



# BLACK BUSINESS COUNCIL

09 November 2018

Mr Mandla Issac Rayi  
Chairperson  
Select Committee on Economic and Business Development  
PO BOX 15  
Parliament of South Africa  
Cape Town  
8000

Dear Mr Rayi

**Draft Comments on the Competition Commission Amendment Bill and the Impact on Small and Medium Business and Firms Owned by Black South Africans**

Black Business Council (BBC) supports the objectives of the Competition Amendment Bill, and believes that if properly implemented proposals can advance inclusive growth, transformation and competitiveness of the South African economy. We believe that by focusing attention on economic transformation and participation by Black business, competition policy will provide further impetus for transformation in South Africa. However, we would like to encourage policymakers to engage with key sector regulators to ensure that there is policy consistency and uniformity in approach and processes.

We welcome the inclusive and accommodative approach that the Commission has embarked on to make competition policy accessible to many South Africans – we are equally happy that the same stance has been adopted during the consultations on the Bill.

It is important to mention that BBC submitted input to the Bill that was released during December 2017, and the subsequent review in July 2018. As such, this document represents our initial comments on the process.

Our response proceeds as follows: The first part provides some comments and responses to the explanatory note submitted with the Amendment Bill. We appreciate the significance of this note in shaping policy thinking and thus our approach. Later, we focus on specific provisions on the Amendment Bill.

## Office Bearers

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### POLICY NOTE

#### Transformation as a competition policy outcome

BBC appreciates that the preamble of the Principal Act which recognised that ‘our country’s past discriminatory laws resulted in excessive concentrations of ownership and control within the national economy, and that the South African economy has to be opened to a greater number of South Africans through ownership and opportunity’, it is our submission that this preamble has not been the key driver of competition policy implementation in South Africa thus far. As a result, the country’s approach to BEE has been an afterthought in most decisions of Competition Authorities. We submit that it would be beneficial that ownership issues are given a significant weighting in all competition related matters.

#### Competition policy as an instrument for inclusive growth

South Africa is a country with one of the highest levels of inequality, with poverty being most prominent amongst the Black African population – we support the statement that “an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans”. By opening markets, addressing anti-competitive behaviours and outcomes in the local economy, the competition authorities would contribute towards facilitating meaningful participation by Black Africans.

#### Coordination between Regulators, Policymakers

BBC agrees that Competition policy cannot be the only instrument for achieving economic transformation. The explanatory note states that “The Act is one of many complementary policy instruments to achieve these objectives. However, the explicit reference to these structural and transformative objectives in the Act clearly indicates that the legislature intended that competition policy should be broadly framed, embracing both traditional competition issues, as well as these explicit transformative public interest goals’. We want to reiterate the urgent need for better coordination between and across public agencies, regulators and departments in addressing



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transformation issues. For instance, in some sectors – the licensing and accreditation regimes (e.g. Recognised Professional Board Organizations, e.g. Auditing Profession Act) is not supportive of economic transformation and inclusion. Thus any objective of this Bill and the Act is immediately blocked by regulatory requirements elsewhere.

There is also a need to place Competition at the core of the work of the B- BBEE Commission. We believe that this can be achieved in a way that is seamless and does not create additional compliance costs for Business constituency.

### Proposals for dealing with concentration in the South African economy

Almost all major international studies on the South African economy have lamented high concentration in the local economy (OECD, 2013, 2015) IMF, 2015,). This concentration has contributed to super profits enjoyed by a few players, and generally higher prices for consumers. Arguably, this contributes to inefficiencies in public investment programmes and more broadly public procurement and lower competitiveness.

As such BBC agrees that there is a need for an “Enhanced scrutiny of the causes of concentration and the need for tailored measures to de-concentrate markets” – this approach should not follow an academic and narrow approach but rather be driven by a clear commitment to structural reform and facilitation of meaningful participation of Black business in all economic sectors.

Given the record of the Competition Authorities over the past five years, we believe that “evidence-based inquiry into and explicit scrutiny of concentration when mergers are considered, abuses of dominance are prosecuted, and market inquiries are undertaken by the competition authorities” will also discourage anti-competitive behaviour while providing a further incentive for big business to include Black Business in their value chains.



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### Proposals for dealing with Transformation issues

We believe that by allowing for scrutiny of *“racially-skewed spread of ownership of the South African economy”*, the proposed amendments will provide an impetus for transformation and support the policy direction as outlined in the policy note. We also support the view that *“While the transformative provisions are often motivated on the basis of an 'equity' argument, it is important to note the economic argument for transformation. Concentrated markets that inhibit new entrants and that, accordingly, exclude large numbers of black South Africans from the opportunity to run successful enterprises, are not a basis for strong and sustained growth.”* Our organisation will over the next few months undertake a study to estimate the true costs of economic exclusion for the South African economy.

### COMMENTS ON THE COMPETITION AMENDMENT BILL

1. BBC welcomes the objectives of the Bill and welcome the explicit objectives of the Bill to *‘to provide for the promotion of competition and economic transformation through addressing the de-concentration of markets; to protect and to stimulate small businesses and firms owned and controlled by historically disadvantaged persons and their growth; to protect and promote decent employment and employment security;’*
2. The insertion of “Participating in” in section 1 is supported – as in the experience of BBC, the major industry firms tend to create barriers for effective participation by Black business in most industries through anti-competitive contracts, policies and terms & conditions. The suggestion is that this paragraph also accommodates potential indirect actions that result in impeding acts or prevention of entry into market or market value chains – such that the definition reads [**“exclusionary act” means an act, directly or by consequence, that impedes.....]**



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3. We support the following amendments which we believe are of particular importance for SMME's and firms owned by historically disadvantaged persons
- Section 8 (1) (d)
    - o We support the prohibition of exclusionary acts including the predatory pricing and margin squeezes by dominant firms. SMME's and HDP's are often most vulnerable to these acts by dominant firms.
  - Section 8 (3)
    - o The removal of the old definition of excessive price and the introduction of illustrative set of factors which the authorities must consider when determining excessive pricing by dominant firms.
  - Section 8 (4)
    - o Big firms often practice unfair uncompetitive behaviour through unfair pricing and unfair trading conditions. The prohibition of unfair prices and other trading conditions introduced in this section will open the market for smaller suppliers that are SME's or HDP's.
  - Section 9
    - o We support this section which prohibits price discrimination as it impedes the ability of SME's and HDP's to participate equitably and fairly in the market.
  - Section 10
    - o Provides for collaboration between firms which promotes participation of SME's and HDP's in the market, or collaboration between firms which promote industrial expansion and employment. Normally, collaboration is prohibited under the Act unless it has been exempted by the Competition Commission. We are happy with this amendment as it provides for the grounds for exemption of this collaboration by the Commission. Section 10 (10) further states that the Minister may issue regulations which allow for expedited exemption of collaboration between firms which may promote public interest including the promotion of SME's and HDP's.
  - Section 59
    - o The provision of increased penalties for repeat offenders, the removal of the so-called "yellow-card" which gave contravening firms a warning for certain offences, and extension of penalties to controlling firms where they knew or



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ought to know about the contravention of their subsidiaries is a step in the right direction. Section 59 (3) (d) requires the Tribunal to consider the impact of the contravention on SME's and HDP's when imposing an appropriate penalty. Although the application of this rule might be subjective, it will assist as a deterrent in the long run.

- Chapter 4 (A)
  - o This section provides for market inquiries by the Commission into the structure of markets including the levels of concentration and ownership in that market which may have an adverse effect on competition in the market, including the level of participation of SME's and HDP's. Section 43G goes further to provide for who may participate in a market inquiry, and requires the Commission to take reasonable steps to promote the participation of SMEs in a market inquiry.
  
- We propose the introduction of compulsory payment periods for SME's and HDP's by both the public and private sector of 30 days on a receipt of an invoice. Some retailers have payment periods of ninety (90) days and this practice is uncompetitive, unfair and impacts negatively on the survival of smaller suppliers. Attached to this proposal is the request to extend credit terms to accommodate SMEs and HDPs. An improvement in the trading conditions for SMEs and HDPs will result in opening the market for smaller suppliers to compete.

Small and medium businesses are an important part of the South African economy, as such, they provide opportunities for employment across a number of segments of the labour force including low skilled workers and provides opportunities for skills development. Small and medium businesses that generate jobs and add value to the economy are therefore an important channel to address inclusion and reduce poverty. Finally, entrepreneurial opportunities can represent an important channel for economic participation, by allowing disadvantaged South Africans, including youth and women to create their own opportunities to participate equitably in the economy.

Ends.

Black Business Council