COSATU Submission:

Competition Amendment Bill

Select Committee on Business and Economic Development

National Council of Provinces

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# Introduction

The Congress of South African Trade Unions (COSATU) welcomes the opportunity to make a submission to the Select Committee on Business and Economic Development on the Competition Amendment Bill, 2018, published on Parliament’s website on 11 July 2018 (and referred to as “the Bill” hereafter).

COSATU makes this submission on behalf of its 16 affiliates and their almost 2 million members.

COSATU and its affiliates have a long history of involvement and interest in competition legislation and its impact on and benefits to workers and the working class. We have participated in numerous market enquiries, mergers and acquisitions at the Competition Commission and Tribunal and the Competition Appeal Court. In addition, in many previous submissions to the government, Parliament, Nedlac and other bodies, we have played a central role in proceedings to craft and later amend the competition legislation.

We take an interest in competition matters as we regard it as a central lever to promote economic inclusion and to address South Africa’s high levels of economic concentration. Economic exclusion and concentration contribute to the record-breaking levels of inequality in South Africa.

COSATU applauds the introduction of the Competition Amendment Bill and supports it as a key means to address the challenges of economic exclusion and concentration and inequality. While the current Competition Act is an important instrument, it needs to be strengthened and aligned more clearly with public policies.

COSATU believes some of the most important benefits from the amended legislation will be:

* It will undo the concentration in the economy, including the racially-skewed spread of firm ownership – by the old white boys club, who are keeping black players out;
* It will promote investment;
* It will lead to a reduction in prices; and
* It will lead to a greater focus on jobs and the promotion of worker ownership.

Strengthening the competition legislation as envisaged by the Bill will allow it to deal with some of the most pressing structural challenges in the economy.

This submission contains our comments on the Bill. We have indicated to the Secretariat of the Select Committee that we intend to make oral representations as well.

# Nedlac process

COSATU, with other labour federations, and Organised Business were involved in an intensive eight-month process of engagement at Nedlac on the Competition Amendment Bill, published by the Economic Development Department in December 2017 (and referred to as “the 2017 Bill” hereafter). These engagements were led by the Minister of Economic Development on behalf of Government and also included bilaterals between Government and the social partners. The Nedlac process saw many substantial areas of agreement and concluded with overall support for the Bill, captured in the Nedlac Report, which was signed off by all constituencies, as follows:

“The parties at NEDLAC recognised that the process of engagement had been meaningful, substantial and helpful and that The Competition Amendment Bill 2018 represents a package of provisions which constitutes an appropriate and effective balance of the interests of all the social partners and the policy imperatives of Government.”

During the Nedlac process, Organised Business and Organised Labour made several submissions containing proposals for amendments and additions to the 2017 Bill. Following a process of social dialogue, many changes were made to the 2017 Bill and have been captured in the version of the Bill tabled at Parliament.

Several of Labour’s proposals made at Nedlac did not make it into the Bill, including some dealing with employment; the handling of mergers with public policy implications involving foreign firms; creeping concentration; fines and penalties; and warning labels. We recognise that this is the nature of social dialogue and negotiations between social partners.

Nevertheless, we are concerned that the Government may have gone too far during the Nedlac process to accommodate Business’ concerns. In many instances, these compromises watered down the possible impact of the Bill.

Further substantial changes to the Bill to accommodate reactionary concerns and large corporate interests will dampen the impact of the Bill and result in the status quo in terms of transformation, concentration and inequality remaining.

# Attacks on the Bill

Since the publication previously by the Portfolio Committee, we have witnessed a sustained attack on the Bill by local businesses; their lap dogs, corporate lawyers; and reactionary institutions and commentators.

COSATU is not surprised by these attacks, as these interests would like to see the old regime and instances of collusion by mainly large, white-owned, apartheid-style companies continuing.

We urge the Select Committee to stay the course and ignore these attacks to ensure we transform the South African economy.

An American publication, *The Nation*, in describing the United States economy in April 2017, warns us what will happen if we do not transform the South African economy and concentration and consolidation increase:

“This market consolidation has wide-reaching effects beyond the higher prices monopolies can charge due to lack of competition. Quality suffers when consumers have nowhere else to turn… Economic power begets political power, and democratic institutions suffer. Personal liberty to use talents and skills gets stymied when there’s only one game in town. Barriers to entry have led to a decline in business start-ups and a retrenching of economic dynamism. Inequality grows when a few at the top gather all the rewards in a market.”

Much of the attacks by local business interests on the Bill claim that it will deter investment. Yet, in reality, foreign investors and institutions, including the World Bank, complain about the collusive practices and concentration in the economy and identify these as the real reasons for the lack of investment. COSATU shares their concerns and has called on government to act more decisively to deal with collusion and concentration as these hamper development and contribute to inequality. We welcome the Bill as a step in the right direction.

Dealing with inequality will also strengthen our democracy, as set out by the former American Supreme Court judge, Justice Louis Brandeis: “We can have democracy in this country, or we can have great wealth concentrated in the hands of a few, but we cannot have both.”

# Economic concentration

COSATU supports the Bill’s expansion of the mandate of the competition authorities to deal with economic concentration. This is an important area in South Africa’s programme to build a more inclusive economy.

We endorse the Bill’s use of instruments to address high levels of economic concentration where these are not justifiable and to enable authorities to take firm measures to deconcentrate the economy. This is in line with trade unions’ call for a more inclusive growth path and for firm action against monopolies, oligopolies and dominant players who abuse their market power. We also support the Bill’s inclusion of economic concentration as a specific consideration in mergers and in the investigation of cartels and the abuse of dominance.

Concentrated markets can have the following negative effects:

* Dominant companies tend to maximise profits by charging higher prices, at the cost of lower levels of production, employment and investment
* Dominant companies are associated with higher levels of income inequality and narrower ownership structures
* As mentioned in paragraph 3 above, highly concentrated markets with cartels and monopolies discourage investment

COSATU believes the Bill addresses the negative impact of concentration in the South African economy through addressing the structure of markets, the impact that they are having, including on SMMEs and businesses owned by black people, and the behaviour of dominant firms.

We support the Bill as it will prohibit a range of behaviours of dominant firms, including:

* where a dominant firm uses its market power to impede an SMME from participating effectively;
* when large vertically integrated firms manipulate prices in the value chain to keep competitors out;
* where price discrimination impedes the ability of SMMEs and black-owned firms from participating in the economy; and
* when a dominant firm’s prices to suppliers, including SMMEs, impedes the suppliers’ ability from participating effectively in the market.

In general, we believe the amendments to address economic concentration will be a major boost to SMMEs. Abuses of dominance by large firms including predatory pricing, margin squeeze, price discrimination and excessive pricing would be dealt with more effectively. This will make it easier for SMMEs to compete in the market.

## Market inquiries

Market inquiries is an important tool to addresses market or economic concentration. COSATU believes such enquiries need to promote the preamble and the aims of the Competition Act and the constitutional goals of greater economic equity and fair labour practices.

The amendments proposed by section 43A and other sections in the Bill will help ensure market enquiries achieve these aims as they will expand the scope and powers of the competition authorities to have a clearer focus on economic concentration and inclusion and to address any adverse effect on competition, including through divestiture, or other remedies.

The Bill provides for the Competition Commission to conduct an inquiry into sectors to determine the concentration levels in a market; the outcomes observed in a market (e.g. high prices); and the conduct in a market (e.g. by suppliers) if it has reason to believe there are factors which impede, restrict or distort competition, or if requested by the Minister.

COSATU welcomes the new market inquiry provision in section 43A including the provision that trade unions can participate in market inquiries.

### Commission’s powers

During the Nedlac deliberations, Business was worried about the Commission’s powers relating to market inquiries proposed by the 2017 Bill. It wanted these powers to rest with the Tribunal. COSATU and other trade union federations responded that to deal with concentration swiftly the Commission had to have impactful powers and supported the provisions of the 2017 Bill.

In the end, it was agreed that certain changes would be made to the 2017 Bill to deal with Business’ concerns. These were: to ensure that market inquiry provisions adequately provide for affected firms to partake during proceedings; provisions on procedures have been strengthened; new provisions have been added to ensure that affected firms have a more clearly defined right to be heard before a decision regarding a remedy is made; and the Commission’s proposed powers have been watered down.

Following the Nedlac deliberations and the changes agreed there, the Bill’s provisions give the Competition Commission the powers to consider and make findings on the effect that concentrated markets have on competition and on economic inclusion and to the extent that it finds any adverse effects, the Competition Commission must determine the action to be taken or recommendations to be made. Actions may include any existing remedy available under the Act (except divestiture, which can only be imposed by the Tribunal) and new remedies tailored to the specific findings of the market inquiry.

### Threshold for market inquiry

At Nedlac, Organised Labour supported the use of the adverse effect on competition test to launch market inquiries, as contained in section 43A of the 2017 Bill. Business on the other hand believed that the threshold for a market inquiry to be set up should be higher. COSATU and the other federations argued that it should not be overly difficult to set up an inquiry or otherwise corporate lawyers would stop any inquiry from being launched and concentration would never be addressed.

Government agreed with COSATU’s analysis. It argued that the best response to Business’ concerns was to provide for an evidence-based inquiry which would be in the best interests of citizens and investors. It proposed that the protection of the rights of parties should not lie in a very high threshold to convene a market inquiry, but instead that additional procedural protections be considered for firms to ensure a fair opportunity to participate and outcomes connected clearly to the evidence led at the inquiry.

Subsequently, changes were made to the 2017 Bill, which are captured in the Bill adopted by the Portfolio Committee.

## Price discrimination

Because of the excessive concentration present in the South African economy, many large businesses can and do abuse their dominance by dictating prices to customers and consumers. Many of these customers are SMMEs or businesses owned by black people. This abuse of dominance has many negative consequences, especially for inequality, economic growth and transformation. This abuse also manifests itself as price discrimination.

During the Nedlac process, Business expressed its concern that the evidentiary burden in the 2017 Bill was shifted to dominant firms to show that price discrimination was not anti-competitive.

Labour supported this new provision as it places the responsibility on dominant firms to show that any price discrimination does not impede the ability of their customers to participate effectively in the economy. Without shifting this burden to dominant firms, it would be very difficult to prove unfair or prohibited price discrimination and such practices would only continue.

Following the Nedlac discussions, the focus of the negative effects of price discrimination was specifically limited to SMMEs and businesses owned by black people. This is captured in the Bill adopted by the Portfolio Committee.

COSATU welcomes the amendments to section 9, as proposed in the Bill. These will especially help address complaints from township businesses, SMMEs and business owned by black people, who often are the victims of price discrimination that has the effect of impeding their ability to participate in the market.

The amendments to:

* section 9(1)(a) will make it easier to prove price discrimination as it requires that price discrimination must not ‘prevent of lessen competition’, rather than the existing Act which refers to ‘substantially prevent or lessen competition’, a more difficult test; and
* section 9(3) will make it more difficult for large, dominant firms to unfairly discriminate against SMME and black-owned customers by charging higher prices, preventing such firms from participating in a market.

## Abuse of dominance

The excessive concentration present in the South African economy, set out in paragraph 4.2 above, also sees many large businesses abusing their dominance by dictating prices to suppliers.

The local economy not only sees many sectors with monopolies but also with monopsonies, where only one buyer interacts with many would-be sellers of a particular product. All power then rests with that buyer, who can dictate prices to the suppliers. In these cases, the monopsony company is often a large, corporate and the suppliers are often SMMEs.

In the South African retail market for instance, including clothing, food and furniture retail, there are often only a limited number of retailers. This makes it difficult for smaller suppliers to get their product to market. If they sell their product to these large, dominating retailers, these firms dictate the prices and may abuse their power.

In the South African clothing market, for instance, the Producer Price Index, which measures increases in prices at the factory gate (prices of goods sold to retailers), was often close to 0% and below in the mid- to late-2000s, meaning that retailers pushed the prices of suppliers down, not allowing the suppliers to increase their prices at all. These suppliers did not make any profit to allow them to reinvest in their businesses to make them more sustainable, to grow and to employ more people. In some cases, it even forced some suppliers to undercut wages or not pay workers’ benefits. This resulted in many businesses, including SMMEs and black-owned businesses, going out of business, unable to cover higher raw material, overhead and utility costs.

This significant market power imbalance between large customers and smaller suppliers has a detrimental effect on retaining productive capacity.

COSATU welcomes the amendments to the Act, including those set out in section 8(1)(d)(vii), which prohibits a dominant firm to require a supplier, which is an SMME or business owned by a black person, “to sell its products to the dominant firmat a price which impedes the ability of the supplier to participateeffectively”. The current legislation does not explicitly deal with practices by dominant firms that make it difficult for their suppliers to continue to stay in business. This is not only confined to forcing a supplier to sell at a price which is too low but also to accept payment terms which are too long.

# Transformation & ownership

In this submission, COSATU has already identified several provisions in the Bill which will help to transform the South African economy and address the racially-skewed spread of ownership.

Overall the Bill has a strong focus on transformation, away from large, often white-owned corporates to SMMEs and firms owned by black South Africans.

COSATU supports this as SMMEs are recognised globally as an important driver of inclusive growth and provide opportunities for employment of low-skilled workers, women and youth.

Except for those amendments identified above, the Bill also amends section 12A(3), with the introduction of an additional test to public interest criteria applied to mergers, namely the extent to which a merger will promote greater ownership, in particular by black South Africans and workers employed at the firms concerned.

COSATU welcomes this amendment. It will create explicit public interest grounds around ownership by workers in firms where mergers are proposed. We anticipate that companies will engage workers and unions around worker ownership in mergers and that workers’ stake in the economy will increase in a meaningful way.

# Collaboration

Cooperation between economic actors aimed at achieving a beneficial socio-economic outcome is not always regarded as anti-competitive. However, the current Act is not clear enough on this. The result is that companies do not cooperate or do not consent to cooperate when urged to do so by government or trade unions to address social goals, including around procurement, job creation or industrialisation.

During the deliberations at Nedlac, Business and Labour both raised that the Bill should provide for collaboration between firms (that are not anti-competitive), including in support of SMMEs, and to further competitiveness, employment and other social objectives.

Amendments are proposed to the section of the Act, dealing with applications for exemption, including section 10(3)(b), incorporating the discussions at Nedlac, as follows: amendments are proposed for the issuing of regulations to clarify the categories of exemptions that will be fast-tracked by the authorities; the addition of grounds for exemption (impact on employment, industrial expansion and transformation objectives); and the setting of timeframes within which exemptions will be considered.

We also support the amendment in section 10(10), which will give the Minister the power to issue regulations which will provide for exemptions to collaborate. This amendment will allow companies to collaborate for instance on ‘buy local’ agreements. It is our understanding that other jurisdictions allow for collaboration between firms in some instances.

In the clothing and textile sector, for instance, there have been efforts to get retailers to buy more locally-made garments and home textiles but the current Act is not clear enough that such efforts would not fall foul of the Competition Act. If the Minister were to allow for retailers to collaborate on ‘buy local’ efforts, it could open the door to job creation and industrialisation.

The amendment will provide certainty to companies that could consider working together to create jobs and deepen industry and to our affiliates that agitate for those companies to do so.

COSATU believes this decision whether to exempt certain agreements or practices is a policy decision and that this provision, section 10(10), is policy-driven. As such, it cannot be the job of the competition authorities. Only the Minister, who is accountable to the electorate and to Parliament, can make such a policy decision.

# Mergers

COSATU supports the increased role for the Executive in the Bill to ensure that public policy drives the transformation of the economy. This includes strengthening the provisions relating to the right of the Executive to intervene in competition issues, as it is accountable to the electorate.

In our submissions to Nedlac, COSATU and other union federations also argued that the Bill should provide the Executive with a direct veto in certain mergers and acquisitions. We are concerned that when foreign companies buy significant South African assets, we should have the right to prohibit it where it is not in the national interest.

## Role of the Executive

In response to Organised Labour’s call for a greater role for the Executive in mergers, Business recognised the intended purpose and value of providing the Executive with the right to appeal and of access to information but proposed that there should be some limitations regarding the Executive’s right to appeal (which should be in respect of matters where the Executive was involved at Commission or Tribunal level) and the use of confidential information (which should be solely for purposes of proceedings under the Act).

During the Nedlac deliberations, it was agreed that certain of the 2017 Bill’s provisions on the role for the Executive would be redrafted.

The Bill adopted by the Portfolio Committee incorporates the discussion at Nedlac, including in sections 17 and 45, as follows: to balance these concerns regarding the exercise by the Executive of the right of appeal to the Competition Appeal Court, the final Bill clarifies that appeals will specifically be limited to public interest grounds; and further that confidential information may only be used for the purposes of the Act or required by any other law.

COSATU especially welcomes the provision (section 17(1)(c)) that the Minister may appeal merger decisions, under certain circumstances, to the Competition Appeal Court when the Minister believes public interest issues, including employment, were not appropriately considered.

Workers, including our members, expect policy makers to be responsible for mergers policy and play an active role in mergers, especially where jobs, factories, sectors or small businesses are at risk.

While the Bill provides for a stronger role for the Executive, COSATU and other trade union federations had wanted an even stronger role, including a direct veto on foreign mergers with a negative impact on jobs and industrial development (apart from the veto on mergers with an adverse effect on the national security, discussed in paragraph 7.2 below).

We are concerned that as foreign companies buy significant South African industrial assets, the government may not have the ability, in law, to put appropriate conditions on such sales or to prohibit it where it is not in the national interest.

In the end, in an effort to reach agreement at Nedlac, we did not pursue this matter. However, the argument remains: a stronger role for the Executive in mergers is warranted.

## Security

During the Nedlac discussions, Organised Labour raised a concern that the current Act did not provide a mechanism for the Executive to intervene in mergers by foreign firms which had an adverse effect on the national interest. Such a provision was included in a number of other countries’ legal systems.

COSATU and the other union federations argued that national security issues may arise when a foreign firm seeks to acquire an interest, particularly a controlling one, in a local firm in a sector or activity with security implications, for example in security companies with large numbers of armed officials in their employ, armaments manufacturers or critical infrastructure.

Organised Business did not raise an in-principle objection to such a provision but it needed to contain appropriate safeguards and be clearly defined.

As a result, a new section 18A has been introduced in the final Bill. It introduces several new provisions which provide for the President to: publish a list of national security interests, based on criteria set out in the legislation; to constitute a Committee of Members of Cabinet and other public officials to consider acquisitions by foreign-owned firms of local firms or mergers between them, where national security concerns may arise; and prohibit or place conditions on such acquisitions or mergers.

COSATU believes this provision will fill a gap in our legislation as there is no provision in our merger legislation nor any investment law which provides the legal basis for government to intervene in mergers with national security implications.

# Elevate employment

COSATU believes employment needs to play a more central role in the competition regime. We are concerned that the Commission selectively interprets the Competition Act when it comes to the objective of promoting employment in section 2 of the Act.

This concern is reflected, for instance, in the general failure to attach employment and social and economic welfare promoting conditions to the approval of mergers and the lack of monitoring and enforcement of non-compliance with such conditions.

Over the last few years, we have seen this situation improving with the competition authorities, including due to the intervention in certain mergers by the Minister of Economic Development, placing more emphasis on employment but we need to continue further on this path.

The Bill helps to further emphasise employment.

For instance, COSATU supports the inclusion of employment as a criteria in market inquiries as is contained in section 43B in the Bill.

At Nedlac, Organised Labour made further proposals to elevate employment in the competition regime.

As a result, the merger provisions in section 12A(1) was refined to make it explicit that public interest matters, including employment, need to be considered in their own right during merger proceedings.

In addition, as mentioned in paragraph 5 above, section 12A(3) has been amended with the introduction of an additional test to public interest criteria applied to mergers, namely the extent to which a merger will promote greater ownership, including workers employed at the firms concerned.

# Fines and penalties

During the Nedlac deliberations, Organised Labour made submission that the penalty regime in the Act should be strengthened considerably.

COSATU and the other union federations argued that this is necessary as the competition authorities continue to uncover collusion and cartels. Clearly, the current penalty regime is not strong enough and does not act as a sufficient deterrent.

Our proposals included

* increasing the fines for collusion and abuse of dominance, including
  + penalties for cartels to be extended to group and holding companies of convicted firms and calculated automatically as a percentage of an entire group’s turnover, in certain instances;
  + the penalty where a company is found guilty of collusion a second time; and
* removing the so-called “yellow card” system, where a first offence did not carry the full penalty. This system is not found in other significant competition regimes internationally.

Business initially favoured the retention of the yellow card provision, but following the deliberations at Nedlac, it proposed that, if the yellow card provision was to be removed, there should be clearer guidelines from the Commission as to what may constitute a contravention of the Act, and that to the extent a respondent firm has not been found in contravention of the Act or if the activity was not covered by guidelines, the Tribunal should consider this in their determination of the appropriate penalty.

COSATU supports the removal of the yellow card provision, as it means that companies have to be found guilty twice of certain prohibited practices (those not listed in the Act) before they are penalised. Our understanding is that this is not a common provision in other major jurisdictions.

The implication of the yellow card provision is that the Competition Commission do investigations which take time and resources and then, when a firm is found guilty, there is no right to impose a penalty. As a result many prohibited practices go unpunished.

We believe that after twenty years of the introduction of the Competition Act it is time to remove this provision. The amendments to the Act will ensure that all prohibited acts can attract a penalty of up to 10% of turnover.

At Nedlac, it was agreed that the Bill would propose to increase the penalty for a repeat offence to a maximum of 25% of a company’s turnover; enable the authorities to extend penalties to the turnover of related firms in specified circumstances (including where those related firms knew or should have known of the prohibited conduct) and apply joint and several liability; and provide for mitigating factors to be taken into account.

To provide greater certainty, the Bill also provides for guidelines to be issued by the Competition Commission on prohibited practices and it introduces a number of definitions including on predatory pricing, margin squeeze, and various price benchmarks to clarify proposed changes to the Bill.

COSATU supports these changes to section 59 of the Act.