

17 August 2018

Mr Peter-Paul Mbele
Committee Secretary
Portfolio Committee on Economic Development
PO Box 15
Parliament of the Republic of South Africa
Cape Town
8000

Dear Mr Mbele

Re:- Comments on Competition Amendment Bill

We are writing concerning the above Bill, in order to present Parliament with a number of comments to consider.

The Centre for Competition Law and Economics is situated in the Department of Economics at Stellenbosch University. We were established in 2017, with the financial support of the South African Competition Commission, with the aim of promoting law and economics research and education related to South African competition policy. Our Centre brings together expertise from South African academia and policymaking and is uniquely placed to provide advice on competition policy matters to lawmakers. It is with the latter in mind that we wish to raise a number of concerns related to the Bill, in the hope of setting the stage for further engagement with Parliament, in person, at a later date. We believe that such engagement would be helpful to Parliament when evaluating the legal and economic impact of the Bill.

The World Bank and the IMF, as well as several commentators and researchers, have indicated in recent years that there are significant competition problems in the South African economy. It is therefore important for policymakers to revisit our competition law. In this regard it is very important to note the following:

- The research reports by the World Bank and IMF are quite clear that competition problems in the South African economy are often the unintended consequences of government policies rather than firm behaviour. For example, these and other research in the past have highlighted repeatedly the negative effects of telecommunications, energy, transport and other policies on competition in those industries. This suggests that we need to address these competition problems, but that they do not have their source in weak competition law.
- There is a claim – including in the Background Note that accompanied the proposed amendments in January – that the South African economy as a whole is uncompetitive. Such a claim about the economy at large is inaccurate. Competition is different in every market and every industry consists of hundreds and more of these markets. To say something about the entire economy one would have to analyze each of these markets individually. It is therefore challenging to reach conclusions about competition in the economy – or even an industry – as a whole. What has been presented in the Background Note is a relatively weak piece of research on rising concentration levels, which relies on data from past merger cases that have not been available in the public domain or, to our mind, properly analyzed.
- It is important not to confuse concentration and competition. There is too much of an emphasis on the number and size of firms rather than competition among firms. Economic research is very clear that the size of firms is only one factor determining the level of competition in a market. Designing a competition law to ‘deconcentrate’ the economy is likely to have more unintended negative consequences than producing more competition.
- If it is important to address competition problems, as noted above, it is critical not to depart from the rules-based system that has been very effective since 1998. The new Bill introduces measures which give

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competition authorities and political agents too much power when assessing competition in a market, without having to prove their case. Economics is quite clear that competition analysis is complicated, which is why competition cases must be subject to clear rules administered through a legal system.

We would be happy to make further presentations to the Committee, but we highlight below some of our concerns:

- As far as market inquiries are concerned, the main issue to be considered is the general lack of legal scrutiny of competition authorities' decisions. As it stands, the market inquiry provision would enable competition authorities to effectively require changes in industries with limited legal process. This is in stark contrast to international practice. Furthermore, a range of vague and incoherent formulations will likely result in extensive legal battles with market participants.
- As far as merger analysis is concerned, the introduction of a government-appointed panel to evaluate mergers of 'national security' concern, which may override the decisions of the competition authorities, is a significant step backward. There are two problems here. Firstly, the definition of 'national security' is too broad and therefore open to political abuse. Secondly, and more important, if lawmakers do wish to include such concerns in competition law (rather than national security legislation, where they properly belong), then lawmakers can legislate explicit criteria relating to mergers of this type and leave it to our competent competition authorities to deal with the matter. It is generally very worrying that the independence of competition authorities will be reduced, leading to greater policy uncertainty.
- As far as provisions relating to buyer power, price discrimination and excessive pricing are concerned, we note that the main problem with these provisions is the lack of economic grounding. It is likely that it will be very difficult to formulate economic tests related to these provisions, which will undermine the effectiveness of competition policy.

While the Bill also includes a number of positive developments, which we welcome, we fear that the provisions discussed above will undermine competition policy in South Africa. Ironically, while the provisions in the Bill could be seen as more strict or onerous compared to existing provisions, the end result will be weaker competition policy. The economic results will be disappointing. In particular, the amendments will not support sustainable black economic empowerment, nor job creation, nor will it deliver the accelerated investment that the President envisages. The Centre looks forward to discussing its views with the Committee and hopes that it will be afforded a chance to do so.

Respectfully yours



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