

**THE COMPETITION BILL, 2020**  
**(Bill No. 2020)**

**(to be presented to the Minister of Commerce, Industry and Trade)**

**MEMORANDUM OF OBJECTS AND REASONS**

The object of this Bill is to increase the effectiveness, consistency, predictability and transparency in the enforcement and administration of competition law in Eswatini, give effect to regional frameworks such as COMESA Competition Regulations and international best practices and for that purpose provide for-

- (a) prevention of anti-competitive trade practices;
- (b) effective and efficient merger review and control;
- (c) coordination with sector specific regulators;
- (d) promotion of competition in the national economy;
- (e) fair trading and consumer protection
- (f) fines, penalties and sanctions;
- (g) clarification of the powers, duties and functions of the Eswatini Competition Commission;
- (h) the establishment of the Competition Tribunal;
- (i) repeal of the Competition Act, 2007; and
- (j) incidental matters.

S. M. KHUMALO

*Attorney-General*

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A BILL  
*Entitled*

**AN ACT** to protect and promote competition, fair trading and consumer protection in the economy of Eswatini and to provide for more effective, efficient and transparent enforcement of competition laws.

**ENACTED** by the King and Parliament of Eswatini.

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## PART I

### PRELIMINARY PROVISIONS

#### *Short title and commencement*

- 1. (1) This Act may be cited as The Competition Act, 2020.

(2) This Act shall come into force on a date to be appointed by the Minister by Notice in the Gazette.

### *Interpretation*

2. In this Act, unless the context otherwise requires -  
“agreement,” when used in relation to an anti-competitive practice, includes any formal, informal, written or unwritten agreement, decision, arrangement, or mutual understanding, whether or not legally enforceable;

“bid rigging or collusive tendering” includes but not limited to an agreement or concerted practice between actual or potential competitors where, in response to a tender or a request for bids –

- (a) one or more of the parties agree or concert not to submit a bid or to withdraw a bid that has been submitted;
- (b) one or more of the parties agrees or concerts to submit an artificially high bid, a bid that does not conform to contract specifications, or a bid that contains terms or conditions which make the bid likely to be rejected by the contracting authority;  
or
- (c) the parties agree or concert upon the price, terms or conditions of a bid to be submitted;

“board” are those members appointed in terms of Section 8 of the Act;

“cartel” means a horizontal agreement or concerted practice where two or more producers, sellers, distributors, traders or service providers who, amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or sale in goods or provision of services;

“commission” means the Eswatini Competition Commission established in section 5 of this Act;

“competition” shall mean fair rivalry in commercial activities or a situation in a market in which sellers of a product or service independently strive for the patronage of buyers in order to achieve a particular business objective such as profit, sales and/or market share;

“concerted practice” means deliberate or calculated cooperative or coordinated conduct between enterprises achieved through direct or indirect contact that replaces their independent action, but which does not amount to an agreement whose intention or effect is to influence certain market outcomes to the benefit of the concerting enterprises;

“confidential information” means trade, business, and proprietary information that belongs to an enterprise, has economic value to the enterprise, and is not generally available to or known by third parties;

“consumer” includes any person-

(a) to whom a service is rendered;

(b) who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production and manufacture of any other goods or articles for sale;

“court” means the High Court of Eswatini;

“document” includes information recorded in any form;

“enterprise” means a person or group of persons whether incorporated or not, that carries on a business for profit or gain involving the production, supply or distribution of goods or the provision of services, and a non-profit entity or association to the extent that the non-profit entity or association acts as a market participant;

“essential facility” means a facility or infrastructure which is necessary for reaching customers and/or enabling competitors to carry on their business, without which competitors cannot enter or participate in a market on account that it cannot be reasonably replicated due to physical, geographical, legal or economic constraints or barriers;

“Executive Director” means the Executive Director appointed in terms of section 19 of the Act;

“Horizontal Agreement” means any arrangement, conduct or practice entered into or adopted by two or more competitors;

“joint venture” means an arrangement in which two or more enterprises agree to pool their resources for a purpose of accomplishing a specific task;

“leniency” means a policy of partial or total immunity from the penalties that would otherwise be applicable to a participant in anti-competitive horizontal trade practices in return for reporting such participation, and supply of information or evidence related to the anti-competitive horizontal trade practices;

“market allocation” means an agreement between actual or potential competitors to divide markets by allocating customers, suppliers, geographic regions, territories, or specific types of goods or services;

“market inquiry” means a formal inquiry in respect of the general state of competition in a market for goods or services, without necessarily referring to the conduct or activity of a particular enterprise, in order to determine whether the process of competition is working effectively in markets as a whole;

“market power” means a position in a market in which one or more enterprises has the ability to act independently of competitors, potential competitors, suppliers, customers and consumers in its market;

“market” means a market for goods or services in Eswatini or part of Eswatini;

“member” means a member of the Board or Tribunal respectively;

“merger” has the meaning assigned to it in section 50;

“Minister” means the Minister responsible for commerce, industry or trade;

“premises” includes but not limited to land, any building, structure, vehicle, boat, aircraft or container;

“price-fixing” or “fixing of prices” means an agreement or concerted practice between actual or potential competitors to raise, lower, fix, stabilize, or otherwise determine or influence the price at which goods or services are bought or sold, and includes, agreements to eliminate discounts, establish

price floors or ceilings, adhere to price schedules, add surcharges, or limit output;

“products” or “services” when used with respect to particular products or services, include those products or services that are reasonably capable of being substituted, taking into account ordinary commercial practice and geographical, technical and temporal constraints;

“relevant market” means the market of products, which are mutually substitutable from the point of view of the consumer related to its characteristics, price, and their intended use in the area, and which are supplied and demanded by enterprises concerned in the geographic area where the competition conditions are sufficiently homogenous and which can be clearly distinguished from neighboring areas;

“resale price maintenance” means an agreement between a supplier and a dealer with the object or effect of directly or indirectly establishing a fixed or minimum price or price level to be observed by the dealer when reselling a product or service to the customers of the dealer; provided, however, that it shall not constitute resale price maintenance when a supplier or producer merely recommends a resale price to the reseller and makes clear in writing that the recommendation is not binding;

“trade practice” means any practice related to the carrying on of any trade and includes anything done or proposed to be done by any person which affects or is likely to affect the method of trading of any trader or class of traders or the production, supply or price in the course of trade of any goods, whether real or personal, or of any service;

“Tribunal” means the Competition Tribunal established in section 21 of this Act;

“Vertical Agreement” means any arrangement, conduct or practice entered into or adopted by two or more enterprises operating at different levels of the production and marketing chain.

### *Application of the Act*

3. (1) This Act applies to all economic activities whether conducted by a private or public enterprise within, or having an effect within, the Kingdom of Eswatini, to the extent that they engage in trade or business for the production, supply or distribution of goods or the provision of any service within any market in the country that is open to participation by other enterprises except if expressly excluded in this Act.

(2) If a regulatory authority, in terms of any public regulation, has jurisdiction in respect of any conduct regulated in terms of PART VIII, IX or X within a particular sector, the Commission and that authority -

- (a) must negotiate an agreement to co-ordinate and harmonise the exercise of jurisdiction over competition or unfair trading matters within the relevant industry or sector and to secure the consistent application of the principles of this Act; and
- (b) in respect of a particular matter within their jurisdictions, may exercise jurisdiction by way of such an agreement.

(3) In addition to the matters contemplated in paragraph (a) of subsection (2), an agreement in terms of that subsection must -

- (a) identify and establish procedures for the management of areas of concurrent jurisdiction;
- (b) promote co-operation between the regulatory authority and the Commission; and
- (c) provide for the exchange of information and the protection of confidential information.

(4) An agreement referred to in subsection (1) shall be published in the *Gazette*

### *Exclusions*

4. This Act shall not apply to –

- (a) activities of employees for their own reasonable protection as employees;
- (b) arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;
- (c) activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members;
- (d) trade practices which are directly and necessarily associated with the licensing of participants in certain trades and professions by agencies of the Government acting in accordance with the authority conferred on them by law;
- (e) Activities of a non-economic and social nature;
- (f) Matters related to the licensing and protection of intellectual property rights subject to abuse of market power; or
- (e) activities expressly approved or required under a treaty or agreement to which Eswatini is party.

## PART II

### ESTABLISHMENT OF THE COMPETITION COMMISSION

#### *Establishment of the Commission*

5. There is established a body to be known as the Eswatini Competition Commission, which shall be a body corporate with perpetual succession, capable of suing and being sued in its corporate name, and with power, subject to this Act, to do or perform all such acts and things as a body corporate may, by law, do or perform.

### *Independence of the Commission*

6. (1) Subject to the provisions of this Act, the Commission shall be independent of control of any person, including but not limited to any statutory body, Government or any other entity, in the discharge of its functions.

(2) The Commission shall be impartial and perform its functions without fear, favour or prejudice.

### *Functions of the Commission*

7. (1) The Commission shall monitor, regulate, control and prevent acts or behaviour which are likely to adversely affect competition and consumer welfare in the country.

(2) Without limiting the generality of subsection (1), the Commission shall perform the following functions —

- (a) investigate alleged or suspected contraventions of this Act;
- (b) refer any matters it has investigated under this Act to the Tribunal for adjudication and prosecute such matters before the Tribunal;
- (c) review and investigate mergers in respect of which it has received notification under this Act, at the request of any person, or on its own initiative;
- (d) make recommendations to the Tribunal as to whether mergers of which it receives notification under this Act should be approved with or without conditions or be prohibited, and appear before the Tribunal in connection with such mergers;
- (e) receive undertakings with respect to mergers which are notifiable or other conduct under this Act;
- (f) issue advisory opinions as provided for under this Act;
- (g) undertake studies, whether by way of a market inquiry in terms of this Act or otherwise, on the effectiveness of competition in individual sectors of the economy;
- (h) issue out a certificate of non-referral where the Commission is of the view that a matter complained against in its discretion does not raise any competition or consumer welfare concerns;
- (i) refer matters that involve criminal sanctions to the Director of Public Prosecution;
- (j) collect information for the performance of its functions;

- (k) inform and educate members of the public and persons engaged in trade or commerce about the provisions of the Act;
- (l) liaise with and exchange information, knowledge and expertise with authorities entrusted with functions similar to the Commission in other jurisdictions;
- (m) hold regular consultations with, and provide to or receive advice from, sector regulatory authorities on competition matters relating to those sectors;
- (n) for the purpose of coordinating and harmonising matters relating to competition in other sectors of the economy, enter into a memorandum of understanding with any regulator in that sector;
- (o) cooperate with and assist regional competition regulators in the enforcement of the national and regional competition law;
- (p) enter and conclude leniency, consent or settlement agreements subject to ratification by the Tribunal; and
- (q) do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act.

### PART III

#### THE BOARD OF THE COMMISSION

##### *Appointment of the Board*

8. (1) The Minister shall appoint the Board in consultation with the Cabinet Standing Committee on Public Enterprise.
- (2) The Board shall consist of -
- (a) a representative of the Ministry responsible for Commerce, Industry, and Trade;
  - (b) a representative of the Ministry responsible for Finance;
  - (c) a representative of the Ministry responsible for Economic Planning and Development;

- (d) a member nominated by the Eswatini Chamber of Commerce and Industry;
- (e) a member nominated by the Economics Association of Eswatini;
- (f) a member nominated by the Eswatini Consumers Association;
- (g) a member nominated by the Eswatini Institute of Accountants;
- (h) a member nominated by the Law Society of Eswatini;
- (i) a member appointed by virtue of their knowledge of or experience in economics, industry, law, consumer affairs or the conduct of public affairs;
- (j) the Executive Director of the Commission as an *ex-officio* member.

(3) The Minister shall designate one (1) of the members of the Board as chairperson and the members of the Board shall elect, amongst themselves, a vice-chairperson at their first meeting.

(4) A member of the Board appointed in terms of subsection (1) (a), (b) and (c) shall not be elected as chairperson or vice-chairperson.

(5) The vice- chairperson shall act as chairperson where –

- (a) the chairperson is absent or unable to perform the functions of the chairperson; or
- (b) the office of the chairperson is vacant.

#### *Tenure of office and vacancies of the Board*

9. (1) A member of the Board shall hold office for a period of not more than three (3) years and shall be eligible for a single reappointment.

(2) Members of the Board shall not be retired at the same time.

(3) At least 6 months before the expiry of a Member's tenure, a Member shall inform the Minister and the nominating institution of the pending end of tenure.

*Disqualification of members of the Board*

10. (1) The office of a member of the Board shall become vacant where the member –

- (a) resigns by giving one (1) month notice in writing to the Minister;
- (b) dies;
- (c) is absent, without valid excuse, from three (3) consecutive meetings of the Board;
- (d) becomes of unsound mind as determined by a medical practitioner;
- (e) becomes an unrehabilitated insolvent by a court of competent jurisdiction;
- (f) is guilty of failure to disclose interest in a matter which is the subject of consideration by the Board or Committee of the Board;
- (g) participates, directly or indirectly, in an activity which is in contravention of this Act;
- (h) ceases to be a member or in the employ of the nominating institution; or
- (i) has at any time been convicted in Eswatini or elsewhere of breach of competition and consumer laws, theft, fraud, perjury, corruption, white collar crime, or an act of money laundering or terrorism and is sentenced to imprisonment without an option of a fine.

(2) On vacation of office by a member, the vacancy shall be filled by a person appointed in accordance with this section.

### *Responsibilities of the Board*

11. (1) The Board shall ensure that the Commission performs its functions in a proper, efficient and effective manner and in line with corporate governance best practices.

(2) Without limiting the generality of subsection (1), the Board shall –

- (a) ensure that the Commission has effective, efficient and transparent systems of financial and risk management including internal controls;
- (b) ensure that there is effective and efficient use of resources within the Commission;
- (c) ensure that the funds and assets of the Commission are well managed and controlled;
- (d) ensure efficient and improved service delivery by the Commission;
- (e) approve the procurement system of the Commission;
- (f) approve closure, referrals, or litigation of cases under the Act

and

- (g) do anything that is incidental to the exercise of any of the best practice corporate governance and enforcement functions.

### *Board Charter*

12. (1) The Board shall cause to be published a Board Charter that shall, among other things,

- (a) provide for delegation of authority to the Executive Director;
- (b) any additional roles for the Chairperson of the Board; and
- (c) Number and nature of committees that the Board would create.

(2) Subject to the provisions of this Act, the Board shall regulate its own proceedings, taking into account matters of natural justice in all circumstances.

#### *Committees of the Board*

13. (1) The Board may, for the purpose of performing its functions under this Act, establish committees and delegate to any such committee such of its functions as it considers necessary through the Board Charter.

(2) The Board may appoint persons who are or are not members of the Board to be members of a committee appointed in terms of subsection (1), and those persons shall hold office for a period as may be determined by the Board.

(3) Subject to any specific or general direction of the Board, a committee appointed in terms of subsection (1) may regulate its own procedure.

#### *Allowances of members*

14. The members of the Board shall be paid such allowances as the Minister may, in consultation with the Minister responsible for Finance, determine.

#### *Meetings of the Board*

15. (1) The Board shall meet for the transaction of business at least once every three (3) months at such times as the chairperson may determine.

(2) A special meeting of the Board may be called by the chairperson upon written notice of not less than seven (7) days received from any member of the Board and shall be called if at least four (4) members so request in writing.

(3) Where the urgency of any particular matter does not permit the giving of a notice, in terms of subsection (2), a special meeting may be called giving a shorter notice.

(4) Five (5) members shall form the quorum of any meeting of the Board.

(5) The decision of the Board shall be by a majority of the members present and voting at the meeting and, in the event of an equality of votes, the

chairperson or other member presiding at the meeting shall have a casting vote in addition to the deliberative vote of the chairperson or that other presiding member.

(6) The chairperson shall preside at any meeting of the Board and in the absence of the chairperson, the vice-chairperson shall preside.

(7) In the absence of both the chairperson and vice-chairperson a member designated by the chairperson or a member elected by the members present and forming a quorum from among their number shall preside for the purpose of that meeting.

(8) The Board shall cause minutes of the proceedings of every meeting of the Board and of every meeting of a committee of the Board to be kept.

(9) The validity of the proceedings, act or decision of the Board shall not be affected by

- (a) any vacancy in the membership of the Board
- (b) by any defect in the appointment of any member or
- (c) by reason that any person not entitled to do so took part in the proceedings.

#### *Disclosure of interest*

16. (1) Where any member or person is present at a meeting of the Board or of any committee of the Board at which any matter which is the subject of consideration is a matter in which that member or person or the immediate family member of that member or person or the member or person's professional or business partner is directly or indirectly interested in a private or professional capacity, that member or person shall, as soon as is practicable after the commencement of the meeting, disclose such interests and unless the Board or the committee otherwise directs, that member or person shall not take part in any consideration or discussion of or vote on, any question touching on such matter.

(2) A disclosure of interest shall be recorded in the minutes of the meeting at which it is made.

#### *Immunity of members*

17. An action, suit or other proceedings shall not lie against any member of the Board in respect of any act done, in good faith, in the course of carrying out the provisions of this Act.

## PART IV

### THE COMMISSION SECRETARIAT

#### *The Secretariat*

18. The secretariat shall be the administrative and investigative arm of the Commission and shall exercise independence in relation to selection of cases for investigation or assessment under this Act.

#### *Appointment of the Executive Director*

19. (1) The Minister shall appoint the Executive Director in consultation with the Cabinet Standing Committee on Public Enterprise.

(2) The Executive Director shall -

(a) be the Chief Executive Officer of the Commission;

(b) preside over and be responsible for the day to day administration, organisation and enforcement actions of the Commission; and

(c) report to the Board

(3) The Executive Director shall, in addition, perform such duties as the Board shall assign to that office and ensure the effective administration and implementation of this Act.

(4) Without derogation from the generality of the responsibilities and duties of the Executive Director conferred in terms of subsection (2) and (3), the Executive Director shall be responsible for the day to day administration of the Commission.

(5) The Executive Director or such other officer of the Secretariat as the Executive Director may designate, shall attend meetings of the Board and of any

committee of the Board and may address such meetings, but shall not vote on any matter.

(6) Section 16 shall apply, mutatis mutandis, to the Executive Director and on such other officer as may be designated by the Executive Director.

#### *Other employees*

20. (1) The Board may appoint employees subordinate to the Executive Director on terms and conditions as it may determine, as it considers necessary for the performance of its functions and to assist the Executive Director in discharging the Executive Director's duties and responsibilities.

(2) The Board may delegate to the Executive Director the appointment of employees of junior positions as may be specified by the Board.

## PART V

### ESTABLISHMENT OF THE COMPETITION TRIBUNAL

#### *Establishment of Competition Tribunal*

21. (1) There is established a Tribunal which shall –

- (a) have jurisdiction throughout the country;
- (b) be a juristic person;
- (c) be a Tribunal of record; and
- (d) exercise its functions in accordance with this Act.

(2) The Tribunal shall consist of the following members appointed by the Minister-

- (a) a chairperson who shall be a legal practitioner of not less than ten (10) years legal experience, with demonstrable knowledge in competition law, consumer law or economics and ordinarily resident in Eswatini;
- (b) a member who shall be an expert, with experience in business and / or economics, of not less than five (5) years, who shall be the vice-

chairperson; and

(c) three other members who shall be experts, with not less than five years experience and knowledge, in matters relevant to this Act.

(3) Subject to subsection (5), a member of the Tribunal shall hold office for a period not exceeding five (5) years from the date of appointment and may be re-appointed for a further single term not exceeding five (5) years.

(4) A person shall not be appointed as a member of the Tribunal if that person -

(a) is an unrehabilitated insolvent;

(b) is insane or of unsound mind;

(c) is in lawful custody or their freedom of movement is restricted under any law in force within or outside Eswatini; or

(d) has been convicted of an offence under any law.

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

(a) the member dies;

(b) the member is absent without reasonable excuse from three (3) consecutive sittings of the Tribunal of which the member had notice;

(c) the member is removed by the Minister;

(d) the member is insolvent;

(e) the member becomes mentally or physically incapable of performing the duties of a member;

(f) the member is convicted of an offence under any law and sentenced to imprisonment for a period exceeding six (6) months; or

(g) the member ceases to practice as a legal practitioner on disciplinary grounds in the case of a member referred to in subsection (2) (a) and (c).

(6) Where a vacancy occurs in accordance with subsection (5), the Minister may appoint a new member in accordance with subsection (2), but the member shall hold office only for the remaining portion of the term.

### *Secretariat of the Tribunal*

22. (1) The Ministry responsible for commerce, industry or trade shall provide the necessary secretarial and accounting services to the Tribunal to perform its functions under this Act.

(2) The Secretariat of the Tribunal shall –

(a) be responsible for the administrative business of the Tribunal and shall, in consultation with the Chairperson act as convener and spokesperson of the Tribunal;

(b) exercise the registry functions independently, impartially and in terms of this Act.

### *Functions of the Tribunal*

23. The Tribunal shall -

(a) hear any matter referred to it by the Commission or other persons;

(b) hear any appeal made to it in terms of this Act; and

(c) perform such other functions as are assigned to it in terms of this Act or any other law.

### *Proceedings of the Tribunal*

24. (1) Three (3) members of the Tribunal shall form a quorum.

(2) Any question at a hearing of the Tribunal shall be decided by a majority of the votes of the members of the Tribunal at the sitting or meeting while the dissenting view, if any, shall also be put in writing as part of the decision.

(3) A party to a hearing of the Tribunal may be represented by a legal practitioner or, if the party so elects, by any other person or appear in person.

(4) The Tribunal may, for the purpose of any proceedings, use such assessors or experts as it may require.

(5) The Tribunal shall keep a record of its proceedings and publish each

decision.

(6) A copy of the decision of the Tribunal, including the dissenting view, if any, shall be supplied to each party to the proceedings.

*Powers of the Tribunal*

25. (1) The Tribunal may -

- (a) order the parties or either of them to produce such information as the Tribunal considers necessary for purposes of the proceedings; or
- (b) take any other course which may lead to the just, speedy and inexpensive resolution of any matter.

(2) The Tribunal may

- (a) summon witnesses,
- (b) call for the production of,
- (c) inspection of, books, documents and other things,
- (d) examine witnesses on oath, and
- (e) for those purposes, the chairperson is authorised to administer oaths.

(3) The Tribunal may issue summons for the attendance of any witness or the production of any book, document or other thing.

(4) The summons shall be signed by the chairperson and served in the prescribed manner.

(5) The Tribunal may on good cause shown and upon application by the Commission, extend any deadline for any investigation into anti-competitive trade practices or merger investigation.

(6) The Tribunal may refer matters that involve criminal sanctions to the Director of Public Prosecution.

(7) The Tribunal may, if a merger is implemented in contravention of this Act -

- (a) order a party to the merger to sell any shares, interest or other

assets it has acquired pursuant to the merger; or

- (b) declare void any provision of an agreement to which the merger was subject.

(8) The Tribunal may, in addition to or in lieu of making an order in terms of subsection (6), direct any firm, or any other person, to sell any shares, interest or assets of the firm if the prohibited practice cannot adequately be remedied in terms of another provision of this Act.

(9) An order made in terms of subsection (7) or (8) may set a time for compliance and any other terms that the Tribunal considers appropriate, having regard to the commercial interests of the party concerned.

#### *Costs*

26. (1) The Tribunal may make an order as to costs as it may consider just having regard to the merits of the matter.

(2) Subject to subsection (1) the costs and charges in connection with proceedings before the Tribunal shall be the costs reasonably incurred by the person in connection with the proceedings or such part of those costs as is determined by the Tribunal.

#### *Funding*

27. (1) The expenses and costs of the Tribunal shall be paid out of funds appropriated by Parliament for the performance of the functions of the Tribunal under this Act.

(2) The members of the Tribunal shall be paid allowances which shall be determined by the Minister in consultation with the Minister responsible for Finance.

(3) The structure, composition, terms and conditions of the secretariat of the Tribunal shall, from time to time, be determined by the Civil Service Commission.

#### *Rules of procedure*

28. (1) The Tribunal may by notice in the gazette make rules relating to -

- (a) the manner and form for lodging of any matter or appeals under this Part;
  - (b) the mode of summoning persons;
  - (c) the form and manner of service of a summons requiring the attendance of a witness before and the production of any book, record, document or thing;
  - (d) the procedure to be followed and rules of evidence to be observed in proceedings before the Tribunal; and
  - (a) the functions of the assessors and experts assisting the Tribunal.
- (2) Rules made in terms of this section may, in particular, provide -
- (a) that before any matters are brought to the Tribunal they shall, in such manner as may be provided by the rules, have been brought before, investigated and determined by the Commission;
  - (b) for securing notices for the proceedings and specifying the time and manner of the proceedings; and
  - (c) for securing that any party to the proceedings shall, if that person requires, be entitled to be heard by the Tribunal.

*Publication of orders and decisions*

29. (1) The Tribunal shall, at the conclusion of a matter, publish its conclusions and issue orders in such manner and form as it considers appropriate, provided that it shall so publish within 30 days of the conclusion of a matter.

*Appeals and operation of orders and decisions of the Tribunal*

30. (1) A person aggrieved by a decision of the Tribunal may appeal the matter to the High Court within thirty days of receipt of the Tribunal's determination

(3) Where an appeal is brought against any order, directive or decision of the Tribunal, that order, directive or decision shall remain in force pending the determination of the appeal, unless the Court otherwise orders.

PART VI

CONDUCT FOR THE COMMISSION AND THE TRIBUNAL

*Conduct of members of the Board and Tribunal*

31. The members of the Board and Tribunal, and any consultant to the Commission or Tribunal, shall not –

- (a) engage in any activity that may undermine the integrity of the respective institutions;
- (b) participate in any investigation, hearing or decision concerning a matter in respect of which that person has a direct financial interest or any similar personal interest;
- (c) make private use of, or profit from any confidential information obtained as a result of performing that person's official functions in the respective institutions; or
- (d) divulge any information referred to in section 33(c) to any third party, except as required as part of that person's official functions within the respective institution.

*Oath of secrecy*

32. Every-

- (a) member of the Board;
- (b) co-opted member of a committee of the Board;
- (c) employee of the Commission;

- (d) member of the Tribunal; and
- (e) consultant

shall, upon assumption of office, take such oath of secrecy as may be approved by the Commission or Tribunal or as may otherwise be prescribed under this Act.

*Prohibition of publication or disclosure of confidential information*

33. (1) A member of the Board or Tribunal shall not, publish or disclose to any person, otherwise than in the course of duties of that member, any confidential information which relates to, and which has come to the knowledge of that person in the course of that person's duties under this Act.

(2) An official, employee or consultant to the Commission shall not, without the written consent of the Executive Director, publish or disclose to any person, otherwise than in the course of the duties of that official, employee or consultant, any confidential information which relates to, and which has come to the knowledge of that person in the course of that person's duties under this Act.

(3) Any person who contravenes subsection (1) or (2) commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand Emalangeni (E100 000.00) or to imprisonment for a period not exceeding five (5) years.

*Conflicts of interest*

34. (1) An employee or consultant of the Commission or Tribunal who or whose immediate family member is directly or indirectly interested in a private or professional or official capacity in any matter being considered by the Commission or Tribunal, shall disclose such interest. The same shall apply, *mutatis mutandis*, to members of the Board and Tribunal.

(2) A disclosure of interest made under subsection (1) shall be made to the Executive Director or Registrar of the Tribunal who shall take such decision as the Executive Director or Registrar considers appropriate in each case.

(3) An employee, consultant and Board member of the Commission shall not represent any third party before the Tribunal.

(4) A former employee or consultant of the Commission shall not represent a third party before the Tribunal in a matter in which that former employee or consultant was actively involved while at the Commission.

(5) Where an employee or consultant of the Commission has an interest in a matter before the Tribunal that employee or consultant, shall -

- (a) immediately and fully disclose the fact and nature of that interest; and
- (b) immediately withdraw from any further involvement in that matter.

*Immunity of officials, employees and consultants*

35. An action, suit or other proceedings shall not be brought or instituted personally against an employee or consultant of the Commission or Tribunal, member of the Board or Tribunal, in respect of an act done, in good faith, in the course of carrying out of the provisions of this Act.

## PART VII

### FINANCIAL PROVISIONS

*Funds of the Commission*

36. (1) The funds of the Commission shall consist of such monies as may -

- (a) be appropriated by Parliament for the purposes of the Commission;
- (b) be obtained as a result of any fees that the Commission may charge under this Act;
- (c) be paid to the Commission by way of grants or donations;
- (d) be collected on behalf of the Commission including filing fees and penalties as are authorised by law;
- (e) be received by the Commission under subsection (2); or
- (f) otherwise vest in or accrue to the Commission.

(2) The Commission may charge and collect fees in respect of programmes, publications, seminars, documents, consultancy services and other services provided by the Commission.

(3) The Board may, subject to approval of the Minister, invest funds which it does not immediately require for the performance of its functions, in such manner as it finds appropriate.

(4) The Board may, subject to the approval of the Minister and the Minister responsible for Finance, raise, by way of loans from any source in or outside of Eswatini, such money as it may require for the discharge of its functions.

#### *Application of funds*

37. (1) There shall be paid out of the funds of the Commission -

- (a) the salaries, allowances, loan, gratuities and pensions of the staff of the Commission and other payments for the recruitment and retention of staff;
- (b) such reasonable travelling and subsistence allowances for members of any committee of the Board when engaged on the business of the Commission and at such rates as the Commission may determine;
- (c) reasonable compensation for consultants to the Commission; and
- (d) any other expenses incurred by the Commission in the performance of its functions.

#### *Financial year*

38. The financial year of the Commission shall be the same as the Government financial year.

#### *Accounts*

39. (1) The Commission shall cause to be kept proper books of accounts and other records relating to its accounts.

(2) The accounts of the Commission shall be audited annually by independent auditors appointed by the Board.

*Annual reports*

40. (1) As soon as practicable, but not later than six months after the expiry of each financial year, the Commission shall submit to the Minister a report concerning its activities during that financial year.

(2) The report referred to in subsection (1) shall be in such form as the Minister shall approve and shall include information on the financial affairs of the Commission, and there shall be appended to the report -

- (a) an audited financial statement; and
- (b) such other information as the Commission may consider appropriate or as the Minister may direct.

(3) The Minister shall lay such report before Parliament.

## PART VIII

### ANTI-COMPETITIVE TRADE PRACTICES

*Outright prohibitions of hardcore cartels*

41. An agreement between, or a concerted practice by enterprises, or a decision by an association of enterprises is prohibited if it is between parties who are competitors or potential competitors and involves any of the following practices having an effect in Eswatini –

- (a) the fixing of prices, terms or conditions of supply of any product or service;
- (b) collusive tendering or bid-rigging;
- (c) the allocation of markets;

- (d) the fixing, prevention, distortion, or restriction of sales or production of any product or service; or
- (e) collective refusal to deal in, or supply, goods or services

*Other horizontal and vertical agreements*

42. (1) Other than the prohibited conduct under section 41, enterprises shall not engage in any other horizontal agreement, where such agreements substantially prevent or lessen competition in a relevant market.

(2) An enterprise shall not enter into a vertical agreement with another independent enterprise to the extent that the agreement involves minimum resale price maintenance.

(3) Notwithstanding subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service if —

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

(4) Enterprises seeking to engage in any non-prohibited horizontal and vertical agreements under this section may apply for exemption and satisfy the requirements as provided for under section 49.

*Prohibited activities by trade associations*

43. The following practices conducted by or on behalf of a trade association are declared to be anti-competitive trade practices -

- (a) unjustifiable exclusion from a trade association of any person carrying on or intending to carry on trade in relation to which the association is formed; or
- (b) making of recommendations, directly or indirectly, by a trade association, to its members or to any class of its members which relate to -
  - (i) the prices charged or to be charged by such members or any such class of members or to the margins included or to be included in

the prices or to the pricing formula used or to be used in the calculation of those prices; or

- (ii) the terms of sale (including discount, credit, delivery and product and service guarantee terms) of such member or any class of members and which directly affects prices or profit margins included in the pricing formula.

#### *Determination of a dominant position*

44. An enterprise is dominant in a market if-

- (a) it has at least 45% of that market;
- (b) it has at least 35%, but less than 45%, of that market unless it can show that it does not have market power; or
- (c) it has less than 35% of that market but has market power.

#### *Abuse of dominance*

45. (1) Enterprises shall refrain from the following acts or behaviour if they substantially prevent or lessen competition or have or are likely to have adverse effect on trade or the economy in general —

- (a) predatory behaviour towards competitors including the use of predatory cost pricing to damage, hinder or eliminate competition;
- (b) discriminatory pricing and discrimination, in terms and conditions, in the supply or purchase of goods or services, including by means of pricing policies in transactions between affiliated enterprises which overcharge or under-charge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside affiliated enterprises;
- (c) making the supply of goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods or the provision of competing or other services;
- (d) making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier to the consignee;
- (e) imposing restrictions where or to whom or in what form or quantities goods supplied or other goods may be sold or exported;

- (f) refusals to supply goods or services to potential purchasers;
- (g) denials of access to an arrangement or association which is crucial to competition; or
- (h) excessive pricing.

*Justifications to Abuse of Dominance*

46. In determining whether an abuse of dominance has occurred, regard shall be made as to whether the conduct in question –

- (a) maintains or promotes exports from Eswatini;
- (b) advances the strategic or national interest of Eswatini in relation to a particular economic activity;
- (c) enhances the competitiveness of small and medium-sized enterprises; or
- (d) in any other way enhances the effectiveness of the Government's programmes for the development of the economy of Eswatini, including the programmes of industrial development and privatization.

*Market inquiries*

47. (1) Where the Commission has reasonable grounds to suspect that, in light of observed unfair pricing patterns, bidding patterns or other circumstances, a restriction or distortion of competition or consumer welfare is likely to occur or may be occurring -

- (a) within a particular sector of the economy; or
- (b) within a particular type of agreement occurring across various sectors, the Commission may initiate a market inquiry.

(2) The objective of an inquiry shall be to determine whether any feature, or combination of features, of each relevant sector and each type of agreement has the

effect of substantially preventing or lessening competition or consumer welfare in connection with the supply or acquisition of any goods or services in Eswatini or part of Eswatini and to achieve the purposes of this Act.

(3) The Commission shall, before the commencement of a market inquiry, publish a notice announcing the establishment of the market inquiry, setting out the terms of reference for the market inquiry and inviting members of the public to provide information to the market inquiry.

(4) For the purposes of an inquiry under this section, the Commission may invite all interested parties to submit information and may in addition exercise, in relation to enterprises considered to be involved in the matters covered by the inquiry, all the powers of investigation conferred on the Commission by this Act.

(5) The Commission shall publish its findings in full to the public, subject to protection of commercially sensitive or confidential information.

(6) On the basis of information obtained during a market inquiry, the Commission may-

- (a) initiate a complaint against any firm for further investigation;
- (b) initiate a complaint and enter into a consent agreement with any respondent in accordance with section 60 with or without conducting any further investigation;
- (c) initiate and refer a complaint directly to the Tribunal without further investigation;
- (d) take any other action within its powers in terms of this Act recommended in the report of the market inquiry;
- (e) take no further action;
- (f) make recommendations to government for changes to existing or draft laws;
- (g) make recommendations to government for changes to existing or draft policies;
- (h) advocate; and
- (i) any other remedy deemed appropriate.

*Advisory Opinions*

48. (1) An enterprise that is concerned about the anti-competitive nature of the proposed business conduct may apply to the Commission for an advisory opinion upon payment of the prescribed fee, with respect to that conduct.

(2) The requesting parties are under an affirmative obligation to make full and true disclosure with respect to the business conduct for which the opinion is requested.

(3) All parties requesting an opinion shall provide the Commission with whatever additional information or documents the Commission may thereafter request.

(4) An opinion under subsection (1) shall be available only for future conduct and is not available if a party has engaged in any of the conduct that is the subject of the request.

#### *Authorisation of Allowable Acts*

49. (1) An enterprise that desires to be exempt from conduct prohibited in this Act, may apply to the Commission for authorisation in the prescribed manner and upon payment of the prescribed fee.

(2) Subsection (1) does not apply to an agreement, concerted practice or decision that is prohibited under section 41

(3) For the purposes of reviewing an application under this section, the Commission may request additional documents and other information and may exercise all the powers conferred to it under this Act.

(4) The Commission may, after receipt of an application under subsection (1) and following such review refer the matter to the Tribunal which may -

(a) grant the application; or

(b) reject the application.

(5) The Tribunal shall grant or reject an exemption, and shall issue a decision setting forth its reasons and such exemption may be time specific.

(6) Exemptions may be granted with or without conditions, and may be modified or revoked as circumstances warrant.

(7) Exemptions may be granted for conduct or agreements that contribute to, or are likely to contribute to, or result in -

(i) maintaining or promoting exports from Eswatini;

(ii) promoting technical or economic progress; or

(iii) promoting the competitiveness of small or medium enterprises in Eswatini.

(8) Exemption authorisations may be subject to undertakings or compliance programmes contemplated under section 55.

## PART IX

### MERGER CONTROL

#### *Definition of merger*

50. (1) For purposes of this Part, a merger occurs where an enterprise, directly or indirectly, acquires or establishes control over the whole or part of the business of another independent enterprise, or when two or more independent enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses.

(2) A merger contemplated in subsection (1) may be achieved in the following circumstances -

- (a) where an enterprise purchases shares or leases assets in, or acquires an interest in, any shares or assets belonging to another independent enterprise;
- (b) where an enterprise amalgamates or combines with another independent enterprise; or
- (c) where a joint venture occurs between two or more independent enterprises.

(3) For purposes of subsection (1), control is exercised over another independent enterprise where the acquirer -

- (a) beneficially owns more than one half of the issued share capital 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;
- (e) in the case of an enterprise which is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- (f) has the ability to materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise the element of control referred to in paragraphs (a) to (e);  
or
- (g) has the ability to influence the strategic decisions of the enterprise such as the appointment of directors, and other strategic decisions which may affect the operations of the enterprise.

#### *Notifiable mergers*

51. (1) The parties to a merger that meets the thresholds prescribed in the Regulations shall notify the Commission of that merger, in the prescribed manner and form.

(2) The Commission may request additional information about a notifiable merger in accordance with the Regulations.

(3) The Commission shall complete its assessment of a proposed merger within a period not exceeding ninety (90) days from the date of receipt of a prescribed complete application thereto.

#### *Other mergers subject to review*

52. (1) The Commission may review a merger that does not meet the thresholds set forth in the Regulations if the Commission has reason to believe that the merger is likely to substantially prevent or lessen competition.

(2) The Commission may request such information as is necessary to complete an assessment of such merger.

(3) The parties to a merger under subsection (1) may not implement that merger until it has been approved, with or without conditions, by the Commission.

(4) Where a merger contemplated under subsection (1) has already been implemented, the Commission shall proceed with the assessment and determine the merger as provided for under section 53 and section 54.

#### *Assessment of Mergers*

53(1) In assessing a merger, the Commission shall primarily determine whether the merger would be likely to substantially prevent or lessen competition.

(2) The Commission may in addition, consider any factor which, the Commission considers bears upon the broader public interest in the proposed merger, including the extent to which the proposed merger —

- (a) would be likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition or;
- (b) may improve, or prevent a decline in the production or distribution of goods or the provision of services;
- (c) would be likely to affect a particular industrial sector or region;
- (d) would maintain or promote exports or employment;
- (e) may advance or enhance the competitiveness of citizen-owned small and medium sized enterprises in Eswatini.

(3) In consideration of the public interest, the Commission shall, in the event that there is any anti-competitive detriment, consider whether any of the public interest outweighs the detriment to competition.

#### *Decision of the Commission*

54(1) The Commission shall, after the completion of its investigation or assessment and consideration of any representations of the parties or other affected parties to a merger -

- (a) approve the proposed merger without any conditions;
- (b) approve the proposed merger with conditions or undertakings given by the parties to address competition and other concerns that may have arisen during the assessment of the proposed merger; or
- (c) reject the proposed merger.

(2) The parties to a merger notified in terms of this provision shall not implement that merger until it has been approved, with or without conditions, by the Commission.

### *Undertakings and Compliance Programme*

55(1) One or more enterprises may offer undertakings to the Commission 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 determinations in relation to the merger on the basis of such undertakings if it is satisfied that the undertakings sufficiently address any competition or public interest concern.

(3) Undertakings accepted by the Commission as part of the merger decision may be expressed through a formal Compliance Programme, and shall in either case, be subject to approval by the Tribunal.

## PART X

### UNFAIR TRADING PRACTICES

#### *Unfair trading*

56. (1) A person shall not, in relation to a consumer —

(a) withhold or destroy producer or consumer goods, or render unserviceable or destroy the means of production and distribution of such goods, whether directly or indirectly, with the aim of bringing about a price increase;

(b) in connection with the supply of goods or services, make any warranty —  
(i) limited to a particular geographic area or sales point;  
(ii) falsely representing that products are of a particular style, model or origin;  
(iii) falsely representing that the goods are new and or of specified age; or  
(iv) representing that products or services have any sponsorship, approval, performance and quality characteristics, components, materials, accessories, uses or benefits which they do not have;

(c) exclude liability for defective goods;

(d) engage in conduct that misleads or is likely to mislead the public as to the nature, price, availability, characteristics, suitability for a given purpose, quality of any products or services;

(e) supply any product which is likely to cause injury to health or physical harm to consumers, when properly used, or which does not comply with a consumer safety standard which has been prescribed under any written law;

(f) engage in pyramid selling of goods and services;

(g) engage in bait selling;

(h) offer gifts or prizes with no intention of supplying them; and

(i) put out an advertisement which is misleading or deceptive.

(2) Where the Commission determines that a contravention under subsection (1) has occurred and the contravenor being a micro, small and medium size enterprise has remedied the situation with the affected person or persons, the Commission shall not refer the case to the Tribunal.

(3) Where the Commission determines that an enterprise or person has contravened any of the provisions under subsection (1) with adverse effects on a class of consumers in any market in Eswatini, it shall refer the case to the Tribunal for appropriate sanctions and remedies under PART XII.

## PART XI

### INVESTIGATIONS OF SUSPECTED CONTRAVENTIONS

#### *Investigations*

57. (1) The Commission shall carry out, on its own initiative or upon a complaint, investigations in relation to any alleged or suspected contravention under the Act and determine the extent of such contravention;

(2) The Commission shall make Regulations or guidelines for procedures for all its investigations and proceedings under the Act.

#### *Powers of the Commission*

58. (1) For the purposes of carrying out its functions under this Act, the Commission, through the Executive Director, shall -

- (a) summon and examine witnesses
- (b) interview witnesses under oath;
- (c) call for and examine documents;
- (d) administer oaths;
- (e) require that any document submitted to the Commission be verified by affidavit;
- (f) adjourn any investigation from time to time; and
- (g) issue orders and directives to secure compliance with its investigatory authority.

(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 hear that person if they have made a written request for an oral submissions, showing that that 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 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 or merger.

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

### *Investigating officers*

59. (1) The Executive Director may designate an employee to be an investigating officer for the purposes of this Act.

(2) an investigating officer shall carry out their functions under this Act subject to such directions as the Executive Director may give them.

(3) The Executive Director shall ensure that every investigating officer is furnished with a certificate of appointment, which shall be exhibited by the investigating officer on demand by any interested person before carrying out any function under this Act.

*Entry and search of premises with warrant*

60. (1) An investigating officer may at all reasonable times and on the production of a search warrant obtained from the High Court -

- (a) enter any premises on or which there is reasonably suspected to be any book, record or document relating to any anti-competitive trade practice or unfair trading practice or any actual or potential merger, takeover or monopoly situation;
- (b) require any person upon the premises -
  - (i) to disclose all information at the person's disposal; and
  - (ii) to produce any book, record or document or copy thereof or extract there from, that may relate, in any way, to any anti-competitive trade practice, unfair trade practice, merger, takeover or monopoly situation referred to in paragraph (a);
- (a) make copies of or take extracts from any book, record or documents referred to in paragraph (b); and
- (b) use any computer system or other electronic components or objects on the premises or in possession of any person named in the warrant, or require assistance of any person on the premises to use such electronic systems, to-
  - (i) search any data contained in or available to that computer system;
  - (ii) reproduce any record from that data; and
  - (iii) seize any output from that computer for examination and copying; and
- (c) attach and, if necessary, remove from the premises for examination and safekeeping anything that has a bearing on the investigation.

(2) Any person who, without lawful excuse -

- (a) hinders or prevents an investigating officer from exercising any power under subsection (1);

- (b) fails or refuses to comply with any requirement of an investigating officer under subsection (1); or
- (c) upon being required under subsection (1) to disclose any information, fails or refuses to do so or provides information that is false or which that person does not believe, on reasonable grounds, to be true,

commits an offence, shall on conviction, be liable to a fine not exceeding fifty thousand Emalangeneni (E50 000.00) or to imprisonment for a period not exceeding two years or to both.

### *Entry and search of premises without warrant*

61. (1) An investigation officer who is not authorised by a warrant in terms of section 60 may enter and search premises.

(2) Immediately before entering and searching in terms of this section, the investigation officer conducting the search shall provide identification to the owner or person in control of the premises and explain to that person the authority by which the search is being conducted, and shall –

- (a) get permission from that person to enter and search the premises;  
or
- (b) believe on reasonable grounds that a warrant would be issued under section 60 if applied for, and that the delay that would ensue by first obtaining a warrant would defeat the object or purpose of the entry and search.

(3) An entry and search without a warrant may be carried out only during the day, unless doing it at night is justifiable and necessary in the circumstances.

### *Privileged information*

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

(2) If the enterprise refuses to disclose or produce information or a document in terms of subsection (1), an investigating officer accompanied by a person

designated by the enterprise, may remove the information or document from the premises to the Registrar of the High Court or such place as agreed to by the parties for safe custody until the court determines whether or not the information is privileged.

### *Leniency*

63(1) The Commission may operate a leniency policy where an enterprise that voluntarily discloses the existence of an agreement, decision or concerted practice that is prohibited under this Act, and co-operates with the Commission in the investigation of the practice, may not be subject to all or part of an administrative penalty that could otherwise be imposed under this Act.

(2) Leniency shall be subject to approval of the Tribunal

### *Consent Agreement*

64(1) The Commission may, at any time, during or after an investigation enter into a consent agreement with a person or enterprise under investigation. (2) A consent agreement shall not be binding on the parties unless made an order of the Tribunal.

### *Referral of Cases to the Tribunal*

65. (1) The Secretariat shall not refer any case to the Tribunal without the authorisation of the Board

(2) The process of referral of cases to the Tribunal shall be prescribed in the Tribunal Rules.

### *Appeals against the Commission*

66. The Commission shall have power to issue orders or directives it deems necessary to secure compliance with this Act or its decisions and any person aggrieved by a decision of the Commission made under this Act or under any regulations made hereunder may, within thirty days after the date on which a formal notice of that decision is served on that person, appeal to the Tribunal.

*Operation of Orders issued by the Commission*

67. Where an appeal is brought against any interim or final order, directive or decision of the Commission, such order, directive or decision shall remain in force pending the determination of the appeal, unless the Tribunal otherwise orders.

PART XII

OFFENCES, REMEDIES PENALTIES AND EXECUTION

*Penalties*

68. (1) The Tribunal may impose a penalty-

- (a) for a prohibited act, conduct or practice under the Act;
- (b) if a party implements a merger that is notifiable to the Commission without providing prior notification;
- (c) if a party implements a merger that is not approved by the Tribunal; or
- (d) if an enterprise contravenes, obstructs, or fails to comply with any directive or order lawfully given, or any requirement lawfully imposed under this Act; or
- (e) if a party fails to comply with conditions stated in a determination or with undertakings given as a condition of a merger approval.

(2) A penalty imposed in terms of subsection (1) may not exceed ten percent (10%) of an enterprise's annual turnover during the enterprise's preceding financial year;

(3) Notwithstanding subsection (2) for contravenes of section 41 and section 45, the Tribunal shall impose a minimum penalty.

(4) The minimum penalty -

- (a) for an enterprise that is not classified as micro, small or medium that contravenes section 41 and section 45 shall be One million Emalangeni (E1 000 000.00); and
- (b) for an individual that contravenes section 41 and section 45 shall be upto a maximum of Two hundred and fifty thousand Emalangeni (E250 000.00).

(5) Where the enterprise forms part of a single economic unit that whole economic unit will be considered for the computation of the penalty.

(6) When imposing a penalty under this section the Tribunal shall consider aggravating and mitigating factors. –

### *Criminal Sanctions*

69. (1) An enterprise that -

- (a) contravenes or fails to comply with any directive or order lawfully given, or any requirement lawfully imposed under this Act for which no fine or penalty is provided;
- (b) knowingly omits or refuses -
  - (i) to furnish any information when required to do so; or
  - (ii) to produce any documents when required to do so; or
- (c) knowingly furnishes any false information or makes a false statement to the Commission or Tribunal,

commits an offence and shall, on conviction, be liable to a fine not exceeding two hundred thousand Emalangeni (E 200 000.00) or in the case of an individual to imprisonment for a period not exceeding five (5) years or to both.

(2) If the offence is committed by a body corporate, every director of such body corporate, or if the body of persons is a firm, every partner of that firm commits an offence.

### *Interim relief*

70. (1) If the Commission on reasonable grounds believes that an enterprise has engaged, is engaging, or is proposing to engage, in conduct that constitutes or may constitute an infringement of any of the provisions of the Act and that it is necessary for the Commission to act as a matter of urgency for the purpose -

- (a) of preventing serious, irreparable damage to competition; or
- (b) of protecting consumer welfare,

the Commission may make application to the Tribunal for an interim order restraining the enterprise or enterprises from engaging in such conduct.

(2) In proceedings under this section, the standard of proof is the same as the standard of proof in the Court on a common law application for an interim interdict.

(3) An interim order granted by the Tribunal pursuant to subsection (1) is of effect until -

(a) conclusion of any proceedings or investigations instituted under this Act;  
or

(b) expiry of the period of six months beginning on the date of issue of the interim order,

whichever is the earlier.

(4) Notwithstanding subsection (3), if an assessment, investigation or hearing in connection with proceedings instituted under the Act is not concluded within six months after the date of an interim order, the Tribunal may, on good cause shown, extend the interim order for a further period not exceeding six months.

(5) An enterprise affected by an interim order that has a final or irreversible effect may appeal to the Court against that order.

### *Remedies*

71. (1) On application by the Commission or other affected person, the Tribunal shall give the enterprise or enterprises concerned such directions as the Tribunal considers necessary, reasonable or practicable.

(2) The Tribunal may, acting under subsection (1) direct the enterprise concerned to remedy, mitigate or prevent —

(a) the adverse effects on competition that the Tribunal has identified or confirmed; or

(b) any detrimental effects on users and consumers to the extent that they have resulted from, or may be expected to result from, the adverse effects on, or absence of, competition.

(3) A direction issued in terms of subsection (1) may include a requirement for the enterprise to which it is given to —

- (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) replace or supply goods or services, or grant access to facilities, either generally or to named parties;
- (e) refund affected parties or repair what is reparable;
- (f) separate or divest itself of any enterprise or assets by an-
  - (i) order to any party to an agreement such as a merger to sell any shares, interest or other assets it has acquired pursuant to the merger;
  - (ii) declare void any provision of an agreement to which any contentious outcome is subject; or
- (g) provide the Commission with specified compliance information in a determinable period.

### *Damages*

72. (1) A person or enterprise seeking an award of damages allegedly suffered as a result of an infringement by another person or enterprise of any provision of this Act may apply to the Tribunal in the prescribed form certifying -

- (a) that the conduct on which the action is based has been found by the Tribunal, following proceedings instituted under the Act, to be an infringement under the Act, and stating the date of that finding; or
- (b) that a consent agreement was confirmed by the Tribunal in relation to the conduct on which the action is based, and that no award for damages was

provided for in that agreement for the benefit of the plaintiff, and stating the reasons therefor; or

- (c) that the Commission, having received a complaint or a request to investigate an alleged infringement of a stated provision in the Act in respect of the conduct on which the action is based, has in terms thereof decided not to conduct an investigation, and stating the reasons for the Commission's decision.

(2) A person or enterprise who has suffered damage as a result of an infringement in any part of this Act shall not commence an action at the Tribunal or in any court for an award of damages or for the assessment of damages if that person has been awarded damages in a consent agreement confirmed by the Tribunal.

#### *Execution against property of the Commission*

73. Notwithstanding anything contrary contained in any written law, where a judgment or order has been obtained against the Commission, no execution or attachment, or process of any nature, shall be issued against the Commission or against the property of the Commission, but the Executive Director shall cause to be paid out of the revenue of the Commission such amounts as may, by the judgment or order, be awarded against the Commission to the person entitled to the amounts.

### PART XIII

#### GENERAL PROVISIONS

#### *Review, rescission or variation of decisions*

74. (1) The Commission or the Tribunal may, at the instance of any affected party, review, rescind or vary their decisions, which are not a subject of appeal, in the following circumstances:

- (a) where any directive, decision or determination granted by it was void *ab origine* or was obtained by fraud or by mistake common to the parties;
- (b) to correct patent errors in any directive, decision or determination;

(c) where evidence that is relevant but was not reasonably available at the time of the Commission or Tribunal decision has been found, which evidence is material to the case.

(2) Any review, rescission or variation of any directive, decision or determination shall only be considered by the Commission or Tribunal within 30 days after delivery of a formal written decision to the parties to a matter that was handled by the Commission or Tribunal.

(3) On application by the Commission or other affected parties, the Tribunal may revoke an authorized merger or exemption if -

- (a) the authorization was based on materially incorrect or misleading information for which a party to a merger or exemption is responsible;
- (b) a material condition attached to the authorization was not complied with by any of the merger or exemption parties;
- (c) changes in the enterprise or market conditions are such that the authorization is no longer appropriate; or
- (d) it becomes evident that the authorization was improvidently granted.

(4) Prior to revoking a merger or exemption authorization, Tribunal shall provide the holder of the authorization with notice and an opportunity to be heard.

*Bilateral, regional or other enforcement actions falling under the Act*

75. (1) Where the Commission, by virtue of commitments entered into at bilateral, regional or any other such arrangements by the country or the Commission itself, is seized with a matter it is empowered to handle, where such matter is also dealt with by any bilateral, regional or other multilateral treaty or arrangement, such matter shall be dealt with in accordance with –

- (a) the bilateral, regional or other multilateral treaty or arrangement as domesticated in Eswatini; or
- (b) any memorandum of understanding or agreement that the Commission may have entered into at bilateral, regional or multilateral level.

(2) Where there are conflicts of interest or inconsistencies in operational bilateral, regional or other multilateral treaties or arrangements, the Commission shall timeously seek the guidance of the Minister on the best option available, taking into consideration –

- (a) the overall policy direction of the country;
- (b) what would be the most efficient and effective treaty or arrangement to comply with in a given situation; and
- (c) what would be in the best public interest.

(3) Pursuant to subsection (2), the Minister shall provide the Commission with a formal and written position within seven (7) days of receipt of the request from the Commission, failure to which the Commission shall determine a course of action taking into account the same factors in subsection (2)

#### *Disclosure of information*

76. (1) An enterprise which seeks to have access to information that is subject to confidentiality claims may apply to the Tribunal and the Tribunal may –

- (a) determine whether or not the information is confidential information; and
- (b) if it finds that the information is confidential, make any appropriate order concerning access to that confidential information.

(2) From the time information comes into the possession of the Commission or Tribunal until a final determination has been made concerning it, the Commission and Tribunal shall treat as confidential, any information that –

- (a) the Tribunal has determined is confidential information; or
- (b) is the subject of a claim in terms under this section.

(3) Once a final determination has been made concerning any information, it is confidential only to the extent that it has been determined to be confidential information by the Tribunal.

### *Restricted use of information*

77.(1) When publishing a decision made in terms of this Act, the Commission, subject to subsection (2), may in publishing the decision take confidential information into account.

(2) If the publication of the reasons for the decision would reveal any confidential information, the Commission shall provide a copy of the decision to the party concerned at least 10 business days before publishing the decision.

(3) Where the Commission considers that the information is not confidential *per se*, a party may apply to the Tribunal within the period contemplated in subsection (2) after receiving a copy of the proposed reasons, subject to its rules, for an appropriate order to protect the confidentiality of the relevant information.

(4) If the reasons of the Commission for the decision would reveal any confidential information, the Commission shall provide a copy of the decision to the party concerned at least ten (10) business days before publishing the reasons.

(5) If a party applies to the Tribunal in terms of subsection (4), the Commission may publish the decision without the assumed confidential information and await for the Tribunal or the High Court order regarding the matter.

### *Protection of Complainants and witnesses*

78. An enterprise which is a party in a matter before the Commission and Tribunal which directly or indirectly intimidates, threatens, harasses, or in any manner victimises a complainant or witness commits an offence and shall on conviction be liable to a fine not exceeding one million Emalangeni (E1 000 000.00) or in the case of an individual to imprisonment for a period not exceeding ten (10) years or both.

### *Regulations and Guidelines*

79. (1) The Minister may, on the advice of the Commission, make Regulations to effect the provisions of this Act, such Regulations may provide for -

- (a) matters required to be prescribed under or for the purposes of this Act including penalty setting procedures for infringements of this Act;
- (b) forms required for the purposes of this Act;
- (c) fees payable in respect of any service provided by the Commission;

- (d) the prescription of levies which the Commission may impose in respect of its services; and
  - (e) any other matters considered necessary or expedient by the Minister or Commission in order to achieve the objectives of this Act.
- (2) The Commission may make guidelines for the better carrying out of its functions under the Act, which may include but not limited to those relating to competition, merger, exemption or other investigations and assessments.

### *Transitional Provisions*

80. (1) The Competition Commission established under the repealed Act shall continue to exist as if established under this Act.

(2) Notwithstanding section 81, all decisions, actions and orders of the previous Commission shall remain in full force and effect.

(3) Anything lawfully done under the repealed Act shall be continued under the provisions of this Act.

(4) Any Regulations made under the repealed Act shall continue, with such modifications as may be required to be in conformity with this Act, to be in force until repealed.

### *Repeal*

81. The Competition Act No. 8 of 2007 is repealed.