Opening Remarks by Commissioner Tembinkosi Bonakele

On the occasion of the ICN Unilateral Conduct Working Group Workshop

1 November 2018

Minister of Economic Development, Ebrahim Patel,

Judge President of the Competition Appeal Court of South Africa, Dennis Davies,

Fellow Core-chairs of the working group, the competition authorities of Italy and Australia,

Members of the Competition Tribunal of South Africa,

Dear Guests and colleagues,

Ladies and gentlemen,

It gives me great pleasure to welcome you to Stellenbosch for the International Competition Network's Unilateral Conduct Workshop for 2018. This workshop brings together 163 delegates from 34 countries across 6 continents as well as representatives from three multilateral bodies, the United Nations, the OECD, and the European Commission. It is a testament to the continued importance of the work of the ICN, now in its 17th year of existence; that this workshop brings together so many participants from all over the world to the southern tip of Africa. The ICN remains the pre-eminent global network of competition agencies and non-governmental actors, and forums such as these are critically important in building capacity, sharing insight and advancing best practice in the

application of competition law across the globe. I want to especially welcome participants from across our continent. South Africa plays a key role in the evolution of competition policy in the continent, and has last moth been retained as the chair of the African Competition Forum.

The Unilateral Conduct Workshop takes place at a time when there is renewed focus in South Africa on the issues of concentration and transformation of the South African economy. This year, 2018, marks twenty years of competition law in South Africa. It is an opportune time to reflect not only on the successes of competition law enforcement, but also on how competition enforcement can be optimised, and whether there is a need to re-design the legal framework in order to achieve the desired objectives of more competitive, efficient, and inclusive markets for all South Africans. These debates are occurring in the context of the Competition Amendment Bill which is making its way through the parliamentary process and is spearheaded by the honourable Minister Ebrahim Patel who will be addressing us shortly.

Over the past twenty years, we have established strong competition authorities and have achieved notable successes. We have finalised more than six thousand two hundred (6200) mergers[1] and have investigated

[1] According to Annual Reports from 1999/00 – 2017/18, 6272 merger cases have been finalised

nearly one thousand (1000) cartel cases[2]; more than half of which were received as a result of our successful corporate leniency policy. We are seen as a leading jurisdiction in the assessment of public interest in our merger regime and the design of innovative remedies to protect employment, increase competition, reduce barriers to entry and promote transformation.

However, the numbers show that there are significant challenges in successfully prosecuting unilateral conduct. Since 1998, the Competition Tribunal has considered a total of 25 unilateral conduct cases and 1 case, the excessive pricing of antiretroviral medication, was settled prior to reaching the Tribunal. Of the 25 cases brought before the Tribunal, 8 were consent orders; 10 contested cases were brought by the Commission and 7 cases were self-referred by private parties. In the 10 contested cases brought by the Commission, the Competition Tribunal found that the Act had been contravened in 8 cases, 2 of which were overturned by the Competition Appeal Court. Of the 6 cases in which the finding of a contravention thus stood, 4 were against current state-owned companies (SAA and Telkom) and the other two were against firms in agricultural markets.

[2] Total of 976 new cases. 433 initiations (both by the Commission and complaints from the public) and 543 CLPs

Of the 7 cases self-referred by private parties to the Tribunal, a positive finding of a contravention was made in only 2 cases, one of which was overturned by the Appeal Court (Nationwide Poles) and the other (Mittal) was remitted back to the Tribunal and subsequently settled privately.

The amendments were developed against the backdrop of this difficult enforcement history and much public debate about the extent to which the standards and tests set out in the current Act constrain effective enforcement. The Amendment Bill places renewed focus on how competition authorities can effectively address concentration and anticompetitive conduct of large firms to ensure that current and future competitors have an equitable opportunity to compete. The intention is to reinvigorate the South African economy and ensure that we have the competitive dynamism we need to put South Africa on a new and inclusive growth path.

Extensive research conducted by the Competition Commission and the World Bank shows that concentration has indeed remained stubbornly high across all key sectors of the South African economy. In these circumstances, it is clear that anticompetitive unilateral conduct should remain one of the core focus areas of the Competition Commission.

South Africa is also not unique in this regard. In many developing countries with smaller markets, dominance may be more widespread – sometimes for completely understandable reasons such as economies of scale. This dominance is, of course, not a *per se* concern. But, it is incumbent upon competition authorities to continuously evaluate whether dominance is maintained through pro-competitive activity that delivers value to consumers, or whether it is maintained through exclusionary and exploitative conduct that undermines rivalry and raises barriers to entry. In jurisdictions with a longer history of competition enforcement, we have also seen continued focus on the behaviour of large firms, particularly in the technology sector where the interface between dominance, competition, privacy and personal data has increasingly come under focus, such as in cases against Google and Facebook. In BRICS we have set up a high level panel on digital markets. The panel will be led by Professors Eleanor Fox and Joseph Stiglitz. The panel will include other prominent academics and will be a fulcrum of competition policy for emerging economies and developing countries.

To ensure that markets are open to fair and effective competition, we must strengthen the ability of competition authorities to detect, investigate and effectively prosecute anticompetitive conduct, including exclusionary and exploitative conduct by large firms. This is why this

workshop has an explicit focus on practical, case-study based application of theoretical concepts and principles to assess unilateral conduct. We have the benefit of panel discussions by leading practitioners in competition law during the plenary sessions. These are followed by practical sessions in which delegates will debate and apply the theory to cases. This will ensure that we benefit from the case experience of all those present here.

The workshop will cover four key topics in Unilateral Conduct. On day 1 we will focus on excessive pricing and predatory pricing. On day 2, we will consider exclusive dealing arrangements and loyalty rebates. We are thus looking forward to two busy days with intense and challenging discussion.

But, luckily, the hard work that lies ahead will take place in one of the most beautiful towns in South Africa and we thank the University of Stellenbosch, one of our long-standing academic partners, for hosting the ICN Unilateral Conduct Workshop this year. We hope that you will all have an opportunity to also enjoy the fruit of the land, in its white and red varietals, that has made Stellenbosch world-famous.

In conclusion, thank you to everyone who has travelled far and wide to join us, and a very warm welcome to South Africa. I would now like to

hand over to the Honourable Minister of Economic Development, Minister Ebrahim Patel, who will deliver the opening address.

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