**South Africa’s Statement**

**TRIPS Council 6 June 2018**

**Ad Hoc Item: Intellectual Property and the Public Interest: Promoting Public Health Through Competition Law and Policy.[[1]](#footnote-1)**

South Africa has a proud history of robustly engaging with issues that concern intersection between Intellectual Property (IP) rights and public health. Indeed, the South African government’s stance in the case between the Pharmaceutical Manufacturers Association versus the President of South Africa (the late President Nelson Mandela) in 1998, was a key factor leading to global dialogue around the potential negative impacts of intellectual property rights on public health, culminating in the Doha declaration on TRIPS and Public Health.

South African law reflects the principles embodied in the Trade Related Aspects of Intellectual Property Laws (TRIPS), and the Doha Declaration in particular with regards to the measures that member states may implement in local legislation to protect the public against the abuse of patent rights and monopolies. However, the practical implementation of the provisions that give effect to the TRIPS, have not been effective in protecting the public against patent monopolies and ensuring that the public has access to essential medicines, at an affordable price.

Competition policy in South Africa, as reflected in the preamble to the Competition Act 89 of 1998 (Competition Act) seeks to address, amongst other things, inadequate restraints against anticompetitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans. It thus aims to open up the economy to greater ownership by a larger number of South Africans in order to attain an efficient, competitive, economic environment, one that balances the interests of workers, owners and consumers, and focuses on the development of all South Africans. This is accomplished by preventing cartels aimed at price-fixing, limiting output or otherwise restricting competition, by preventing firms from gaining market power in unjustified ways, including through anticompetitive mergers, thus raising barriers to market entry by new firms. Competition policy is also concerned with preventing firms with market power from abusing their dominant positions, including by charging excessive prices to the detriment of consumers. The role of competition authorities is therefore to ensure markets function efficiently and to the benefit of both consumers and producers.

South Africa has a well-developed competition regime based on best international practice. Even though our economic system is mainly based on free market principles, competition is regulated by statutory created competition authorities, namely the Competition Commission, the Competition Tribunal and the Competition Appeal Court. The Competition Act became effective on 1 September 1999. It fundamentally transformed South Africa’s competition legislation and substantially strengthened the powers of the competition authorities. Unlike some foreign jurisdictions, South African competition law focuses not only on pure competition law matters, but also contains pertinent public interest and social objectives.

Both competition law and patent law together can be used to implement competition-related TRIPS flexibilities and advance consumer welfare. Chapter 2 of the Competition Act, covers practices such as horizontal restrictions, vertical restrictions, and abuse of dominance, and various licensing provisions in the Patents Act. Horizontal agreements such as price fixing, market division and collusive tendering are prohibited *per se*, without requiring a showing of actual harmful effect or permitting a showing of net efficiency.

The competitive effects of vertical agreements are usually complex. Under the Competition Act, a vertical agreement is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs the anti-competitive effect. Thus, finding a violation usually depends on showing an actual anti-competitive effect. The only vertical practice that is prohibited *per se* is minimum resale price maintenance.

Abuse of dominance is dealt with through a list of prohibited practices. The first of these is charging an ‘excessive price’ that harms consumers. This term is separately defined: an ‘excessive price’ must have no reasonable relationship to the economic value of the particular good or service in question and must be in excess of that value. The second prohibited practice is refusing a competitor access to an essential facility when it is economically feasible to grant access. The term ‘essential facility’ is also defined – as an infrastructure or resource that cannot reasonably be duplicated and without access to which competitors cannot reasonably provide their customers.

The Competition Act also prohibits price discrimination: in relation to prices broadly, dis- counts, rebates, allowances, credits, services, or payment terms, for products or services. Again, market power is a prerequisite – only a dominant firm acting as a seller can be liable. Liability is subject in all cases to a competitive effects test: is the discrimination likely to have the effect of substantially preventing or lessening competition?

Although the Competition Act does not make specific provision for the handling of matters relating to intellectual property rights, it does make provision in section 10(4) of the Act for an exemption from the Competition Act in respect of an agreement or practice, or category of agreements or practices that relates to the exercise of specific intellectual property rights.[[2]](#footnote-2)

Exemptions may be granted upon application if the act(s) or agreement(s) concerned are aimed at fulfilling certain, specific national priorities. In particular, section 10(4) permits firms to apply for exemptions in respect of any agreement or practice regarding the exercise of IP rights. The grant or refusal of such an exemption, which is at the discretion of the Commission, constitutes a reviewable administrative action.

In line with the general approach to South African competition law and policy, it is accepted that certain anti-competitive conduct may be required to achieve broader industrial and macro-economic goals.[[3]](#footnote-3) The Competition Act therefore provides a mechanism whereby a party or parties can apply for an exemption from prosecution in certain cases. What is inferred from section 10(4) is that the legislator intended for the current Competition Act to extend to the exercise of intellectual property rights and that an exemption is required for certain intellectual property rights in order to achieve these broader industrial goals.

The South African Competition Commission has not issued specific guidelines on application of the Competition Act to IP. However, it has explained its general approach in that firms are not automatically exempted from the rules of the Competition Act as a result of the rights granted in terms of laws like the intellectual property laws. This means that firms cannot be allowed to automatically continue with a particular prohibited practice as outlined in the Competition Act because that practice is allowed by another Act. It has taken the view that that conflicts between intellectual property rights and competition mandates should be resolved according to the extent to which the “long-term pro-competitive benefits” of a practice outweigh its “short-term ‘anti-competitive’ effects.” The Competition Commission has thus analyzed this conflict by considering the following factors:

1. Competition law should recognise the basic rights granted under intellectual property law. The creation and maintenance of innovation markets are necessary for economic progress and development.
2. Intellectual property does not necessarily create market power.
3. A practice involving intellectual property should not be prohibited if the practice leads to a less anti-competitive situation than without the said practice.
4. The long-term pro-competitive benefits should outweigh the short-term ‘anti-competitive’ effects of intellectual property rights.

The Competition Tribunal has the power to order a wide range of remedies. These can include enjoining prohibited practices, requiring a respondent to supply another party on terms reasonably required to end a prohibited practice, ordering divestiture, declaring con- duct to constitute a prohibited practice in order to establish the basis for a civil action, declaring an agreement to be void, or ordering access to an essential facility on reasonable terms. An administrative (financial) penalty may also be imposed in certain circumstances.

In the context of IP-related cases, it is important to note that compulsory licensing is not explicitly listed as an ‘appropriate order’ that the Tribunal might issue in relation to a prohibited practice, though the wording of section 58(1)(a) strongly suggests that the list of orders specified is not exhaustive. In any event, if the prohibited conduct is a refusal to licence, then an order compelling a firm to stop such conduct would, in effect, be an order granting a compulsory licence.

Against this background, South Africa’s competition law is still evolving including certain proposed amendments to the Competition act. 1 December 2017, the Minister of Economic Development published the Competition Amendment Bill, 2017 (Bill). The Bill seeks to create and enhance the substantive provisions of the Competition Act No. 89 of 1998 (as amended) (**Act**) and focuses on two key structural challenges in the South African economy: (i) concentration; and (ii) the racially-skewed spread of ownership of firms in the economy. In respect of excessive pricing, the draft Bill proposes that a new provision be included in the Act prohibiting a dominant firm from requiring a supplier to sell at an excessively low price. Price discrimination is also addressed. On 23 May 2018, South Africa’s Cabinet approved Phase 1 of the Intellectual Property Policy, dealing inter alia with access to medicines, substantive patent examination and competition policy.

**END**

1. This intervention is without prejudice to the position on the Government of the Republic of South Africa regarding the application of stipulated norms in the context of its WTO obligations, information contained in this document is solely geared towards informing the debate envisaged under document IP/C/W/643. [↑](#footnote-ref-1)
2. These rights include rights acquired or protected in terms of the Performers’ Protection Act (11 of 1967), the Plant Breeders’ Rights Act (15 of 1967), the Patents Act (57 of 1978), the Copyright Act (98 of 1978), the Trade Marks Act (194 of 1993) and the Designs Act (195 of 1993). [↑](#footnote-ref-2)
3. Section 10(3)(b) of the Competition Act. [↑](#footnote-ref-3)