Opening remarks by the Competition Commissioner, Mr Tembinkosi Bonakele, on the occasion of a stakeholder breakfast meeting with captains of the industry held at Houghton hotel, Johannesburg on 20 June 2022

Colleagues, friends, and business leaders - good morning. I thank you for joining us this morning and for your continued partnership with the Competition Commission in our quest to achieve a growing, inclusive, and deconcentrated economy. I'm also thankful that we can now meet in person again and exchange new ideas on how to reach the goals we have set for ourselves and South Africa's economy.

One of our pressing challenges in South Africa, one we are all unfortunately familiar with, is unemployment. The figures around youth unemployment are particularly disturbing. Youth in South Africa continue to be disadvantaged in the labour market with an unemployment rate higher than the national average. According to the Quarterly Labour Force Survey (QLFS) for the first quarter of 2022, the unemployment rate was 63,9% for those aged 15-24 and 42,1% for those aged 25-34 years, while the current official national rate stands at 34,5%. I'm quoting these statistics to again make the point that it is very difficult to celebrate this.

We also know that we have a challenge of poverty and inequality. In 2019, the World Bank determined that South Africa was the most unequal country in the world. And, according to the United Nations Human Development Index, the country's wealthiest 10% possess more than half of the nation's income whilst the poorest 40% share just 7.2%. The Human Development Report also indicates that there are a number of South African citizens living below the international poverty line. The report notes that 18.9% of the population or about 11 million South Africans live on less than R28 a day which is around R800 a month. Statistics SA reports that Gauteng and Western Cape are less impacted by the dismal poverty rates.

But overall, as a country, we are not doing very well. Of course, we are emerging out of a devastating pandemic. And of course, there are green shoots with the latest reports indicating that our economy has at least returned to its pre-pandemic size.

But this is not growth. This is recovery. In fact, we have not covered everything we lost. We know that in South Africa, business plays a major role in addressing all these issues that I've raised. Business is responsible for investments and therefore driving economic growth and employment. President Ramaphosa in Parliament reminded us that business remains the largest employer in the country. Whilst employment in the public sector increased from 1.9 million in 2002 to 2.8 million in 2017, over the same period, the number of people employed in the private sector increased from 8.2 billion to 13. 5 million. This underscores the role that those who are here play in the growing the economy.

Before I gloat about our achievements at the Commission, I thought that I should bring you this context. I'm not bringing it to you so that you can feel a sense of shame, but that you could be reminded of the challenge before us.

Indeed, South Africa is at a crossroads because the current political gloom more generally in the country, to those who are enlightened, is just reflective of the social conditions that we find ourselves in. For there is no gloom when there is economic prosperity. And so, while we may want to do everything to fix our politics, we should be doing more to change the economic and social conditions of our country. Because the people who are educated, who are healthy, make better political choices.

I don't think that we should, when we think about the work of the Commission, be narrowly focused on what we do day-to-day. We should be thinking of the outcomes for our country and for our people. All the interventions we make are in fact towards creating the South Africa that we desire. A South Africa that has an economy that looks after its people. The economy we have as we have doesn’t, we already outlined the numbers.
In our day-to-day engagements, in our moments of success, as we toast as businesses and even as we toast victories before courts as the competition authority, we will do well to remember this - that we don't do this, for the sake of it, neither are we excited by the legal and economic jargon we use every day in pursuit of our work. The key issue is what difference does this work make? Of course, we derive pleasure in these victories because we believe that from time to time, they take us closer to the desired objective towards the vision of an economy that takes care of its people.

As the Commission, we had set ourselves this vision of a growing and inclusive economy, of a deconcentrated economy. It became clear though, a few years ago that whatever we may have achieved has had very little impact on growth, on participation and on inclusivity. That is why we have retooled ourselves and regeared towards a faster pace to achieve these goals.

What did we do? Firstly, the government through the Minister of Trade, Industry and Competition introduced far reaching amendments to the Competition Act. I just want to highlight a few aspects of provisions of this Act.

The amendments introduced what we call buyer power provisions. Fundamentally, what buyer provisions seek to achieve is promote access of SMMEs into platforms such as retail supermarket groups. As we know, if you are producing your widget in South Africa, to reach the market the platform possessed by retailers is a huge one at over 65%. So, you can't sell your widgets without access to that. And for the longest time there has been a debate in South Africa about why these large businesses are not buying from SMMEs. And this is what this buyer provision seeks to address. Unfortunately, it has to be addressed by legislation, but nevertheless, this is what we have.

And so, in the future, the competition authorities will have to deal with complaints of people who say that they have been refused access and that “The big buyer refuses to buy from me and that constitutes a form of abuse or the trading terms unfair towards me only because I am small or I am historically disadvantaged.”

So, that is the first issue. This has been introduced very slowly. The scheme is that the Minister must designate sectors where these provisions would apply. And so far, I think we are experimenting with a few and really the aim is to promote SMME participation as well as historically disadvantaged individuals’ participation in the economy.

We also have specific amendments on price discrimination. The provisions here have tried to limit as much as possible discrimination on the basis of size. The basis of the number of items that you are buying, of course, is still a complex area of the law. But the idea is that you will charge smaller buyers a higher price and give discounts or rebates to larger buyers is something that the competition authorities can now look at.

The other area that was strengthened by these amendments is mergers. In mergers, we've always had the possibility of looking at the impact of the measure, not just on competition but also on public interest, employment of SMMEs, HDIs or the impact of any industrial sector. The amendments sought to strengthen these. For example, we now look at not just the impact on HDI but also look at the impact on worker ownership. There's quite a strong drive from the legislature that we must go beyond just traditional BEEE when we're looking at transactions. We must think about how we can be more inclusive by bringing in a key stakeholders such as labour to participate in companies that they work for and how to strengthen the evaluation of public interests more generally in such a way that the assessment of public interest carries more weight others say and equal weight to competition issues. This means that public interest must be assessed independent of competition and that when the weighing is done that the public interest effects of the merger be treated in no way as a poor cousin of a competition assessment. Already, we have seen some decisions emanating from our interpretation of some of these provisions. But to be fair, most of them are yet to find traction, especially the ones I've referred to related to enforcement.

The last element of these amendments I need to talk about are the market inquiries. The biggest change in market inquiries we saw is that the findings of a market inquiry now have a much more powerful force in the sense that remedies coming out of those findings are binding. I think we are all familiar now with the office of the Public Protector and its powers, so we can use that analogy. Findings that the competition authorities make as well as the remedies emanating from that are binding unless of course they have been reviewed and set aside. This is quite an important development in the sense that previously our findings were no more than recommendations. We join a few countries in the world where competition authorities have this possibility.

We do all these things to use competition law to contribute to growth, inclusivity, and to deconcentrate the South African economy. When you hear about debates about this or that other decisions of the Commission, prohibition of a merger… there was a famous one Burger King. This is the debate we're having. It might seem obscure or arbitrary, but we use the tools we have to advance these objectives. We might not always get it right. In my view, one of the lessons learned from some of the recent major decisions is that the Commission needs to clarify its position through guidelines on its approach to these new issues. New in the sense of sometimes emphasis is on BEEE, worker ownership, and so on.

We are learning that we need to think a little bit more about how we implement this and avoid unintended consequences. Black shareholders, for example, have said: “Look, we also want to be able to sell at the highest price so don't restrict us to selling only to players when we are exiting”.

We must deal with that.

Private Equity people have told us that: “Look when we bring in black people, you know our investment horizon is limited. So, when we want to exit after seven to ten years, we don't want to be restricted because if you restrict us, we may not bring in blacks now so that we avoid this problem at the exit point”.

I raise this because it's been feedback that we are getting. We don't need to wait for you to speak. We know that we must fix this and when I make this concession, I make it very clear that we need a competition policy and law that's got the right incentives to do the right thing.
It is not just a question of enforcement. Of course, enforcement will always be there. I think that we need to be very smart about what people do in business. And I think with the right incentives, businesses will do the right thing with a fair mix of enforcement. For example, we can't be debating about price-fixing, we just have to prosecute those people who are involved in price-fixing.

I also want to address another problem. A criticism that may be the South African competition law is interventionist. First, a concession, yes, it is historically because when the South African competition policy was adopted, it was to deal in part with the legacy of apartheid. I don't want to go through that. You all know the concentration levels in the South African economy, the old days of the dominance of Anglo, the exclusion of black people in general, and women as well. This law was designed to deal with efficiencies in the economy, but also to address these problems.

When we were adopting this law, Professor Eleanor Fox, who is a friend of the South African competition regime, in the sense that she has always taken an interest from the days when we were drafting the Competition Act and since retained that interest up until this day, had this to say in 2000. “The experience of mature market economies is highly useful but may not be wholly transferable. Whilst American determination not to mix equality with efficiency may work for the US in the year 2000. It may not be an obvious truth for the world”. Professor Eleanor Fox is an American and a professor at New York University.

Last month I met with the chairperson of the United States Federal Trade Commission (FTC), one of the competition authorities of the United States. An issue raised in the meeting was the experience of South Africa in dealing with employment issues through competition legislation. She remarked that the Biden administration is looking at ways of bringing in competition and labour issues in the assessment of mergers. In the United Kingdom, in recent international mergers, we have seen the UK Government as a condition to approving those mergers, insisting on such things as investments in the UK, employment and Research and Development.

We have seen in Germany, the government getting involved in matters of industrial policy. In other words, governments sometimes overrule competition agencies allowing for concentration in certain areas in pursuit of their industrial policy. In fact, the Germans and Europeans more generally are using competition laws now to advance sustainability goals - issues around environment issues around emissions.

The point I'm making is historically the South African policymaker may have been the most interventionist. I don't know. But it seems that the world is following.
I then want to talk about a few interventions we have made just to illustrate again, an example of how we are advancing towards these goals through our casework.

We have a whole host of mergers where we have imposed conditions on saving jobs, on investments and creation of funds to promote entry of SMMEs and black participants. I think the numbers have been quite impressive there, but I think we still need to assess the real impact of these and how we have structured them. We also have BEE as part of those conditions. I'm quite happy with the work we're doing at mergers except that we need some impact assessment of some of these interventions.

On the market inquiry side, we are just beginning. We are doing one now on digital markets, which is led by our Chief Economist, James Hodge. It is beginning to raise some of these issues of access by SMMEs. But since they will be publishing it, I can only advertise that be on the lookout for it. We have just launched an inquiry into fresh produce value chains which will be headed by the Deputy Commissioner Hardin Ratshisusu. Again, we know in agricultural markets that there are huge problems which ultimately impact on participation of SMMEs, but importantly, also impact on food prices. We will be looking at that in detail.

One of the major interventions which is the aftermath of a market inquiry after we gathered information is to use that information to advance competition and participation. One of those is on this issue of exclusivity in shopping malls, the exclusive contracts. After we had done a market inquiry, and confirmed the existence of these exclusionary practices, where anchor tenants insist on long term, exclusive lease agreements (30 years 35 years), we have now reached an agreement with the major retailers to do away with exclusively lease agreements.

We're expecting more competition in shopping malls with independent entrants, specialist retailers, butcheries, and fresh produce shops. The guys who have been selling biltong in shopping malls are now allowed to get in without restriction by anchor tenants. This work is going to need investments, it's going to need entrepreneurs, and so on.

Another example is the work that we've been doing in the auto sector. You will know that the auto sector is one of those that are huge in South Africa in the sense of our industrial policy. If you look at our industrial support the bulk of it goes to the auto sector. The auto sector value chain is very lucrative in the so-called aftermarket. After buying your car it is about maintaining that car. Economically you repair it, you service it and for the longest time consumers have been trapped in servicing and repairing cars to particular service providers be they dealerships or approved workshops or panel beaters. We have managed to shine a spotlight on this by understanding how those markets work. We now understand them better. We published a guideline on how we would interpret the laws in relation to this and these guidelines are really aimed at opening up the aftermarket space for part makers, part suppliers, for independent repairers, for all sorts of services and goods that get to be supplied removing the nullification of warranties as a result of using these independent suppliers.

This is just a foretaste of the work that we do. So, when you see our work in nuts and bolts it's sometimes not easy to connect it with the overall goal. Sometimes some of the misunderstandings about what the Commission and the competition authorities do has got to do with this missing link between the technical detail of what we do (the outcome of cases) and the objectives that we are pursuing. We are inviting you today not only to look at a micro level the decisions that we make, that you may or may not like that may impact you as a firm or as a sector. Try and look at this macro picture, the contribution of this policy area in the development of the South Africa we want, the South African economy that takes care of its people.

When I leave the Commission, it will be the beginning of this phase, not the end. A lot of the work that we have been doing in the past has made us realise that more and more emphasis and a faster pace is required towards this because just about all the work we have done in the biggest piece of work we have now done is the Concentration Tracker Report, which tracks the concentration of the South African economy.

All the work that we do including the Concentration Tracker report points to constraints imposed on the South African economy by concentration. It points to exclusion but also starts to suggest why you would have high returns without much innovation and many investments. The dynamism of the economy, and the contestation in the economy, enable people to innovate, enable people to invest. When you have an economy like ours, with poor participation of SMMEs, you are bound to produce unemployment and exclusion and you are also not going to have innovation.

This is the balance that is required. People have always said do you not want big firms or even some members of the Cabinet to raise this issue when we present this study. It is not about that. It's about whether this economy is poised to do the things that it is supposed to do - generate growth.

Big firms are there for themselves and they are very excited because they see growth internally within those firms. When you look at their numbers, they are shooting lights off. But big firms growing and growing alone doesn't do the things that we say this economy must do. The firms must grow with other businesses, with their suppliers. They must grow with SMMEs growing because we can accept that these big firms are not going to create jobs. It's not just about Mercedes Benz saying they are investing R6 billion in East London, it is about what happens to that ecosystem. So, if you don't do that you're simply not going to have the required levels of growth, but you're also not going to have employment. You're also going to have inequality. When we raise this, it really is an issue that we think all of us should be concerned about.

I'd like once more to thank you for your attention, thank you for all the work we have done together over the years and I'm looking forward to the debates this morning.

Thanks very much.