises.

(2) Where the Commission is satisfied that a position of dominance exists in relation to the supply or acquisition of goods or services of any description in Lesotho, the Commission may carry out an investigation.

(3) The Minister may amend the threshold specified in subsection (1) by notice published in a Gazette

Assessment criteria for non-application of prohibition

25. (1) The Commission may allow or permit a prohibited horizontal or vertical agreement which substantially lessen competition where it is evident that there are offsetting benefits for the public directly attributable to the agreement or conduct or by important public policy objectives which among others may include -

- (a) maintaining or promoting exports from Lesotho;
- (b) maintaining or promoting employment in Lesotho;
- (c) promoting the competitiveness of small and medium-sized enterprises in Lesotho;
- (d) the maintenance of lower prices, higher quality or greater choice for consumers;
- (e) the promotion or maintenance of the efficient production, distribution or provision of goods and services; or

- (f) the promotion of technical or economic progress in the production, distribution or provision of goods and services,

where the restriction or lessening of competition is proportionate to the benefits for the public and does not allow the enterprise or enterprises concerned to eliminate competition completely in respect of a substantial part of the products or services in question.

(2) The Commission may also apply a block exemption to a category of agreements if it is satisfied that the agreements are unlikely to lead to a substantial lessening of competition or that one or more of the offsetting benefits specified in subsection (1) exist, or can reasonably be expected to exist, in relation to agreements in such a category.

(3) The Commission may, in determining whether an abuse of a dominant position has occurred and whether a prohibition should be applied, consider the circumstances specified in subsection (1).

Professional rules

26. (1) This section shall apply to the rules of professional associations specified in Schedule 2 to the extent that such rules have the effect of restricting competition in the context of setting professional standards or regulating the conduct of members of the profession.

(2) Where the rules of a professional association are required for the purpose of compliance with this Act, the Commission may -

- (a) conduct an investigation, using its powers, and may make an assessment of whether such rules restrict competition to a greater extent than is proportionate to the need to maintain professional standards or to regulate conduct in the profession; and
- (b) publish a report setting out its findings and making recommendations to the Minister for the requisite amendments if the Commission finds that such disproportionate restriction of competition exists.

(3) Where one of the professional associations specified in Schedule 2 makes rules for its members regarding professional standards or conduct in circumstances where such rules are not required for the purpose of compliance with this Act, the professional association in question may request the Commission to exempt such rules from the terms of section 21(1).

(4) The Commission may grant the exemption if it is satisfied that the public interest in the maintenance of professional standards and the regulation of conduct outweighs the restrictions on competition.

(5) The Commission shall keep the exemption under review and withdraw the exemption if, in the view of the Commission, the public interest is no longer served by a particular rule or rules.

(6) The Minister may, by notice published in the Gazette, add a professional association to, or remove a professional association from, Schedule 2.

Publication and revocation of exemptions

27. (1) The Commission shall publish all exemptions and non-application decisions, including any rule or rules of a professional association that are the subject of an exemption, and shall state its reasons for not applying the relevant prohibition.

(2) An individual or block exemption granted under this Act shall be subject to such conditions as the Commission thinks fit.

(3) An exemption may be revoked by a directive from the Commission if -

- (a) the information on which the exemption was based on proves to be materially incorrect;
- (b) there is a material change in circumstances regarding the exemption; or
- (c) a condition on which the exemption was granted is not complied with.

PART IV - MARKET INQUIRIES AND DETERMINATION
OF PRODUCT MARKET

Circumstances in which market inquiry may be initiated

28. The Commission may order a market inquiry where the Commission has reasonable grounds to suspect that, in the light of observed price rigidities or other circumstances, a restriction or distortion of competition may be occurring -

- (a) within a particular sector of the economy; or
- (b) within a particular type of agreement occurring across various sectors.

Powers of investigation in connection with market inquiry

29. For the purposes of a market inquiry, the Commission may invite all interested parties to submit information and may in addition exercise, in relation to enterprises deemed to be involved in the matters covered by the inquiry, all the powers of investigation conferred on the Commission by this Act.

Objective of inquiry

30. The market inquiry shall be undertaken to determine whether any -

- (a) feature, or combination of features, of each relevant sector and each type of agreement has the effect of preventing, restricting or distorting competition in connection with the supply or acquisition of any goods or services in Lesotho; and
- (b) of the offsetting benefits specified in section 25(1) apply to the sector or type of agreement on the same basis as they would have applied to a prohibited horizontal or vertical agreement or a prohibited abuse of dominant position.

Action to be taken following inquiry

31. (1) Where a market inquiry has been carried out, the Commission shall publish its findings at the conclusion of the inquiry.

(2) In the event that the Commission determines as a result of its inquiry that the adverse effects for competition specified in section 30(a) do exist in relation to a sector or a type of agreement and section 30(b) either does not apply or applies only to a limited extent, the Commission shall -

- (a) in so far as particular practices identified by the inquiry are capable of being addressed as matters falling within sections 18(1), 19(1), 21(1) or 23(1), deal with them in accordance with the provisions of this Act relating to such matters;
- (b) in so far as the adverse effects for competition cannot be remedied under this Act will deal with them under Part VII of this Act.
- (c) in so far as adverse effects for competition are the result of other legislative provisions or regulatory measures, make recommendations to the Minister for such further action, including amendments to this Act and its regulations as is required to provide an effective remedy.”.

Determination of relevant product market

32. (1) The criteria for determining the relevant product market within which the share of supply or acquisition thresholds for horizontal and vertical agreements and determination of dominant position are to be met shall be such as in any particular case appear to the Commission to be the most appropriate in the circumstances.

(2) For the purpose of establishing whether the share of supply or acquisition thresholds for horizontal and vertical agreements and determination of dominant position are satisfied, the share of the group as a whole is to be used if an enterprise -

- (a) is a subsidiary of a group; or
- (b) is otherwise party to arrangements by which enterprises are interconnected within a group.

(3) When the Commission has opened an investigation under this Act because it is satisfied that the applicable criteria for share of supply or acquisition has been fulfilled, the Commission may decide whether or not the product market used also constitutes the relevant market for the purpose of assessing the effects on competition or whether some alternative definition of the market should be substituted for this purpose.

PART V - CONTROL OF MERGERS

Definition of merger

33. (1) For the purposes of this Act, “a merger” occurs when one or more enterprises directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another enterprise.

- (2) A merger may be achieved in any manner, including -
 - (a) purchase or cession of shares or an interest in, or of assets belonging to, the other enterprise in question; or
 - (b) amalgamation, take over or other combination with the other enterprise.
- (3) A person controls an enterprise if the person -
 - (a) beneficially owns more than one half of the issued shares of the enterprise;
 - (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the enterprise, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that enterprise;
 - (c) is able to appoint or to veto the appointment of a majority of the directors of the enterprise;

-
- (d) is a holding company, and the enterprise is a subsidiary of that company as contemplated in the Companies Act of 2011;
 - (e) in the case of an enterprise being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
 - (f) in the case of the enterprise being a cooperative or association, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the cooperative or association; or
 - (g) has the ability materially to influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Reviewable mergers

34. (1) The Commission shall review -
- (a) mergers which are subject to a prior notification requirement in terms of section 35; and
 - (b) any other merger in terms of section 36.
- (2) A merger may not be implemented in Lesotho by any enterprise or enterprises unless -
- (a) the merger is approved by the Commission in accordance with the provisions of this Part;
 - (b) the merger is implemented in accordance with any conditions attached to the approval;
 - (c) the Commission has failed to make a determination in relation to a notified merger within such time frame as the Minister may prescribe by the regulations.

- (d) the merger falls below the prescribed threshold and has not been reviewed under section 36.

Requirements for the notification and thresholds

35. (1) The Commission shall recommend to the Minister the thresholds to be used for the purposes of this Part.

(2) The thresholds shall be expressed in terms of one or more of the following -

(a) the turnover in Lesotho of -

- (i) the enterprise or enterprises being taken over; or
- (ii) both or all the enterprise that are parties to the merger;

(b) the value of the assets in Lesotho, of -

- (i) the enterprise or enterprises being taken over; or
- (ii) both or all the enterprises that are parties to the merger.

(3) A merger which falls above a threshold established under this section shall be notified to the Commission prior to implementation.

(4) Different thresholds may, if appropriate, be applied to different industries or business sectors.

(5) The Minister shall, by notice, publish the thresholds in the Gazette.

(6) An enterprise that fails to notify a merger to the Commission is liable to a fine of M150,000.

Other mergers subject to review

36. (1) This section shall apply when the Commission has reasonable grounds to believe that a merger which falls below the thresholds, or is otherwise not subject to the prior notification requirement, may nonetheless merit review, if -

- (a) the merger will create a position of dominance in a localised product or geographical market;
- (b) the merger will be part of a process of gaining a dominant position incrementally through a series of acquisitions which are not individually subject to prior notification;
- (c) the consequences in Lesotho of a merger transaction concluded outside Lesotho appear to require further consideration; or
- (d) there are other competition or public interest factors which require to be considered in a particular transaction.

(2) Where subsection (1) applies, the Commission shall be entitled to -

- (a) seek information on the transaction from the parties involved and, within 7 days of verifying that information; and
- (b) require the parties, where appropriate, to submit a notification as if the merger had been subject to the prior notification requirement.

Assessment of merger

37. (1) In the assessment of the notified merger, the Commission shall -

- (a) first determine whether the merger may be expected to

result in a substantial lessening of competition within any market or markets in Lesotho for goods or services; and

- (b) take account of any factor which bears upon the broader public interest in the proposed merger, including the extent to which the merger -
 - (i) would likely result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition;
 - (ii) may improve the production or distribution of goods or the provision of services in Lesotho;
 - (iii) may promote technical or economic progress, having regard to Lesotho's development needs;
 - (iv) would maintain or promote exports from Lesotho or employment in Lesotho;
 - (v) may enhance the competitiveness of small and medium sized enterprises in Lesotho; and
 - (vi) may affect the ability of national industries to compete in international markets.

Consideration of notification by Commission

38. (1) The Commission shall appoint an inspector to investigate the notified merger and to produce a report for the Commission.

(2) The inspector shall investigate the merger bearing in mind the provisions of section 47.

Hearing in relation to a merger

39. (1) On receipt of the inspector's report, the Commission may hold one or more hearings in relation to a proposed merger.

(2) The provisions of section 52 shall apply with the same effect to a hearing in relation to a merger.

Final determination by Commission on a merger

40. (1) The Commission may, in making a determination in relation to a proposed merger -

- (a) give approval for the implementation of the merger or subject it to such conditions as it considers appropriate; or
- (b) decline to give approval to the implementation of the merger insofar as it relates to a market in Lesotho.

(2) Where conditional approval is granted, the Commission's determination may contain such directives as the Commission considers necessary, reasonable and practicable to remedy, mitigate or prevent any adverse effects of the merger.

(3) The directives under subsection (2) may, among other things, require an enterprise or enterprises, before the merger can be implemented, to-

- (a) divest such assets or a line of business within a period specified in the directive ; or
- (b) adopt, or desist from, such conduct, including conduct in relation to prices, as is specified in the directive.

(4) The Commission shall give the party or parties to whom the directives are to be addressed, the opportunity to make representations on the proposed directives before such directives are made.

(5) The Commission's final determination, including any directives, shall be communicated in writing to the parties involved in the merger, and shall be published in a newspaper widely circulating in Lesotho.

Address of concerns during consideration of merger

41. (1) One or more enterprises may offer an undertaking to the Com-

mission to address any concern that has arisen, or may be expected to arise, during the Commission's consideration of a notified merger.

(2) The Commission may make its determination in relation to the merger on the basis of such an undertaking if it is satisfied that the undertaking covers all the concerns that need to be addressed as part of the assessment under section 37.

(3) An undertaking accepted by the Commission shall have effect as if it were a directive under section 40(2), and shall be published in a newspaper widely circulating in Lesotho.

Time limits for determination of the Commission on mergers

42. (1) The Minister may, by notice published in the Gazette, set -

- (a) time limits within which each stage of merger control is to be completed; and
- (b) an overall time limit within which the Commission shall make its final determination.

(2) In the absence of such a notice, the Commission shall use its best endeavours to make its determination in an expeditious way but there shall be no default time limit for the making of the determination.

Enforcement of determinations and directives of the Commission in relation to mergers

43. (1) The Commission shall keep under close and continuous review the compliance of enterprises with its determinations and directives regarding mergers.

(2) The Commission may exercise the powers of investigation provided under this Act where the Commission has reasonable grounds to suspect that -

- (a) one or more parties to a merger provided materially in correct or misleading information when the Commission approved the merger;

- (b) one or more parties to a merger are not complying with any condition embodied in a directive allowing a merger to proceed; or
- (c) a merger has been implemented in contravention of a provision of this Part.

(3) Where the Commission finds that any of situations specified in subsection (2) has occurred or is occurring, it may, after giving the party or parties involved the opportunity to make representations, issue directives including, but not limited to, directives revoking the Commission's previous approval and requiring that the steps taken to implement a merger should be reversed so as to restore the pre-existing conditions of competition.

Application to Court in the case of non-compliance

44. (1) The Commission shall, in the event that one or more parties fail to comply with directives under section 40 (3) or if it thinks it is otherwise necessary to do so, apply to the Court for an order requiring the enterprise or enterprises to make good the default within a time specified in the order.

(2) An order under subsection (1) may provide for all of the costs of, or incidental to, the application for the order, to be borne by the enterprise in default.

Exclusion of agreements and conduct related to mergers

45. (1) An agreement giving effect to a merger or any provision directly related and necessary to the implementation of a merger, is excluded from the scope of section 18(1), 19(1) or 21(1).

(2) Conduct which results in a merger or is directly related and necessary to the implementation of a merger is excluded from the scope of section 21(1).

Compliance with other laws

46. An approval of a merger granted by the Commission under this Part does not relieve an enterprise from -

- (a) obtaining such other approvals as may be required from other bodies in the exercise of their statutory responsibilities;
- (b) complying with the provisions of any other law.

PART VI - INVESTIGATIONS

Investigation or enquiry by Commission

47. (1) The Commission may, either on its own initiative or upon receipt of information or a complaint from any person, commence an investigation or enquiry into any practice when it has reasonable grounds to suspect that -

- (a) the practice in question -
 - (i) may constitute an infringement of a per se prohibition in the terms of sections 18(1) or 19(1); or
 - (ii) is subject to prohibition after investigation or enquiry in terms of sections 21 or 23(1).
- (b) the provisions of sections 24(1) or 26(2) are satisfied.

(2) The Commission may appoint one or more inspectors to conduct the investigation and to collate the evidence and information collected during the investigation.

(3) The Commission shall, having commenced an investigation and as soon as practicable, give written notice of the investigation to every enterprise which is suspected to be a party to the practice to be investigated, and shall in the notice indicate the subject matter and the purpose of the investigation.

(4) The Commission may, simultaneously with, or following, the notice prescribed in subsection (3), by notice in writing served on any person in the prescribed manner, require that person to -

- (a) furnish to the Commission in a statement that is signed by that person or, in the case of a body corporate, by a

director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any information pertaining to any matter specified in the notice which the Commission considers relevant to the investigation;

- (b) produce to the Commission, or to a person specified in the notice to act on the Commission's behalf, any document or article, as specified in the notice, which relates to any matter which the Commission considers relevant to the investigation; or
- (c) appear before the Commission, or before a person specified in the notice to act on the Commission's behalf, at a time and place specified in the notice to give evidence or to produce any document or article specified in the notice.

(5) Further notices may be given under subsection (4) during the course of the investigation or enquiry.

(6) The Commission may in addition receive in evidence any further statement, document, information or matter that may in its opinion assist with its investigation or enquiry.

(7) The Commission may, at its discretion, publish brief details of the subject matter and purpose of the investigation once the notice or notices under subsections (3) and (4) have been issued and invite comments from any party with an interest in the practice under investigation or enquiry.

(8) If the Commission has grounds to suspect that the giving of a written notice or notices under subsection (3) and (4) may materially prejudice the exercise of its powers under section 49 it may defer the giving of such written notice or notices until the point in time when the powers under section 49 are exercised.

Decision not to investigate or enquire

48. If the Commission, having received from any person a complaint or a request to investigate a practice, decides not to conduct an investigation, it shall

in writing, within 21 working days inform that person of the reasons for that decision.

Entry and search of premises

49. (1) Where the Commission has reasonable grounds for suspecting that the written notice procedure provided for under section 47(3) will produce incomplete information or result in undue delay, the Commission may apply to a subordinate court for a warrant authorising one or more named inspectors, and such other accompanying persons as are specified in the warrant, to enter and search such premises owned, occupied or used by the parties under investigation, as are specified in the warrant.

(2) The inspectors and the other persons named in the warrant may, pursuant to a warrant issued under subsection (1), at any time during normal business hours -

- (a) enter and search any premises occupied by the enterprise or any other premises, including a private dwelling, where information or documents may be kept;
- (b) search any person on the premises if there are reasonable grounds for believing that the person has personal possession of any document or article that has a bearing on the investigation;
- (c) examine any document or article found on the premises that has a bearing on the investigation;
- (d) require information to be given about any document or article by -
 - (i) the owner of the premises;
 - (ii) the person in control of the premises;
 - (iii) any person who has control of the document or article; or
 - (iv) any other person who may have the information;

-
- (e) if documents or information are not provided, require any of the persons specified in paragraph (d) to state, to the best of their knowledge, where the documents are to be found or how the relevant information may be retrieved;
 - (f) take extracts from, or make copies of, any book or document found on the premises that has a bearing on the investigation;
 - (g) use any computer system on the premises, or request assistance from any person on the premises to use that computer system to -
 - (i) search any data contained in or available on that computer system;
 - (ii) reproduce any record from that data; and
 - (iii) seize any output from that computer for examination and copying; and
 - (h) attach, if necessary, remove from the premises for examination and safeguarding any document or article that appears to have a bearing on the investigation.

(3) In executing the warrant, the inspectors and the other persons named in the warrant may, if necessary, use reasonable force to gain entry to the specified premises.

(4) Upon entering any premises under a warrant, the inspectors shall -

- (a) provide to the owner or person in control of the premises proof of -
 - (i) their authority to enter the premises by handing a copy of the warrant to that person; and
 - (ii) their identity;

- (b) where the owner or person in control of the premises is not present, affix a copy of the warrant to the premises in a conspicuous place and proceed with the investigation or enquiry;
 - (c) provide a copy of the Commission's notices under section 47(3) and (4) or a comparable document indicating the subject matter and purpose of the investigation and the nature of the practice under investigation.
- (5) An inspector who removes anything from any premises under warrant shall -
- (a) issue a receipt for it to the owner of, or person in control of, the premises; and
 - (b) return it as soon as practicable after achieving the purpose for which it was removed.
- (6) The inspector shall, on leaving any premises which he has entered by virtue of a warrant under this section, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as they were prior to entry.
- (7) A warrant under this section continues in force until the end of the period of one month from the date on which it is granted.

Obtaining information

50. (1) The Commission shall obtain such information as it considers necessary to assist it in its investigations and, where it considers appropriate, shall examine and obtain verification of documents submitted to it.
- (2) A person who fails to furnish the Commission with information referred to under subsection (1), shall be liable to a fine of M 20,000.

Outcome of the investigation or enquiry by the Commission

51. (1) Where, upon the conclusion of an investigation or enquiry the Commission proposes to make a determination that -

- (a) the prohibition contained in section 18(1) or 19(1) has been infringed;
- (b) an agreement is subject to prohibition in terms of section 21(1) and none of the circumstances specified in section 25 apply to that agreement;
- (c) an abuse of dominant position in terms of section 23(1) has occurred or is occurring and none of the circumstances specified in section 25 apply to the case,

the Commission shall send a written notice of its proposed decision to each enterprise that may be affected by the decision.

(2) The notice referred to in subsection (1) shall -

- (a) state in detail the findings of the Commission ;
- (b) inform each enterprise that it may -
 - (i) submit written representations to the Commission; and
 - (ii) indicate whether it requires an opportunity to make oral representations at a pre-decision hearing before the Commission;
- (c) state the penalties or remedial action the Commission may apply.

PART VII - HEARINGS, REMEDIES AND PENALTIES**Main hearing before the Commission**

52. (1) The Commission may, at any time following the commencement

of an investigation, and shall if any party under investigation so requests, convene a hearing at which the Commission can hear the views of any person they consider to have a relevant interest in the case.

(2) The Commission may decline to hold a hearing requested in accordance with subsection (1) until it is satisfied that it has obtained sufficient information for the purposes of the hearing from the inspector or other officers.

Conduct of hearing

53. (1) The hearing referred to in section 52 shall be governed by, and conducted in accordance with, the rules of procedure made by the Commission and published in the Gazette.

(2) The hearing shall be -

- (a) presided by the Chairperson of the Board or, in his absence, by the Vice Chairperson; and
- (b) attended by at least 2 other Commissioners one of whom shall be a legal practitioner unless the Chairperson is a legal practitioner.

(3) The Commission may require any person to attend and give evidence at a hearing and may require that person to produce documents in his possession or control.

(4) A person attending a hearing -

- (a) may be required by the Commission to produce documents and other material; and
- (b) shall be required to give evidence under oath or affirmation.

(5) The Commission shall keep records of the hearings in such a manner as is sufficient to keep the records of the matters raised by the persons participating in the hearing.

Determination by the Commission

54. (1) Where upon the conclusion of a hearing the Commission makes a determination that -

- (a) the prohibition contained in section 18(1) or 19(1) has been infringed;
- (b) an agreement is subject to prohibition in terms of section 21(1) and none of the circumstances specified in section 25(1) apply to that agreement;
- (c) an abuse of dominant position in terms of section 23(1) has occurred or is occurring and none of the circumstances specified in section 25 apply to the case,

the Commission shall send the notice of its decision to each enterprise that may be affected by that decision.

(2) The notice referred to in subsection (1) shall -

- (a) state the reasons for the Commission's decision; and
- (b) set out the penalties or remedial action.

Pre-decision hearing

55. The provisions of section 54 shall apply to a pre-decision hearing.

Opportunity to be heard

56. The Commission shall not apply a remedy or impose a financial penalty unless the concerned enterprise -

- (a) against whom it is proposed to take the relevant action has had the opportunity to state its views at a hearing; or
- (b) has elected not to attend a hearing which it had itself requested or has failed to attend a hearing when required to do so by the Commission.

Directives

57. The Commission shall, in applying a remedy or imposing a penalty, issue a written directive or order to that effect.

Directives in respect of agreements prohibited per se and abuse of dominant position

58. (1) The Commission may issue a directive where it makes a final determination to the effect that -

- (a) an agreement falls within the prohibition under sections 18 and 19 and no exemption applies; or
- (b) the conduct of one or more enterprises constitutes abuse of dominant position under section 23.

(2) The Commission may give the enterprise or enterprises concerned such directives as are required to rectify the situation including a directive to terminate or modify the agreement in question if it is still in force.

Financial penalty for prohibited agreements

59. (1) The Commission may, in addition to, or instead of, giving a directive, make an order imposing a financial penalty on the enterprise or enterprises concerned.

(2) After consulting the Commission, the Minister shall by notice published in the Gazette, specify the maximum amount of a financial penalty that may be imposed under this section.

(3) The Commission shall issue and publish guidelines on the method it will use in calculating the level of a penalty in any particular case up to the maximum figure prescribed in the notice under subsection (2).

(4) Any order by the Commission imposing a financial penalty shall be published and the Commission shall set out its reasons, by reference to the guidelines under subsection (3), for determining the level of each penalty imposed.

(5) The Commission may not impose the financial penalty provided for in subsection (1), unless it is satisfied that the breach of the prohibition was committed intentionally or negligently.

(6) An order imposing a penalty under subsection (1) shall specify the date before which the penalty is required to be paid.

(7) The date referred to in subsection (6) shall not be earlier than the end of the period within which an appeal against the order may be brought in accordance with section 78(6).

(8) Where the penalty has not been paid and the specified date has passed and -

- (a) no appeal against the order was brought in accordance with the provisions of this Act; or
- (b) such an appeal was made but dismissed or withdrawn,

the Commission may apply to the Court for an order enforcing payment and such an order by the Court may be executed as if it were a judgment granted by the Court in favour of the Commission.

Criminal proceedings

60. (1) Where the Commission has determined that two or more enterprises have participated in an agreement that is prohibited under sections 18 and 19 and has imposed a financial penalty under section 59 (1), the Commission shall inform the Director of Public Prosecutions of its actions so that he can consider whether criminal charges should be brought against the directors of the enterprises concerned.

(2) For the purposes of any prosecution, the findings of the Commission as regards the participation of the enterprises in the prohibited agreements shall be deemed to be prima facie evidence that the directors of these enterprises had personal knowledge of and responsibility for that participation, unless the contrary can be shown.

Directives on adverse effects on competition

61. (1) The Commission shall give the enterprise or enterprises concerned such directives as it considers necessary, reasonable or practicable to remedy, mitigate or prevent -

- (a) the adverse effects on competition that the Commission has identified; or
- (b) any detrimental effects on users and consumers so far as they have resulted from, or may be expected to result from, the adverse effects on, or absence of, competition.

(2) A directive given under subsection (1) may include, but is not limited to, a requirement that the enterprise to which it is given shall-

- (a) terminate or amend an agreement;
- (b) cease or amend a practice or course of conduct including conduct in relation to prices;
- (c) observe specified conditions in relation to the continuation of an agreement or conduct;
- (d) supply goods or services, or grant access to facilities, either generally or to named parties;
- (e) separate or divest itself of any enterprise or assets; or
- (f) provide the Commission with specified information on a continuing basis.

Acceptance of undertakings

62. (1) An enterprise may offer an undertaking to the Commission to address any concern that has arisen, or may be expected to arise, prior to or during an investigation in respect of an agreement falling within the scope of section 21 or of conduct falling within the scope of section 23.

(2) The Commission may determine a case on the basis of an undertaking if it considers that the undertaking satisfactorily covers all the concerns it has over the adverse effects for competition of the agreement or conduct.

(3) An undertaking accepted by the Commission shall have effect as if it were a directive and may contain any of the remedies that the Commission is empowered to impose under section 61.

(4) An undertaking accepted by the Commission shall be published in the form of a decision of the Commission.

Enforcement of directives

63. (1) The Commission shall keep under close and continuing review the compliance of enterprises with directives from the Commission.

(2) The Commission may make a determination that there has been a failure of compliance where the Commission has reasonable grounds to believe, after considering any representations that an enterprise wishes to make, that the said enterprise -

- (a) has, without reasonable excuse, failed to comply with a directive or with any other requirement laid on it under this Act; and
- (b) has declined to comply when notified by the Commission of the actions that are needed to secure compliance.

(3) The Commission may then apply to the Court for an order requiring the enterprise to make good the default within a time specified in the order.

Determination of Interim measures

64. (1) Where the Commission, having commenced an investigation, requires more time to complete the investigation but has reasonable grounds to suspect that the practice under investigation-

- (i) may be an agreement which infringes one of the per se prohibitions provided for in section 18 or 19 ;

- (ii) may be an agreement falling within the scope of section 21; or
- (iii) may be a conduct which constitutes abuse of dominant position in terms of section 23;

the Commission may give an interim relief directive as it considers appropriate in the circumstances.

(3) The Commission may give an interim relief directive where it considers it necessary as a matter of urgency for the purpose of-

- (a) preventing serious, irreparable damage to a particular person or category of persons; or
- (b) protecting the public interest.

(4) An interim relief directive shall have effect until the Commission terminates its investigation or the Commission makes a final determination of the case, but may be replaced, if the circumstances permit or require, by a directive under section 58 or 61.

PART VIII - SETTLEMENT OF DISPUTES

Establishment of the Competition Tribunal

65. (1) There is established a Competition Tribunal which shall hear appeals submitted under Section 71 and referrals submitted under Section 72.

- (2) The Tribunal shall consist of the following members -
 - (a) a Chairperson and a Vice Chairperson who shall be a Legal Practitioner and nominated by members.
 - (b) a Legal Practitioner of the High Court, with experience of not less than 7 years, nominated by the Law Society of Lesotho and appointed by the Minister;
 - (c) 2 advocates with expertise in Competition matters one of whom shall be the secretary, appointed by the Minis-

ter; and

- (d) 2 persons who have demonstrated exemplary competence in the field of competition management appointed by the Minister in consultation with the Commission.
- “(e) The composition of the Tribunal shall be gender sensitive.”.

(3) The Minister shall by notice published in the Gazette, publish the names of the members of the Tribunal.

(4) The office of a member of the Tribunal shall become vacant -

- (a) at the expiration of five years from the date of his appointment;
- (b) if he accepts any office, the holding of which, if he were, not a member of the Tribunal, would make him ineligible for appointment to the office of a member of the Tribunal;
- (c) if he is removed from office by the Minister for failure to discharge the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour; and
- (d) if he resigns the office of a member of the Tribunal.

Functions and powers of the Tribunal

66. The Tribunal shall sit as a quasi-judicial authority to -

- (a) confirm, set aside or vary the decision of the Commission;
- (b) remit the proceedings to the Commission with such instructions for further consideration, report, proceedings or evidence as the tribunal consider necessary to give; and

- (c) make such other order as may consider just, including an order as to costs of the appeal.

Tenure of office

- 67. (a) The Chairperson, Vice-chairperson and members of the Tribunal shall hold office for a term of 5 years and shall be eligible for reappointment for a period of 5 years.
- (b) The Chairperson shall hold office for a period of 6 years.

Quorum of the Tribunal

68. For the purposes of hearing and determining any cause or matter under this Act, the Chairperson or Vice-chairperson and two members of the Tribunal shall form a quorum.

(1) A member of the Tribunal who has a direct interest in any matter which is the subject of the proceedings before the Tribunal shall not take part in the proceedings.

(2) A matter considered by the Tribunal shall be decided by the votes of the majority of the members constituting the Tribunal and voting, and the person presiding shall have a casting as well as a deliberative vote, if a point of law arising, in any proceeding before the Tribunal shall be reserved to, and pronounced upon, by the person presiding exclusively.

(3) Notwithstanding any other provision of this Act, the Chairperson of the Tribunal acting alone shall have jurisdiction to deal with temporary injunctions.

(4) Any power conferred or duty imposed by or under this Act on the chairperson may unless a contrary intention appear, be exercised or performed by the Vice chairperson of the Tribunal if -

(a) the Chairperson is unable to exercise or perform that power or duty owing to illness or absence; and

(b) the Chairperson authorises the Vice-chairperson to exercise or perform that power or duty.

Proceedings of the Tribunal

69. (1) The provisions of the Criminal Procedure and Evidence Act shall not apply to the Tribunal.

(2) The Tribunal shall, upon an application made to it in writing by any party, or a referral made to it by the Commission on any matter relating to this Act, inquire into the matter and make an award, give directions, make orders or make a decision on the matter, and every award, direction, order or decision made shall be notified by the Tribunal to the parties concerned, the Commission or any relevant committee.

(3) The Tribunal shall sit at such times and in such places as it may appoint.

(4) The proceedings of the Tribunal shall be open to the public save where the Tribunal, for good cause, otherwise directs.

(5) Except as expressly provided in this Act or any regulations made under this Act, the Tribunal shall regulate its own proceedings.

Appointment of Assessors

70. The Chairperson of the Tribunal may appoint any person with special skills or knowledge on competition matters which are the subject matter of any proceedings or inquiry before the Tribunal to act as assessors in an advisory capacity in any case where it appears to the Tribunal that such special skills or knowledge are required for proper determination of the matter.

Appeals to the tribunal

71. (1) An enterprise or person aggrieved by -
- (a) the determination of the Commission that an enterprise has or has not breached a prohibition under sections 18 (1) and 19 (1); or
 - (b) the imposition of a financial penalty by the Commission or the level of such penalty; and

- (c) any other determination, directive or decision of the Commission in respect of any competition matter under this Act or Regulations made under this Act;

may appeal to the Tribunal against the decision, determination or part of such decision or determination.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Minister or the Chief Executive Officer to make decisions, such decisions may be subjected to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal, for that purpose.

(3) An appeal shall be lodged within 14 days after the receipt of the decision, determination or directive by the Commission, and unless an appeal is lodged, the decision, determination or directive made by the Commission is final and binding.

(4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

Referrals by the Commission

72. (1) Where a dispute concerning competition arises -

- (a) among small and medium enterprises; and
- (b) between the Commission and small and medium enterprises,

it shall be referred to the Tribunal for determination.

(2) A dispute for the purpose of this Act shall include -

- (a) commercial disputes involving small and medium enterprises; and
- (b) any other dispute acceptable by the Tribunal.

Expenses of the tribunal

73. (1) The expenses of the Tribunal for the conduct of its business shall be met from the funds of the Commission.

(2) There shall be paid to the Chairperson, Vice-chairperson and the members of the Tribunal such remuneration and allowances as the Minister may, in consultation with the Commission, determine from time to time.

Appeals to the Commercial Court

74. (1) An enterprise aggrieved by a decision or order of the Tribunal may, within 30 days of such decision or order, appeal against such decision or order to the Commercial Court.

(2) A decision or order of the Tribunal may not be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined.

(3) Upon the hearing of an appeal under this Act, the Commercial Court may -

- (a) confirm, set aside or vary the decision or order in question;
- (b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the Court may deem necessary to give; or
- (c) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

Power to seek the directions of the Tribunal in complex matters

75. (1) Where a matter to be determined by the Commission under this Act appears to it to involve a point of law or to be of unusual importance or complexity, it may, after giving notice to the concerned parties, refer the matter to the Tribunal for direction.

(2) Where a matter has been referred to the Tribunal under subsection(1), the Commission and the parties to the matter may be entitled to be heard by the Tribunal before any decision is made in respect of such matter and may appear personally or be represented by a legal practitioner.

Representation

76. An enterprise which is a party to the proceedings before the Tribunal may appear on its own or be represented by a legal practitioner.

Immunity

77. (1) The Chairperson or other members of the Tribunal shall not be liable to be sued for an act done or omitted to be done or ordered to be done by them in the discharge of their duty as members of the Tribunal, whether or not within the limits of their jurisdiction; where they, at the time, in good faith, believed themselves to have jurisdiction to do or order the act complained of.

(2) It shall be an offence for an enterprise to engage in acts or make omissions amounting to contempt of the Tribunal and the Tribunal may punish such an enterprise for contempt in accordance with the provisions of this Act.

PART VIII - GENERAL PROVISIONS

Privatisation and sale of public assets

78. (1) Where the Government ministry or agency considers it necessary to -

- (a) privatise an enterprise owned by, or an activity currently undertaken by, the Government or a State authority; or
- (b) dispose of assets currently owned by the Government or a State authority through proper procurement procedures

the Commission shall be informed of the proposal and shall be given the opportunity, before any such proposal is put into effect, to assess the proposal, including any exclusivity periods, and to recommend measures to avoid or reduce the risk of consequential restrictions of competition.

(2) The Government ministry or agency shall not implement a process of privatisation or a sale of public assets until it has considered the recommendations of the Commission and has either adopted those recommendations or published its reasons for not doing so.

Relationship between Commission and regulators

79. The regulators whose relationship with the Commission is the subject of this Part shall be as set out in Schedule 3.

Memorandum of Understanding between the Commission and the Regulator

80. (1) For proper implementation and application of the provisions of this Act to regulated sectors, the Commission and the regulator shall, enter into a memorandum of understanding to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant sector, and to ensure the consistent application of the principles of this Act.

(2) The Commission may, in the context of a memorandum of understanding -

- (a) identify -
 - (i) issues which require to be addressed by a regulator with specialist skills; and
 - (ii) other regimes of competition scrutiny administered by a regulator;
- (b) make provision for the avoidance of duplication, as far as is possible, in any investigative work by the Commission in the areas covered by paragraph (a);
- (c) establish mechanisms for practical co-operation between the Commission and the regulator in the exercise of their respective responsibilities, including the use, in investigations under this Act, of the sector-specific expertise of the regulators and the appointment of staff of regulators as inspectors;

- (d) provide for the views of the relevant regulator to be sought when the Commission is considering a notified merger which involves one or more enterprises that are subject to prudential or economic regulation by that regulator.
- (3) Notwithstanding subsections (1) and (2), the Commission -
- (a) retains ultimate responsibility for determining whether the objectives of this Act are achieved in any given case; and
 - (b) is bound to apply the per se prohibitions provided for in sections 18(1) and 19(1) wherever the relevant practices are identified.

(4) In the event that a memorandum of understanding has not been concluded between the Commission and any individual regulator within a specified period prescribed by the Minister, the Minister shall, by notice published in a Gazette, determine the required relationship between the Commission and that regulator.

Market inquiry into regulated sector

81. Where the Commission is of the view that a regulatory regime is unduly restrictive of competition, it may conduct a market inquiry into the regime and advise the Minister accordingly.

Consultation on mergers

82. The Commission shall seek the views of the relevant regulator when it is considering a notified merger which involves one or more enterprises that are subject to prudential or economic regulation by that regulator.

Legal professional privilege

83. (1) Nothing in this section requires a person or an enterprise to disclose or produce information or a document if the person or enterprise would in an action in a court be entitled to refuse to disclose or produce it on the grounds of legal professional privilege.

(2) Notwithstanding subsection (1), a legal practitioner shall disclose the name and address of a client to the Commission when required to do so by the Commission in the exercise of its powers under this Act.

Limitation of liability

84. A person who is an employee or agent of the Commission shall not be liable in damages for anything done or omitted in the performance or purported performance of a function of the Commission unless it is shown that the act or omission was committed in bad faith.

Confidentiality

85. (1) A person shall not disclose confidential information with respect to a particular enterprise or the affairs of an individual that has been obtained under or by virtue of a provision of this Act while the business continues to be carried on.

(2) Subsection (1) does not apply to a disclosure of information-

- (a) made with the consent of the person carrying on the business or the individual concerned;
- (b) made in circumstances where the information is in the form of a summary or collection of information so framed as not to enable information relating to a particular person to be ascertained from it;
- (c) that is already in the public domain;
- (d) made to facilitate the performance of a function of the Commission such as giving reasons for the Commission's decisions;
- (e) made in proceedings under this Act or to facilitate performance of a function under this Act;
- (f) made in connection with the investigation of a criminal offence;

- (g) made to the competition authority of another country in connection with a request to that country for assistance in terms of the arrangements under this Act; or
- (h) to facilitate the performance of a function specified by regulations made by the Minister.

Enforcement of competition law at the request of another state

86. (1) Subject to the provisions of subsection (2), the Commission may order investigation of any matter falling within the scope of this Act, and make an appropriate determination of a case, when a competition authority duly constituted in another state requests and when that authority provides information sufficient to demonstrate reasonable grounds for belief that anti-competitive practices in Lesotho are damaging competition in that other country.

(2) Subsection (1) applies -

- (a) to requests for assistance from other members of the Southern Africa Customs Union or of the Southern African Development Community in accordance with agreed arrangements for co-operation; and
- (b) to requests by any State that Lesotho has entered into an agreement with on a basis of reciprocity, and in such cases, the Commission shall exercise the principle of comity on the basis described in subsection (1), in investigating and determining cases falling within its jurisdiction at the request of the other state party.

Claims for damages or other sums of money

87. (1) A claim for damages or other sums of money by any person or enterprise may be made -

- (a) only in respect of a breach of the prohibition contained in sections 18 and 19, relating to prohibited horizontal and vertical agreements; and
- (b) only if the breach is established by a determination of

the Commission, or following an appeal, by a judgement of the Court.

(2) The Commission shall provide the Court before which the action is brought with such information within its possession or control as the applicant reasonably requests relating to the Commission's determination.

Leniency programme

88. (1) The Commission may be lenient, where an enterprise -
- (a) voluntarily discloses the existence of a practice that is prohibited, and
 - (b) cooperates with the Commission in the investigation of the practice;

and may direct that such an enterprise shall not be subject to whole or part of a financial penalty that would otherwise be imposed under section 59.

(2) The details of the leniency programme shall be set out in the guidelines of the Commission provided for under section 89.

Guidelines and procedural rules

89. (1) The Commission shall publish -
- (a) guidelines on the economic and legal analysis to be used in assessing and determining cases under this Act;
 - (b) guidelines on the principles to be used in determining any penalty or remedy imposed under this Act; and
 - (c) procedural rules specifying the various procedures to be followed in applying the provisions of this Act.

(2) The Commission may from time to time publish revisions of the guidelines and procedural rules.

- (3) The Court shall set aside a decision or determination of the Com-

mission where there is a breach of procedural rules published under this Section unless the Court is satisfied that the breach does not affect the decision or determination made.

(4) In an appeal relating to a breach of the prohibitions in sections 18 and 19, subsection (3) is without prejudice to the power of the Court to make its own decision under this Act.

(5) In formulating and publishing procedural rules, the Commission shall have regard to -

- (a) the principles of natural justice;
- (b) the need for fairness between parties; and
- (c) subject to paragraphs (a) and (b), the need for the expeditious determination of the case.

Publication of decision

90. (1) A determination and a decision by the Commission under this Act, including any directives issued by the Commission, shall be published together with a statement of the Commission's reasons for taking the relevant action.

(2) The Commission shall, to the extent practicable, publish its reasons for taking no action in any particular case.

Appeals

91. (1) This section applies to a decision or determination that the Commission makes, and to any directive the Commission gives under this Act, other than a decision, determination or directive of a purely administrative nature not directly relevant to any enterprise.

(2) An enterprise or person aggrieved by a determination of the Commission to the effect that an enterprise has breached a prohibition under sections 18(1) and 19(1) may appeal to the Tribunal -

- (a) against the determination;

-
- (b) against all or part of any directive given by the Commission; or
 - (c) against the imposition of a financial penalty by the Commission, or against the level of such penalty.

(3) An appeal to the Tribunal may also be lodged by an enterprise or person aggrieved by a determination of the Commission to the effect that an enterprise has not breached a prohibition under section 18(1) or 19(1).

(4) An enterprise or person aggrieved by any other decision or determination by the Commission may appeal to the Tribunal against that decision or determination.

(5) On an appeal under subsections (2) (3) or (4), the Tribunal may fully review the facts and evidence on which the Commission relied -

- (a) in reaching its decision or determination;
- (b) in formulating any directives; or
- (c) in determining the amount and proportionality of any financial penalty.

(6) An appeal shall be lodged within 14 days after the receipt of the decision, determination or directive by the Commission, and unless an appeal is lodged, the decision, determination or directive made by the Commission is final and binding.

Specific grounds for appeal

92. In giving notice of an appeal lodged under section 71, the appellant shall indicate the specific points in the decision, determination or directive that are to be the subject of the appeal.

Outcome of appeals

93. (1) Where an appeal has been lodged under section 71, the Tribunal may -

- (a) confirm or set aside the decision, determination or di-

- rective that is the subject of the appeal, or any part of it;
- (b) remit the matter to the Commission for re-consideration;
 - (c) revoke, increase or reduce a financial penalty;
 - (d) give a directive of its own in substitution for that of the Commission; or
 - (e) make any other decision that the Commission would have made; and
 - (f) dismiss the appeal or quash the whole or part of the decision, determination or directive to which the appeal relates.

(2) Where it quashes the whole or part of that decision, determination or directive remit the matter to the Commission for re-consideration.

(3) The Tribunal may fully review the facts and evidence on which the Commission relied in -

- (a) reaching its decision or determination; or
- (b) formulating any directive,

determining the amount and proportionality of any financial penalty.

Effect of the appeal

94. Except in the case of an appeal against the imposition or level of a financial penalty, the lodging of an appeal under this section does not suspend the effect of the decision, determination or directive by the Commission to which the appeal relates unless the Court decides otherwise.

Offences and penalties

95. A person who -

- (a) hinders, opposes, obstructs or unduly influences any per-

on who is exercising a power or performing a duty conferred or imposed on that person by this Act;

- (b) having been required to produce information to the Commission, fails without reasonable excuse to provide that information;
- (c) having been duly summoned to attend a hearing, fails, without reasonable excuse, to attend;
- (d) being in attendance as required -
 - (i) refuses to take the oath or affirmation lawfully as required by the Commission;
 - (ii) refuses, after having taken the oath or an affirmation, to answer any question to which the Commission may lawfully require an answer or gives evidence which the person knows is false;
 - (iii) fails to produce any document or thing in his possession or under his control lawfully required by the Commission to be produced to it;
 - (iv) does anything calculated improperly to influence any Commissioner, or the Chief Executive Officer, concerning a matter connected with the exercise of any power or the performance of any function of the Commission;
 - (v) does anything in connection with an investigation that would constitute contempt of court had the proceedings occurred in a court of law; or
 - (vi) knowingly provides false information to the Commission;
- (e) contravenes section 72 (1); or
- (f) being director or officer of an enterprise and acting in

that capacity participates and enters into an agreement prohibited under this Act,

commits an offence and shall be liable on conviction to a fine of M100,000 or imprisonment of 2 years or both.

Regulations

96. (1) The Minister may, after consultation with the Commission, make regulations for the proper implementation of the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the regulations may prescribe the following -

- (a) thresholds for mergers;
- (b) fees to be paid for services of the Commission;
- (c) fees for mergers;
- (d) defining the extent of relationship between the Commission and other regulators;
- (e) exemptions or inclusions of bodies or agencies under this Act;
- (f) the method of calculating the turnover and assets of an enterprise for the purposes of the thresholds;
- (g) the form and publication of the notification for a merger threshold;
- (h) code of conduct for the staff of the Commission; and
- (i) any other matter that needs to be prescribed or regulated under this Act.

NOTE

1. Act No. 18 of 2011

GOVERNMENT NOTICE NO. 54 OF 2022

The Parliament of Lesotho

Statement of Objects and Reasons of the Competition Act, 2022

(Circulated with the authority of the Minister Responsible for trade and industry, Hon. Thabiso Molapo)

Lesotho does not currently have a legal framework which regulates issues of competition in the domestic market. Lack of regulatory framework poses a challenge as domestic market is likely to suffer from distortions created by anti-competitive practices such as predatory pricing, price gouging and refusal to deal. The Lesotho Competition Policy was therefore developed and approved back in 2007 in order to safeguard against this challenge.

In order for Lesotho Market to realise and benefit from the advantages brought about by this domestic market. The Act provides the legal basis for undistorted competition and thus a contributing to transparency and predictability in domestic market. Competition Act will serve as a strategic tool for economic development because it not only creates an environment that is attractive to both domestic and foreign investment but also ensures that the benefits from foreign direct investment are maximized. It achieves this objective assuring that foreign investors' economic activity is governed by a principle-based and internationally acceptable regulatory mechanism, which specifies what is considered to be acceptable corporate behaviour devoid of anti-competitive practices.

The Competition Act seeks to maintain a fair competition through; prohibition of agreements or practices that restrict free trading and competition between businesses, banning of abusive behaviour by our firms dominating a market or anti-competitive practices that tend to lead to such a dominant position and lastly, supervising the mergers and acquisitions of large corporations.

In line with the economic reforms that already taken place, namely privatisation and deregulation of public enterprises in Lesotho, competitiveness of firms will increase ensuring that economic gains and opportunities afforded by a free and enabling environment are maintained and provide important economic benefits to consumers as well as to industry.

The Act also seeks to establish the Competition Commission which will be an impartial and independent body corporate capable of suing and being sued. The Commission will be an overseer of all competition issues and bestowed with powers to implement the Bill.