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ATTORNEYS

COMMENTS ON THE COMPETITION
AMENDMENT BILL B23 – 2018

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1. **INTRODUCTION**

- 1.1 We have considered the proposed amendments to the Competition Act (“the principal Act”) as tabled before Parliament by the Honourable Minister Ebrahim Patel, MP, on behalf of the Economic Development Department. We are in support of the proposed amendments in the Competition Amendment Bill (“Amendment Bill”), in particular the provisions proposed with a view to advance the public interest.
- 1.2 In our view, the Amendment Bill seeks to reinforce economic inclusion to, *inter alia*, redress a long-standing history of a racially-skewed national economy. Moreover, there is a need to enhance participation by small and medium enterprises (“SMEs”) and firms controlled or owned by historically disadvantaged persons (“HDIs”) in the economy by ensuring access to markets through competition legislation and we believe the Amendment Bill sufficiently serves that purpose.
- 1.3 Competition legislation in South Africa has proven to be effective; however, there is a need to strengthen competition laws to advance government objectives, such as transforming the economy and promoting inclusive growth.
- 1.4 We have identified various provisions of the Amendment Bill which we consider to be relevant in respect of general public interest considerations, and we set them out below.

2. **SECTION 8 - ABUSE OF DOMINANCE**

- 2.1 The Amendment Bill introduces a new subsection (1)(d)(vii). In terms of the subsection, a dominant firm is prohibited from requiring SMEs or HDIs, to sell its product to the dominant firm at a price which impedes the ability of the supplier to participate effectively.
- 2.2 Dominant firms have been prosecuted by competition authorities for the illicit use of their power in markets and such abuse has resulted in barriers to entry and market foreclosures. Our view is that the inclusion of section 8(1)(d)(vii) is essential in that it specifically protects SMEs and HDIs against abuse of dominance. The provision seeks to ensure that dominant firms do not exploit SMEs and HDIs by purchasing products at prices which do not advance effective participation in a market by SMEs and HDIs.
- 2.3 The onus will then be upon the dominant firm to show that the purchase price is reasonable.

3. **SECTION 9 – PRICE DISCRIMINATION**

- 3.1 The new subsection (3) requires a dominant firm as a seller and/or purchaser of goods and services to show that its differential pricing methods do not impede effective participation by SMEs and HDIs.
- 3.2 The proposed subsection requires dominant firms to act in a manner that is consistent with the promotion of effective participation by SMEs and HDIs by ensuring that prices by dominant firms are not discriminatory towards the said businesses.
- 3.3 We support the introduction of section 9 (3) and (4) which place an onus on a dominant firm to demonstrate that its pricing methods are not discriminatory towards effective participation of SMEs and HDIs. This will ensure that there is still a benefit for consumers and the economy by the protection of SMEs and HDI business on the one hand, and on the other hand, it will allow the dominant firms to sell at a lower price to more price-sensitive customers, provided that this is not done to the detriment of the small and medium sized firms and historically disadvantaged firms.

4. **SECTION 10 – EXEMPTION**

- 4.1 The Amendment Bill introduces a new subsection (3)(b)(ii), which provides the Competition Commission (“the Commission”) with authority to exempt small and medium businesses or firms controlled by historically disadvantaged persons from the application of Chapter 2. Such an exemption will only be granted on the basis of the said firms demonstrating an ability to effectively enter, participate and expand in a market.
- 4.2 Subsection 3(b)(iv) provides that exemption may be granted on consideration of economic development, growth and transformation of an industry.
- 4.3 Subsection 3(b)(v) has been added to exempt firms which promote competitiveness and efficiency gains that promote employment or industrial expansion.
- 4.4 The aforesaid provisions give effect to the government’s objectives of development, growth and transformation of the national economy by ensuring that firms advancing such objectives are exempted from the application of Chapter 2. Firms which enhance employment or expansion of an industry are to be considered for exemption and this is necessary in a country that has seen a dramatic increase of its unemployment rate.

5. **SECTION 12A – CONSIDERATION OF MERGERS**

- 5.1 The new subsection (3)(c) authorises the Commission and the Competition Tribunal (“the Tribunal”) to consider the effect a merger will have on SMEs to effectively enter, participate and expand within the market. The Principal Act does not cater for medium businesses and only refers to competitiveness of a small business. We support the proposed amendment on the basis that it specifically sets out the aspects the Commission must consider when considering the effects of a merger on SMEs and HDIs.
- 5.2 Subsection (3)(e) provides that the Commission must consider the effect of a merger on the promotion of a greater spread of ownership by historically disadvantaged persons and workers in firms in the market.
- 5.3 We view this section as necessary in that, in line with objectives of inclusive participation in the economy, merging entities must be seen to promote ownership by previously disadvantaged persons and workers of the merging firms. This provision is consistent with the Government’s transformational objectives.

6. **SECTION 18A - INTERVENTION IN MERGER PROCEEDINGS INVOLVING FOREIGN ACQUIRING FIRM**

- 6.1 This section creates a legislative framework within which the President of the Republic is required to constitute a Committee which is responsible for considering whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic.
- 6.2 The Committee will assess such a merger purely based on national security interests. The foreign acquiring firm will be required to file a merger with the Committee before notifying the Commission. The Commission or the Tribunal may not consider a merger which is subject to the approval of the Committee. In the event that such a merger is not granted by the Committee, the Commission or the Tribunal will not have any powers to consider the merger.
- 6.3 What is being introduced by section 18A is the involvement of government in merger regulation. This is not a new concept in global competition regulation. The European Union, the People’s Republic of China; Canada and the United States of America have similar requirements incorporated in their anti-trust regimes, although national security interests are not properly defined.

- 6.4 In the South African context, section 18A requires the President to publish a list of national security interest within the context of mergers by foreign acquiring firms. In the circumstances, there will be greater certainty with respect to what factors the Committee will consider when assessing mergers by a foreign acquiring firm.
- 6.5 Some of the factors that will impact a merger transaction to be considered by the Committee include, security of infrastructure, espionage, terrorism and organised crime.
- 6.6 Although radical legislative changes are a potential threat to investment, if media reports are anything to go by, the Amendment Bill seeks to empower competition authorities and implement tighter controls over acquisitions by foreign entities.
- 6.7 Every country has a right to protect its national security interests and sovereignty, considering the prevalence of global terrorism and national security breaches. Section 18A ensures that foreign companies enter the domestic market purely for commercial reasons and contribute positively to the national economy. There cannot be a risk of political meddling as both the section and the list of national security interest within the context of mergers by foreign acquiring firms to be published by the President provides a safeguard. We are of the view that section 18A will hardly be an impediment to foreign investment. Furthermore, the Gazette to be published by the President in terms of section 18A(3) will ensure transparency around Government interventions to give investors and citizens comfort that the process is not open to abuse.
- 6.8 We are cognizant of the concerns raised by groups who advocate for commercial interests regarding potential challenges brought about by the introduction of section 18A. A major concern advocated is that section 18A does not make provision for a specific appeal and/or review process in the event that the appointed Committee does not approve a merger due to security reasons. South Africa is a Constitutional State which observes the rule of law. In the context of recent Constitutional Court jurisprudence^a, we should be assured that if the Committee contemplated by Section 18A were to act contrary to the prescripts of the Act and not apply the relevant considerations contained in the list of national security interest within the context of mergers by foreign acquiring firms as published by the President, then their decision will be subject to court review

^a *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited (CCT254/16) [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) (14*

under the the Promotion of Administrative Justice Act, 2000 and also in terms of the principle of legality.

7. **SECTION 43C – MATTERS TO BE DECIDED AT MARKET INQUIRY**

- 7.1 In line with the objectives of the Bill to protect and stimulate the growth of SME's and firms owned and controlled by HDI's, the Bill includes a new requirement that in a market inquiry the Commission must decide whether any feature, including structure and levels of concentration, of each relevant market for any goods or services impedes, restricts or distorts competition within that market. In addition, thereto, the Commission, in making its decision, must have regard to the adverse impact on SMEs and firms controlled by HDIs. The specific inclusion of the impact on SMEs and on firms controlled by HDIs will assist in removing the barriers to entry encountered by the SMEs and firms controlled or owned by HDIs.

8. **SECTION 43G - PARTICIPATION IN AND REPRESENTATION TO MARKET INQUIRY**

- 8.1 Section 43G lists the persons who are eligible to partake in a market inquiry and such persons include trade unions representing employers of a firm subject to an inquiry, persons who have substantial interest in the inquiry and those who would assist with the work of the inquiry.
- 8.2 This provision allows for broader participation in market inquires and also curtails the process of determining who may partake in a market inquiry. Of greater importance is the presence of persons who are considered to be in a position to substantially assist the Commission in the market inquiry, thus allowing increased public participation.

9. **CONCLUSION**

- 9.1 As set out in the explanatory memorandum on the objects of the Bill, the primary objectives of the proposed amendments are twofold, namely:
- 9.1.1 To address the high levels of economic concentration in the economy; and
- 9.1.2 To address the skewed ownership profile of the economy.
- 9.2 It is our considered view that the amendments, specifically those concerned with public interest considerations achieve the objects of the Bill. They do so by challenging the

levels of economic concentration which favor dominant firms, promotes racially-skewed ownership profiles, the purchase of products at an unreasonable price, discriminatory pricing methods which impede effective participation of SMEs and HDIs, contribute towards the early exit of new entrants, prevent the entry of new participants, and other such like matters.

- 9.3 The concern expressed in the public domain that there is no provision made for an appeal process or review of the decision by the Committee as contemplated in section 18A is misplaced. The Committee must function within the confines of Section 18A and a list of national security interest within the context of mergers by foreign acquiring firms as published by the President. South Africa is a Constitutional State and thus any decision by the Committee under section 18A will be subject to court review.

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