BUSINESS SUPPLEMENTARY SUBMISSION ON THE COMPETITION AMENDMENT BILL FOLLOWING THE NEDLAC ENGAGEMENT OF 29 JANUARY 2018

February 2018

INTRODUCTION

Following the engagements held within the ambit of the Nedlac Trade & Industry Chamber on 5 December 2017, and again on 29 January 2018, an in-principle agreement had been reached to conduct a bilateral engagement between the Economic Development Department (EDD) and business. The purpose of the planned engagements is to afford the EDD an opportunity to respond to business' initial submissions and allow business to make supplementary inputs on the Bill based on Minister Patel's initial feedback on 29 January 2018. As such, the following comments are not intended to replace the initial submissions made by business, but rather to attempt to bridge the gap between the initial positions of government and business in a spirit of compromise. In other words, where government has indicated that it is not prepared (or is unlikely to be prepared) to adopt business' initial submissions, what follows are proposals that business may be prepared to accept even where it is not business' initial preference.

ROLE OF THE EXECUTIVE

The enhanced role for the Minister, as outlined in previous submissions, is not supported by business. Specifically, the following is of concern to business:

The proposed amendment to section 26(2) of the Act, which envisages that the Minister be entitled to appoint "*acting part-time*" members to the Tribunal, should, in business' view, either be removed or at the very least be subject to significant limitations. The current amendments would allow the Minister to appoint any number of persons that meet the requirements of section 28 to be members of the Tribunal, for an indefinite term (since the Minister may determine the period for this appointment and also re-appoint that member upon expiry of that member's term of office). This would jeopardise the separation of powers between the Minister and the Tribunal and could result in a substantial undermining of institutional trust, independence and objectivity. To the extent that the proposed amendments are retained, the power to appoint acting part-time members of the Tribunal should rest with the Chairperson of the Tribunal. In this regard, there is a potential for abuse with respect to "case specific appointments" that deviate from strict neutrality. Accordingly, business proposes that the Tribunal gain more part time members (subject to comprehensive vetting) that can be flexibly assigned to cases as required, rather than the Minister hiring a specific Tribunal member on an ad-hoc basis.

With regard to the right of the Minister and Commission to appeal decisions, business is of the opinion that there should be no right for the Commission to appeal, particularly given that the Amendment Bill provides no guidance in respect of potential conflicting views which may arise between the Competition Commission and the Minister of the Department of Economic Development and how this conflict is to be resolved in the "decision making process". In any event, the proposal to confer a right to appeal on the Commission would undermine the structure of the hierarchy of Commission Authorities created by the legislature and would have the effect of prolonging merger proceedings. In order to address the concerns raised regarding the potential violation of the separation of powers principle, the Amendment Act should provide further clarity as to the precise role and scope of the executive in the "decision making process". **With a view to a compromise proposal, business proposes that the Minister's right to appeal should be limited to public interest matters only and only to mergers where the Minister has participated fully. This could be achieved through the following wording:**

> **"*17(1)(A) Within 20 business days (which period may not be extended), the Minister may, after notice of a decision of the Competition Tribunal in terms of section 16, appeal such a decision to the Competition Appeal Court (subject to its rules), provided that (i) the Minister's appeal is limited solely to public interest considerations and (ii) the Minister may only appeal in the event that the Minister participated both in the Commission's investigation and the Tribunal proceedings*".**

In relation to the Ministers' right to access confidential information, it is proposed that this power be removed from the Amendment Bill in its entirety as the current mechanism which permits interested parties access to confidential information is sufficient. Furthermore, this power should not be vested in all Ministers and should at the very least be curtailed to the Minister of the Department of Economic Development. To the extent that the proposed amendments are retained, the Amendment Bill should expressly cater for circumstances in which private companies compete with state owned enterprises as private firms would essentially be making available highly confidential and competitively sensitive information to an actual or potential competitor. In addition, to the extent that the proposed amendments are retained, the Minister should be required to motivate for the access to particular confidential information on the basis that the Minister would be unable to meaningfully participate in the proceedings otherwise, with Ministerial access limited to that sub-set of necessary confidential information only.

MARKET INQUIRIES

Market inquiries are time consuming, expensive and intrusive to those firms present in the market being investigated. Therefore, we propose that as a matter of policy, the Competition Commission intervention into the legitimate conduct of business should be based on a legitimate and objectively justifiable reason. Although business's position is that the Competition Commission should only make recommendations following a market inquiry, to the extent that the Amendment Bill retains the Competition Commission's powers to impose remedies the Amendment Bill must set out clear criteria against which the Competition Commission and the Competition Tribunal may assess whether a proposed remedy is objective and proportionate – particularly in relation to structural remedies. In this regard, the current weakening of the "substantial lessening of competition" to an "adverse effects" test is overly broad and vague, some substantiality criterion must be retained, and any proposed remedies must be tested against likely impacts on all stakeholders.

As discussed with the Minister in the bilateral following the Nedlac meeting on 29 January 2018, some “identifiable harm” to South Africa must be identified or reasonably apprehended, as it is recognised by the EDD itself that in many cases scale and concentration in an industry may be necessary for competition and efficiency reasons.

We thus propose that the Amendment Bill specifies criteria, similar to those common to a merger control assessment, to ensure that there is an objective and defined benchmark against which to assess the appropriateness and likely impact of any proposed remedy. **The criteria to be used should at the very least include:**

- **Whether the market concentration had increased to the levels that would raise a concern as to a prospective merger;**
- **Whether the firms remaining in the market are providing better value for consumers due to technological and global changes;**
- **Whether the firms remaining acquired their market share due to internal growth that was fuelled by competitive advantages such as product innovation; and**
- **Whether to the extent corporations are earning significant profits, there are barriers to entry that prevent entry by small or historically disadvantaged businesses who would otherwise be attracted into that market by those profits.**

The delineation of these factors would not only aid the Competition Commission in the investigation and remediation of concentration that presented such an adverse effect but also would provide the Competition Tribunal with a defined standard to review the Competition Commission’s analysis and decision and thus enhance predictability, particularly where the inquiry may be a market-wide study.

This thinking is in line with that of eminent economist Professor Massimo Motta, who has suggested in numerous articles that there is an important conflict between *ex ante* and *ex post* approaches as has been explicitly recognised by the Advocate General Jacobs in his Opinion in Case C-7/97, *Bronner* [1998] ECR I-7791. Further, Motta and de Streel (2007) in 2007 Konkurrensverket series of papers argue:
Evans and Padilla (2005) suggest that the following three conditions should be met for the antitrust authority to intervene in a market and business proposes that these market conditions could be considered when deciding whether to trigger a market inquiry.
“(1) a firm exists in the market that enjoys a (near) monopoly position in the market, which is not the result of past investments or innovations and which is protected by insurmountable legal barriers to entry; (2) the prices charged by the firm widely exceed its average total costs; and (3) there is a risk that those prices may prevent the emergence of new goods and services in adjacent markets.”

Insofar as remedies pursuant to a market inquiry is concerned, it should be made clear that they are prospective and remedial, rather than retrospective and punitive. As a matter of principle, the Bill crosses a line, because it makes the Commission investigator, prosecutor and judge in relation to market inquiry issues, Business is of the view that the Commission should investigate and prosecute, but that the remedies should be imposed by the Tribunal, based on recommendations made by the Commission.

It should be expressly clear that remedies do not include any power to impose penalties for past conduct.

To the extent that the Bill retains remedial powers in the hands of the Commission, any price control regime proposed as a remedy, should be an issue which is adjudicated by the Tribunal, in addition to its adjudication of any divestiture proposal.

Should EDD decide that the Competition Commission should retain the power to propose remedies to address market concentration as such, divorced from any violations of competition law, the Ministry should further delineate the circumstances under which market concentration in and of itself will be deemed to warrant remediation.

Should EDD retain the watered down "adverse effects" test, the Amendment Bill should require the Competition Tribunal to determine whether the Competition Commission's decision to order a structural remedy is based on one of "rationality", "reasonableness" or an objective competition test (i.e. a SLC test). It should also be the case that the onus should rest on the Competition Commission, and not the appealing party, to show that a structural remedy is based on one of rationality, reasonableness or an objective competition test. It should also be incumbent on the Competition Commission to show that no other remedy in the Competition Act can adequately address the "adverse effect" found in the market inquiry.

Given the time and expense, and potential consequences, business proposes that provisions should be introduced that permit for adverse costs orders to be made against the Competition Commission following the imposition (or proposal) of remedies occasioned by a market inquiry to ensure that any remedy which is imposed (or recommended) following a market inquiry is justified and proportionate. The Tribunal may retain the discretion whether to make an adverse costs order and this discretion should be exercised in a manner which does not deter the Competition Commission from discharging its public duties.

With regard to divestiture orders in the context of market inquiries, the new section 60(2)(c) provides for the Tribunal to impose divestiture following the finding by the Commission of an adverse effect on competition in a market inquiry. Divestiture is a very extreme and punitive measure. This is recognised in the existing section 60(2)(b) which allows the Tribunal to order divestiture for a prohibited practice contravention <u>but only if no other remedy in the Competition Act can adequately address the prohibited practice</u>. Business proposes that a similar restriction on section 60(2)(c) be inserted, particularly as firms that may be subject to divestiture orders in terms of section 60(2)(c) may not be guilty of any conduct that contravenes the Competition Act (unlike section 60(2)(d) where the limitation is prescribed). In this regard it is submitted that it is a common consequence of forced divestiture (particularly if the divestiture must be made within a specified time and only to specified potential purchasers) that the value of the asset that must be divested drops substantially, as potential purchasers in the market know that the seller must sell. The Commission routinely imposes divestiture orders of this kind as conditions to merger approvals. The difference between a divestiture ordered as a condition to a merger approval and a divestiture ordered following a market inquiry is that a party to a merger has the option not to implement the merger (thereby avoiding the divestiture) if the condition is too punitive. A divestiture order that is imposed on a firm, without any conduct by the firm giving rise to it (or without providing the firm with the option of avoiding such a divestiture) may well be challenged as an unconstitutional arbitrary deprivation of property rights.

WITHDRAWAL OF THE "YELLOW CARD" REGIME

As indicated in the detailed submissions which have been made, it is often very difficult to establish whether or not a particular course of conduct would give rise to a contravention of these sections as it requires a balancing between the anti-competitive effect of an undefined course of conduct and the efficiency, technology or other pro-competitive gains associated with that conduct. Unlike the red card offences, where the offence is generally easier to identify, it is very often difficult for a party to determine in advance whether or not a particular course of conduct will give rise to a contravention of these provisions.

This means that it would be unfair (**and potentially unconstitutional**) to impose a penalty for a first-time contravention of these provisions.

BUSA persists with its position that the yellow card regime be maintained for infringement of Section 4(1)(a), Section 5(1), Section 8(c) (which should be retained) and Section 9.

BUSA does not agree with the suggestion by the EDD that the yellow card protection is no longer palatable from a policy perspective, and that we no longer need it because the law is much clearer than it was 18 years ago. We also do not accept the proposition that firms use it to dodge their competition law obligations – we would like to hear some specifics from the regulators to support that claim.

BUSA does not believe that there is a real substance behind these contentions. The Act in its current form is clear about conduct which should attract harsh penalties, such as cartel behaviour, and that conduct has been regularly and harshly punished.

There is a without doubt a separate category of much less defined concerns, which need proper space to be defined and developed through the case law over time.

The chilling effect of the withdrawal of the yellow card on innovation and encouraging investment should not be underestimated and a full debate should be held on this. South Africa needs to actively encourage investment, innovation and vibrancy in our economy.

One way of meeting the EDD half way on this would be to exclude from the cover any conduct which has been expressly declared as unlawful by the Competition Tribunal or appeal authorities. This would be a change, as, at present, it is only the <u>same firms</u> that can be penalized for <u>repeat conduct of the same nature</u>. This would apply to all future conduct by any firm from the point in time when a particular category of conduct has been declared to be unlawful.

In this regard one could **amend the current section 59(1)(b) to read as follows: "*for a prohibited practice in terms of section 4(1)(a), 5(1), 8(c) or 9(1) only if the conduct in question is substantially the same as conduct which has previously been found by the Competition Tribunal (not by way of a consent order) to be a prohibited practice and in relation to the conduct which continued after the finding of the Competition Tribunal was made public*".** This would mean that a respondent who is found to have engaged in conduct which is substantially the same as that which the Tribunal has previously found to constitute a contravention of these rule of reason provisions would be exposed to the risk of the imposition of a penalty. In other words, a firm could be fined for a first contravention of these provisions in the event that the factual matrix relating to the conduct in question is similar to that which had previously been found by the Tribunal (or Competition Appeal Court) to constitute a contravention of the Competition Act. The proposed revised section would no longer require the respondent itself to have been the subject to such a finding.

An alternative approach would be to follow the approach in Europe where there are guidelines and block exemptions for a wide range of clearly defined categories of horizontal and vertical conduct which is regarded as pro-competitive.

However, it should still be noted that these sections require a complex weighing up of factors and it is quite possible that a respondent may make a *bona fide* error in weighing up these factors (given that they involve complex analyses of the effects of the conduct as weighed against the pro-competitive benefits of the conduct). **As such, it would be suggested that section 59(3) should also be amended to include a new (h) along the following lines: "*in respect of a contravention of section 4(1)(a), 5(1), 8(c) or 9(1), the extent to which a party in the position of the respondent could reasonably have been anticipated to have understood that the conduct would constitute a contravention of the Competition Act*".**

<u>MERGER CONTROL</u>

The proposed amendments regarding public interest considerations need to be approached with considerable care, as they may give rise to considerable uncertainty and may also pose risk to the institutional integrity of Competition Commission itself.

Where the Competition Act confers wide and undefined powers on the Competition Commission, it could lead to potential abuse in the sense that unscrupulous third parties could attempt to unduly influence the Competition Commission to achieve particular outcomes which are in their own commercial interests.

For this reason and for the detailed reasons set out in the longer submissions, considerable care should be exercised in relation to the proposal that the Competition Commission should consider the effect of the merger on the "*promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons in firms in the market*". There are specific regulatory instruments which have been adopted in this regard and it does not conduce to clarity or certainty to create a parallel set of undefined powers on the part of the competition authorities.

Moreover, while it is correct that the Competition Appeal Court in *Walmart* has clarified the role to be played by the public interest considerations, the proposed rewording does not determine how the impact of the merger on the specified public interest considerations is to be weighed against the impact on competition.

This is an issue which would have to be clearly dealt with in the proposed amendments. **This could potentially be addressed by the following amendment to the proposed clause 12A(1)(b) "determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3). If it is concluded that the merger cannot be justified on substantial public interest grounds, the negative impact of the merger on the public interest grounds must be weighed up against the pro-competitive effects of the merger".**

"CREEPING MERGERS"

The risks associated with the proposed "creeping merger" provisions as they are currently drafted may result in the competition authorities assessing and potentially unbundling transactions which have already been implemented. The creeping merger provisions will also lead to a disproportionate increase in costs and uncertainty for the merging parties which is not justified based on clear merger specificity concerns or theories of harm. Accordingly, business proposes that to the extent the 'creeping mergers' are retained in the Amendment Bill, the Amendment Bill prescribe certain thresholds which curtails the broad and unqualified interpretation of the current proposed amendment envisaged by section 7(3)(k). These include limiting the competition authorities review of historic transactions to those which took place within the same product and geographic market as the principle transaction being notified. It should only be in instances where there is evidence of a deliberate strategy to circumvent the merger control provisions that the competition authorities should be permitted to intervene and impose remedies in relation to those historic transactions.

Unfortunately, the provisions which have been proposed in relation to so-called "*creeping mergers*" are extremely unclear and it is not clear what legitimate competition law purpose these provisions seek to serve. If EDD wishes to include a provision requiring the Commission to analyse shareholdings and cross directorships (the proposed clause 12A(7)) in the context of merger analysis, this is already being done as the Commission tends to analyse the extent to which parties may have shareholdings in the entities which are involved in the same relevant markets. However, for the reasons set out in the more detailed submissions, the current wording of the proposed section 12A(7) is too broad and would impose disproportionate obligations on parties to mergers as well as the Commission.

If the EDD wishes to retain these provisions, it is proposed that these should be amended as follows:

> "*(i) the extent of shareholding by a party to the merger in another firm or other firms in the markets which are relevant to the merger"; and*
> *(j) the extent to which the directors of the acquiring firm or target firm may serve on the boards of directors of other firms which participate in the same relevant markets*"

With respect to the proposed insertion of 12A(k) ("*any other mergers engaged in by a party to the merger in the preceding three years*"), this provision is entirely unclear. Simply put, when a merger is analysed, the Competition Authorities will determine whether or not the merger gives rise to a substantial prevention or lessening of competition. It is entirely irrelevant how the party has established its position in the market and whether or not a party has been involved in one or more mergers in the past three years has no bearing as to whether or not the merger under scrutiny may give rise to a substantial prevention or lessening of competition. The insertion of the proposed section 12B suffers from the same lack of clarity and it does not appear that this provision serves any meaningful purpose other than to create uncertainty.

Business certainty is not served by including unclear provisions which will simply give rise to confusion.

To the extent that there is a concern that parties may seek to structure transactions in a manner which avoids notification, this is a legitimate concern and could be addressed through adopting a provision which is similar to that in the European Union's Merger Control Regulations. A potential compromise may be to adopt the approach of the European Merger Control Regime which provides that (amended to take account of the specific provisions of the South African Competition Act): **"*If two or more transactions (each of them bringing about an acquisition of control) take place within a two-year period between the same persons or firms including simultaneous transactions which are not conditional upon each other, they shall be considered as a single merger, irrespective of whether or not those transactions relate to parts of the same business or concern the same sector*."**

In addition, it should be made clear in the amendments that a merger prohibition on the basis of the proposed "creeping merger" provisions would not result in the retrospective prohibition (i.e. unbundling) of the entire series of transactions that have been assessed as a single transaction under the proposed provisions. Not clarifying the proposed amendments in this way would result in significantly greater uncertainty and costs associated with merger control, reducing investment and economic growth.

REVERSE ONUS

The Amendment Bill introduces a reverse onus on a dominant entity to demonstrate that its conduct is not anti-competitive. Although a respondent generally retains the evidentiary onus to demonstrate any pro-competitive or efficiency justifications, the Amendment Bill should clarify that a respondent will only be found to have contravened the Competition Act if, on a balance of probabilities, the anti-competitive effects of the conduct outweigh the pro-competitive effects. In the complex economic assessments usually required in abuse of dominance cases, it is important for respondents and the adjudicative body to understand the standard of 'proof' required. In other words, if on a balance of probabilities the Competition Tribunal assesses that there is a 50% likelihood that the evidence demonstrates that the net effects of the conduct are in fact pro-competitive, the Competition Tribunal should find in favour of the respondent and not the complainant.

In terms of the Amendment Bill, the Competition Commission could essentially refer a complaint without having conducted a substantive investigation. This could lead to spurious and unjustified litigation, which disproportionately prejudices dominant entities. Accordingly, introducing adverse costs orders against the Competition Commission could serve as a sufficient sanction to ensure that all cases referred to the Competition Tribunal are based on good investigative work by the Competition Commission. The Competition Tribunal may retain the discretion whether to make an adverse costs order and this discretion should be exercised in a manner which does not deter the Competition Commission from discharging its public duties. Including adverse costs orders will also likely result in more settlement agreements being concluded expeditiously alternatively referred to trial for prosecution (should no settlement be forthcoming). The expeditious resolution of complaints is not only mutually beneficial for all parties involved in the complaint but will also be favourable for civil litigants who may potentially have damages claims. The delay in concluding investigations is a significant impediment to follow-on damages claims.

To the extent that the reverse onus provisions are retained, the Amendment Bill should at least introduce an "effects based" test for dominance (such as those adopted by the European Commission during its modernisation agenda) so as to ensure that such reverse onus is only placed on firms that are truly dominant and do not simply have a large share in the domestic market.

GUIDELINES

As a general point, the Amendment Bill envisages a number of guidelines to be published by the Competition Commission which would, as envisaged by the Amendment Bill, provide greater clarity on various aspects of the Bill. The non-binding nature of guidelines coupled with the fact that no such guidelines have as yet been published, places the public at a significant disadvantage in commenting on the empowering provisions of the Amendment Bill without having sight of the guidelines. Accordingly, the guiding principles which are contemplated or envisaged to be published by way of Guidelines should rather form part of the Amendment Bill itself as this will ensure a level of certainty and predictability is achieved and allow parties to engage constructively with the Ministry in an effort to identify workable solutions to the various issues raised with the Amendment Bill in its current form.