SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

Voorheen bekend as AfriSake

TO: THE SELECT COMMITTEE ON ECONOMIC AND BUSINESS DEVELOPMENT

ATTENTION: Ms Noziphiwo Dinizulu

DELIVERED: VIA EMAIL:

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Comment on the Competition Amendment Bill, 2018 [B23B – 2018] published for public comment by the Select Committee on Economic and Business Development

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Introduction

This submission on the Competition Amendment Bill [B23B- 2018] has been compiled following the request for public comment by the Select Committee on Economic and Business Development.

Sakeliga (formerly known as AfriBusiness) had previously submitted extensive comment on the Competition Amendment Bill, 2017, on 31 January 2018 [cf. Annexure A]. We also submitted comment on the 2018 Competition Amendment Bill [cf. Annexure B] on 17 August 2018. We kindly request that the committee consider these abovementioned submissions along with this writing.

About Sakeliga

Sakeliga is a not-for-profit organization registered in the Republic of South Africa and represents more than 12 500 members in businesses across different sectors of the South African economy. Sakeliga supports constitutional order, free markets and a favourable business climate in the interests of its members, as well as in the interest of communities wherever its members do business.

Sakeliga maintains that the proposed amendments to competition legislation, if accepted, would have a material impact on commerce in South Africa. The local competition authorities represent an important gateway to commerce in South Africa. Their role in and impact on the economy is not trivial. Competition regulation forms part of the existing structure of regulation that adds to the general cost of doing business in South Africa and needs careful evaluation.

Sakeliga contends that the proposed Amendment Bill will exacerbate excessive and costly interference with the market economy. Such interference is likely to hamper South Africa's economic recovery and progress. At worst, an increasingly punitive competition dispensation, as the bill evidently foresees, may severely disincentivize local and foreign investment and commercial expansion in South Africa, which is likely to harm the local business community, including our members. Importantly, however, we also foresee this broadly harming most of South Africa's communities that rely on a growing and vibrant commercial environment for their employment, livelihood and exit out of poverty.

Furthermore, these amendments may run foal of provisions in the constitution, international law and existing trade agreements.

Sakeliga would like to re-emphasize that government can attain its goals of transformation using means less intrusive to the workings of a market economy. As we noted in our previous January 2018 submission:

> "Government can **subsidise** firms owned by historically disadvantaged persons without violating the rights of other firms. Ideally, government can **liberalise** the economy thoroughly by getting rid of red tape and State monopolies, thereby making entry for all firms, especially small firms inevitably owned by historically disadvantaged persons, easier. Finally, government **can continue encouraging** firms to transform, without threatening or actually using the violence force of law to compel it."

The liberalisation of markets, and the curtailment of harmful state monopolies, in our estimation, should be the proper and urgent goal of SA's competition authorities.

Specific concerns on the Competition Amendment Bill [B23B – 2018]

We note with concern the additions to the *Competition Amendment Bill B23B-2018* (the bill hereafter) in clauses 5 and 6, which seek to prohibit dominant firms in designated sectors *"to avoid purchasing, or refuse to purchase, goods or services"* from certain suppliers under specified conditions. The clause is included below:

> 4) (a) It is prohibited for a dominant firm in a sector designated by the Minister in terms of paragraph (d) to directly or indirectly, require from or impose on a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons, unfair—
> (i) prices; or
> (ii) other trading conditions.
> (b) It is prohibited for a dominant firm in a sector designated by the Minister in terms of paragraph (d) to avoid purchasing, or refuse to purchase, goods or services from a supplier that is a small and medium business or a firm controlled

or owned by historically disadvantaged persons in order to circumvent the operation of paragraph (a).

We find the spirit, underlying assumptions, and likely legal ramifications of these clauses extremely troubling. On appearance, it signals that the latticework of competition policy is becoming increasingly, perhaps even excessively, punitive. These clauses suggests that, in the end, government and legislators deem it appropriate to deprive some companies of the fundamental freedoms associated with choosing their own suppliers – a likely violation of Section 18 of the Constitution.

It, furthermore, suggests that some designated enterprises, in the eyes of legislators, are not free to use their property (in the form of their procurement funds) as they see fit. This is likely to impugn upon Section 25 of the Constitution, as it entails an arbitrary deprivation of rights associated with ownership in South African law.

The proposed amendments may, in addition, infringe upon a number of international human rights treaties to which South Africa has acceded. Freedom of association is, for instance, enshrined in Article 22 of the ICCPR, Article 5(d)(ix) of the ICERD, Article 10 of ACHPR and Article 20 of the UDHR. Likewise, the right to property is protected by Article 5(d)(v) of the ICERD, Article 14 of the ACHPR and Article 17 of the UDHR.

Finally, it is to be borne in mind that the application of these clauses is likely to violate the duties imposed upon South Africa by several treaties and other international arrangements. It is, for instance, doubtful that these provisions are in keeping with the eligibility requirements set out in section 104(a)(1) of the *African Growth and Opportunity Act*, a US-based preferential trade arrangement. These requirements include, amongst others, the establishment of an "*open* rules-based trading system" and the minimization of Government interference in commercial activity.

The proposed amendments, on appearance, could be regarded as adding further to a forcible imposition of government-mandated trade which – in conjunction with a number of other concerns relating to South Africa's eligibility under AGOA – is unlikely to pass muster.

South Africa is also party to a number of bilateral trade agreements, many of which include provisions which strictly proscribe the interference by the South African state in the management, disposal, use or enjoyment of foreign investment in South Africa. The amended statute will run the risk of violating these international legal obligations.

On a practical note, among other counterproductive possibilities it is likely that some firms and suppliers, given the arbitrary and ambiguous nature of these stipulations, may form or retain counterproductive and inefficient commercial relationships, in order to steer clear of potential frivolous litigation. Such behaviours would be counterproductive to economic

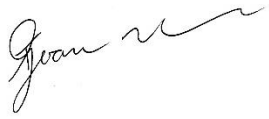
efficiency in general. It is not clear that thinkable economic consequences were properly considered in drafting these clauses.

In our estimation, then, such interventionism that infringes on the workings of free markets and freedom in general, is likely to bring about unintended harmful consequences. Sakeliga states on record that cannot support this type of increasingly punitive competition interventionism.

Request to make oral submissions to the select committee

Sakeliga herewith requests an opportunity to outline our concerns in an oral submission on the bill [B23B -2018] to the Select Committee on Economic and Business Development.

Yours truly,



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