BUSINESS LEADERSHIP SOUTH AFRICA ("BLSA") MEETING WITH COMPETITION COMMISSION ON 19 NOVEMBER 2009- SPEAKING NOTES

1. Introduction

- Speaking as CEO of BLSA, an association of the 80 largest companies in South Africa including multinationals and SOE's.

- Welcome the dialogue and the initiative taken by BUSA and the Commission.

- The dialogue particularly important because the field of competition policy is one where perception and interpretation are important, as well as what may be considered as objective "fact".

- BLSA fully supports proper regulation of the SA economy which should include the implementation of a competition policy which:

    - is consistent with the provisions of the Constitution,
    - promotes competition, and
    - is applied impartially and equitably to firms operating in both the public and private sectors.

- The major analyses of the SA economy have all highlighted a need to promote competition. In particular:

  - BLSA's views on competition policy reflects much of what is contained in the OECD Economic Assessment of South Africa of 15 July 2008 (the OECD Report).

  - The OECD recognises that competition is generally ineffective in various sectors of the South African economy, and finds that the competition policy required to address this issue needs to be broad and coherent.

  - In particular the Report recommends that sectors of the economy dominated by state-held entities should be deregulated.
    The Report indicates that these sectors are models of oligopolies and monopolies.[i]

- BLSA spends considerable time on its formal agenda on competition issues for example facilitating presentations to its members on how competition audits should be conducted. It has also devised a short guide to competition do's and don'ts to encourage and facilitate compliance both in the spirit and the letter of competition law.

- BLSA acknowledges the progress made in opening up the SA economy and promoting competition. In particular, it has praised the policy framework adopted post 1994, which promoted liberalisation as a key driver to promoting a more competitive landscape.

- Generally speaking, BLSA perceives the Competition Authorities to be professional and competent and to have done a good job in promoting competition. I personally sent a note to that effect to the recent ten year celebrations of the Authorities, though I was not able to be present.

2. The Competition Amendment Act 2009

We broadly support the aims that the Amendment Act seeks to achieve. For instance:

- We support deterrent mechanisms for collusive conduct – we certainly don't want to protect wrong doing of directors and managers involved in collusive practices

- We believe that the Commission should have the powers to investigate industries where there is reason to be concerned (the market inquiry provision is adequate and there is no reason why the complex monopoly provision is required.)

- We encourage sector regulators to meet with the Commission to agree a workable allocation of responsibilities, thereby creating greater certainty for industry players through the augmented concurrent jurisdiction provision. .

We are however concerned that the new legislation introduces greater uncertainty, both for corporates and individuals. The uncertainty is attributed to:

1. The vagueness (lack of clear definitions) of key provisions that relate to complex monopoly

2. The treatment of corporate vs. individuals deserving leniency

3. Difficulty to design compliance programmes (with adequate detection and prevention mechanisms as it is unclear what one should be guarding against)

4. Constitutionality of the complex monopoly and personal criminal liability provisions is doubtful – I will return to this point

5. The application of provisions (here, BLSA looks forward to working with government to ensure that the rules are clear and practicable)

As far as the impact on corporate SA of the Amendment Act - the risk of a chilling effect on business activity maybe seen in the following:

- Directors becoming warier of accepting appointments

- Industries refusing to collaborate in public interest issues such as security of supply for fear of hefty fines and reputational damages. I have just come from a meeting on energy and one institution has said it has delayed its contribution so as to reconcile constitution to make sure it doesn't fall foul of the Act

- Sectors being unable to plan for the future with industry players operating as a collective

- Industry players being reluctant to grow for fear of abuse of dominance allegations

- Changing, unclear rules, encouraging risk averse defensive strategies as opposed to aggressive employment generating growth

- With the multiple competition law levers (some of which are unclear and/or unconstitutional), compliance programmes and business practices and management controls becoming more cumbersome and costly

- The Amendment Act poses a significant infringement threat to the constitutional rights of the firms to which it applies, as well as to the rights of the directors and managers of such firms. It is interesting to note that similar concerns were expressed by other parties during the Parliamentary hearings, including the Competition Authorities, and that the Presidency (headed by the then President Motlanthe) sought legal advice regarding the constitutionality of the Act (the Bill, as it was then). The Presidency's legal advisors recommended that the President refer the Bill to the Constitutional Court for review.

- There is also a concern that the Amendment Act may not (given the history of the Competition Act), be applied as readily to public utilities owned directly or indirectly by the State than to firms in the private sector. This unjustifiably ignores the significant anti-competitive effects arising from the dominant positions and conduct of significant public sector utilities.

- I recognize that the Competition Commission has investigated several public sector companies, including SAA, Transnet's Portnet Division and Telkom. The argument here is not that the Competition Authorities have not investigated public companies but, rather, given the fact that 43.1% of the economy comprises state-owned companies, that a disproportionate number of investigations of private companies has been undertaken relative to those in the state owned sector.

- Let me take one recent example. ACSA has built a new airport, King Shaka at La Mercy, north of Durban (at a cost of over R6.5bn) but has refused to consider a sale of the existing airport to private operators. A senior political figure in the Province was quoted in supporting ACSA's position: "we can't allow competition – we have invested too much in the new airport". Such an outrageously anticompetitive statement elicited no comment that I know from the Authorities. Yet one should note that the UK Competition Commission

recently broke up BAA on the grounds of abuse of dominance, and forced it to put Gatwick airport up for sale as a result of BAA's dominance at Heathrow and Stansted.

- A complementary concern is the recent trend in trade policy away from post-1994 liberalisation towards protectionism and a more closed economy in which global competitive forces will have less play. One can't speak of a competitive economy if there are significant tariff and non-tariff barriers to imports.

- Finally, one should note a regrettable tendency towards economic populism and anti-business sentiment in much of the discourse on competition policy. Whilst I absolutely acknowledge business responsibility to get its own house in order, any suspicion of a witch-hunt would be damaging to investor confidence and to the interests of the economy as a whole. It is imperative that the Competition Authorities maintain a scrupulous professionalism and regard for correct procedure at all times and avoid perceptions of being affected by such populism.

- Let me give an example of about how populist rhetoric tends to undermine careful rational thought. In all the acres of commentary on high food prices, I have seen little if any reference to basic economic issues of supply and demand. We all know that South Africa became a net food importer for the first time in decades last year. One reason for that was revealed in a recent paper analysing land reform and agriculture. It noted that the acreage planted and supply produced of a number of key staple foods in South Africa had either been static or declining over the last decade whilst demand for such staples had consistently grown. The effect on prices would seem to be obvious.

- BLSA believes that these problems could partly be ameliorated through the regulations of the Competition Amendment Act.

3. Competition Amendment Act- unconstitutionality

- This brings me back to BLSA's concerns about the Amendment Act

- While BLSA supports the general objects of the Act- essentially, the effective enforcement of competition policy and the achievement of an effective and efficient economy, it believes that certain fundamental provisions of the Act, the director's liability (section 75A) and complex monopoly (section 10A) provisions, are irrational and unconstitutional

- These provisions will dissuade those firms and directors which could be the subject of prohibited practice or complex monopoly investigations from innovating and developing their businesses, and possibly from doing business in the country altogether.

- As a result, BLSA believes that the Act's provisions in fact undermine its key objectives, in particular promoting an effective and efficient economy.

- Without discussing our legal arguments in great detail (as these are set out in our various submissions to Parliament), it is worth summarising them:

- **Section 10A (complex monopolies)**

  - Section 10A appears to target sectors of the economy in which private sector firms are the most notable players (eg the banking and fuel sectors) and not sectors of the economy dominated by directly or indirectly state-owned enterprises (eg ports, railways, electricity).

  - Several terms and definitions used in this section are vague, ambiguous, and have and will create great uncertainty for firms operating in certain important sectors of the economy (notably, in the fuel and banking sectors).

  - The vagueness and ambiguity of this section, and the significant discretion it vests in the Competition Authorities as to whether or not to institute an investigation, could lead to numerous situations in which innocent firms are subject to investigation by the Competition Authorities.

  - I am advised by BLSA's legal counsel that section 10A's vagueness, coupled with its apparent irrationality, unjustifiably contravene the constitutional principle of the Rule of Law[ii]

- **Section 73A (criminal liability of directors or managers who caused or knowingly acquiesced in a firm engaging in a practice prohibited under section 4(1)(b) of the Competition Act)**

  Section 73A of the Act is, in BLSA's view, unconstitutional.

- Section 35(3) of the Constitution protects a defendant's right to be presumed innocent as well as the right to remain silent. These rights require the State to bear the onus of proof in criminal proceedings.[iii]
- Section 35(3) of the Constitution also makes provision for defendants to have adequate time and facilities to prepare a defence, and to appoint a legal practitioner of their choice.[iv]
- Section 35 and the common law provide defendants with the right to have their cases heard before ordinary courts, and not before specialised adjudicatory forums which form part of the executive arm of government.[v]
- Section 73A of the Act infringes all of these rights.
- Section 73A also infringes the equality rights of directors of firms in the private sector as section 73A will probably not be applied to directors of firms in the public sector.

4. **Conclusion**

In conclusion, the Act will, in our view, lead to:

- uncertainty in various sectors, such as banking and fuel
- directors rethinking their position owing to the imposition of personal liability; and
- the possible elimination of interoperable payment systems.

5. **Proposed solutions**

- BLSA would fully support public and stakeholder consultation on the content of the regulations to the Act, and is willing to assist the Department of Trade and Industry in formulating the content of such regulations.

- Thank you.

ENDNOTES

[i] The OECD report indicates and recommends as follows:

- South Africa's product market is very restricted by international standards, with concentration in many sectors and relatively extensive state involvement in the economy. This highlights the potential contribution of competition-enhancing regulatory reforms to South Africa's long-term economic prospects.
- The support for competition reforms should be translated into a comprehensive policy strategy. A broad, coherent and systematic framework for the conduct of regulatory policy is required.
- There should be greater liberalisation of the economy as well as the privatisation of South Africa's network industries, such as transport.

(OECD Report pages 13, 102, 125, 75-76).

[ii] The Constitutional Court has held that, at a minimum, the rule of law requires:

- that people and governments should be ruled by the law and obey it;
- laws to be clear and precise;
- the requirements of laws not be retrospective but, rather, ascertainable in advance so that those subject to the laws will be able to be guided by them, and may regulate their conduct accordingly.
- that all law and state conduct must be rationally related to a legitimate government expectation

[iii] Under section 73A, a director or person with “management authority” may be criminally prosecuted for an offence if the relevant firm has acknowledged, in a consent order, that it engaged in a prohibited practice or the Competition Tribunal or the Competition Appeal Court has made a section 73A finding that the firm engaged in a prohibited practice (ie a practice forbidden under section 4(1)(b) of the Competition Act).

In the criminal proceedings instituted against the director, an acknowledgement in such a consent order is *prima facie* proof of the fact that the firm contravened section 4(1)(b). There is thus a presumption that the firm contravened section 4(1)(b): an essential element of the accused director's crime.

In the absence of a rebuttal from the director, the *prima facie* proof (ie the consent order) hardens to become conclusive proof.

Thus, under section 73A, a director or “person in management authority” will be required to give evidence in his or her defence, without the State having established his/her guilt beyond a reasonable doubt. This constitutes a reverse onus of proof.

This infringes the rights of an accused director to remain silent and to be presumed innocent.

[iv] Section 73A provides that the relevant firm may not, either directly or indirectly, fund an accused director's legal defence. This restricts accused directors to choosing legal practitioners which they can afford in their personal capacities, as opposed to legal

practitioners of their choice, as well as reduces the financial facilities available to directors to prepare a legal defence.

[v] The criminal proceedings against a director resulting from section 73A proceedings in the Competition Tribunal or Competition Appeal Court will be determined, to a significant extent, by the latter proceedings.

This is because in criminal proceedings instituted against a director, an acknowledgement in a consent order by the relevant firm under the preceding section 73A proceedings is *prima facie* proof of the fact that the firm contravened section 4(1)(b), and the director must (in the criminal proceedings) adduce evidence to disprove that he or she did not engineer or acquiesce to the firm committing such an offence.

The Competition Tribunal and Competition Appeal Court are not ordinary courts. They are civil law forums which not only affiliated to the executive arm of government but are comprised of competition law, and not criminal law, specialist adjudicators. Moreover, the onus of proof in civil proceedings is lower than the standard of proof in criminal proceedings.