7 November 2018

Parliament of RSA
Attention: Ms Noziphiwo Dinizulu

Per e-mail: ndinizulu@parliament.gov.za

Dear Ms Dinizulu,

COMMENTS TO THE COMPETITION BILL, B 23B—2018

1 INTRODUCTION

1.1 We refer to the publication of the Competition Amendment Bill on 1 December 2017, as revised by subsequent versions published in July 2018 and October 2018 respectively (the **Competition Bill**). The comments set out herein relate to the latest iteration of the Competition Bill, B 23B—2018, as passed by the National Assembly on 23 October 2018.

1.2 Sasol Limited on behalf of its various businesses domiciled in South Africa (**Sasol**), would like to emphasise that it is a firm that embraces initiatives that have the objective of transforming the South African economy for the better. Sasol especially recognises that the promotion of firms controlled by historically disadvantaged persons (**HDPs**) and small and medium sized enterprises (**SMEs**) is a key factor in driving meaningful and overdue change in the South African economy. In the financial year ending 30 June 2018, Sasol spent ZAR 12,7 billion on Black-Owned suppliers. As set out in Sasol's most recent Integrated Report:

"*Sasol considers transformation to be a business, social and moral imperative. As a responsible corporate citizen, it is our ethical duty to take decisive action to contribute meaningfully towards redressing the injustices of our country's past.*"[1]

1.3 Sasol is aligned fully with the overarching objectives of the Competition Bill, including addressing the pressing need to create a more inclusive, dynamic and competitive economy in South Africa that fosters, rather than excludes, HDPs and SMEs from participating in the economy. This is demonstrated through initiatives such as the introduction of Sasol Khanyisa as its new broad-based black economic empowerment (**B-BBEE**) share ownership scheme. Sasol Khanyisa has resulted in an effective (direct and indirect) B-BBEE ownership of approximately 25% in Sasol South Africa (Proprietary) Limited, a wholly-owned subsidiary of Sasol.[2]

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[1] Integrated Report, 30 June 2018, page 36.

[2] More information is available at: https://www.sasol.com/investor-centre/introducing-sasol-khanyisa-0.

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1.4 It is in this vein and context that the comments made herein are presented. We highlight that Sasol has previously sought to engage constructively with the Economic Development Department (the **EDD**) in relation to the Competition Bill. This has been done by submitting detailed comments on two prior occasions: the first on 29 January 2018 and the second on 17 August 2018.

1.5 To this end, having reviewed the amendments proposed in the Competition Bill, Sasol submits its concerns and recommendations, which it hopes will be considered by the National Council of Provinces (the **NCOP**) in its deliberations. Sasol's comments are not directed at the principles or objectives of the Bill, rather, Sasol has sought to put forward certain recommendations that might: (i) better enable businesses to continue to flourish in South Africa (while continuing to aid in the creation of new jobs and the development of small businesses), and (ii) ensure legal certainty that will support investment and enable greater compliance with the provisions of the Competition Act, No. 89 of 1998 (the **Competition Act**), once amended by the Competition Bill.

1.6 Succinctly, the concerns raised are set out below:

1.6.1 **Abuse of dominance (sections 8(2) and 9(3)(b)/9(3A))**: As a general comment, Sasol submits that the introduction of a reverse onus standard in relation to general categories of abuses of dominance and price discrimination may well be unconstitutional and may impede the ability of the Competition Tribunal (the **Tribunal**) to run cases effectively.

1.6.2 **Abuse of dominance (section 8(3)(e))**: Sasol submits that the reference to past state support in the revised section 8(3)(e) of the Competition Bill is very broad, and could include in its ambit state support that has no nexus to a current ostensible competitive advantage or position of dominance enjoyed by a firm in the market;

1.6.3 **Abuse of buyer power (section 8(4)(a))**: Similarly, it is submitted that the proposed new section 8(4)(a) is very broad and could consequently have an unintended adverse impact on legal and commercial certainty. Furthermore, the proposed amendments may lead to the creation of inefficient HDP firms and SMEs;

1.6.4 **Price discrimination (section 9)**: The new section 9 does not allow dominant firms to justify differential treatment for HDPS or SMEs on the basis of volume discounts, which undermines the understanding that, from an economics perspective, quality and quantity discounts (along with other forms of cost-based differentiation) can improve consumer welfare;

1.6.5 **Concentration**: Sasol acknowledges that certain sectors of the South African economy may be highly concentrated, and that could have a negative effect on the ability of HDPs and SMEs to enter into and effectively participate in these sectors. Nonetheless, it is submitted that the concentration analysis relied on by the Competition Commission (the **Commission**) previously should not necessarily form the basis of any legislative amendments, particularly in circumstances where the assessment is preliminary and may contain measurement errors;

1.6.6 **Penalties:** It is submitted that the proposed increase in the potential administrative penalty for repeat offences is unwarranted in circumstances where: (i) such a high penalty could have the effect of crippling businesses; (ii) is nevertheless unwarranted on the basis that the existing 10% cap on administrative penalties serves as a sufficient deterrent; and (iii) is likely to raise constitutional issues, in particular in relation to its retrospective application; and

1.6.7 **Ministerial intervention/powers:** Lastly, Sasol notes the increased role of the Minister of Economic Development (the **Minister**) in the competition process. This more interventionist approach, however, may potentially impair the competition authorities' ability to engage in a robust analysis of competition law, as well as their independence and ability to deal with matters without fear, favour or prejudice.

2 ABUSE OF DOMINANCE: PRIMA FACIE CASES AND REVERSE ONUS

2.1 The amendments in sections 8 and 9 of the Competition Act, in particular the introduction of sections 8(2), 8(4)(c), 9(3(b) and 9(3A), go beyond a shift in an evidentiary burden and create a reverse onus, that is unconstitutional and undermines the inquisitorial powers of the Tribunal. This is because it states that the dominant firm must establish, for example, that an excessive price was reasonable, following a prima facie case.

2.2 This raises the following serious issues:

2.2.1 First, the inquisitorial powers of the Tribunal are undermined by this adversarial framing of the referral process;

2.2.2 Second, it is unclear how a prima facie case is established: Does, for example, a referral by the Commission to the Tribunal constitute a prima facie case?; and

2.2.3 Third, reverse onuses are constitutionally questionable since they offend the presumption of innocence and fair trial rights/access to justice rights.

2.3 Finally, the formulations are duplicative and circular - the prohibited practice and the onus on the dominant firm are the same thing as formulated e.g. it is prohibited to charge an excessive price or to discriminate on prices versus the onus on the dominant firm to show a that a price is reasonable or that it has not engaged in prohibited price discrimination.

Recommendation: *It is Sasol's suggestion that these sections be deleted and/or amended to reflect the existing position under the Competition Act. Such provisions will likely be challenged before the Constitutional Court when the first such prima facie case is referred: To enact a piece of legislation which will require clarification by the courts is not desirable in circumstances where it is in the interests of all stakeholders for such cases to be finalised swiftly and with certainty that clear legislative provisions would offer.*

3 ABUSE OF DOMINANCE: EXCESSIVE PRICING AND THE RELEVANCE OF STATE SUPPORT

3.1 In respect of the new section 8(3), additional guidance has been provided in the Competition Bill in relation to what the competition authorities must take into account in determining whether a supposedly excessive price charged by a dominant firm is reasonable. In particular, Sasol notes section 8(3)(e) which provides as follows:

"the structural characteristics of the relevant market, including the extent of the respondent's market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the respondent's own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market." (our emphasis)

3.2 This section amends the July iteration of the Competition Bill, in terms of which state support could be taken into account when determining whether or not a price could be considered excessive. It is not clear how taking into account past state support will assist with a meaningful assessment into the determination of excessive pricing or the reasonableness of a price considered excessive, particularly in circumstances where any advantages bestowed on firms many decades ago (as may be the case for Sasol), have long-since fallen away and lost their relevance to the competitive dynamics of the market. To this end:

Section 8(3)(e) is broadly worded

3.2.1 The current wording of the new section 8(3)(e) does not contemplate the imposition of a time period ("*past or current*") or what type of intervention would constitute state support ("*direct or indirect*"). Importantly, no exclusions exist in this regard.[3] It is possible that this lack of clarity could reduce the provision of future state support by the Government, and the acceptance by firms of the state support, if such support could put that firm at risk in respect of potential excessive pricing cases – especially in the case of state owned enterprises, in particular those that are ailing.

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[3] For example, Article 107(2) of the Treaty for the Functioning of the European Union (**TFEU**) states that following is compatible with the internal (European) market: (a) aid having a social character, granted to individual consumers, provided that such aid is

3.2.2 When considering the international position, having regard to past state support is irrelevant and unprecedented. Rather, what should be considered is only whether proposed current state support might negatively affect or irreparably damage competition. This is in line with so-called "state aid" regimes in other jurisdictions.

3.2.3 A further risk associated with the broad wording of the proposed section 8(3)(e) is the implication that a history of state support excludes the possibility that a firm has achieved a certain competitive position due to its own commercial efficiency, innovation, ingenuity or investment. Under the section, a view may be established that once a firm has received state support, irrespective of how long ago, any risk-taking or innovation is immediately discounted and disregarded in assessing whether a higher price charged is reasonable.

3.2.4 The wording seems to be based on the view that all dominant companies that received or receive state support are dominant in their respective markets because of state support. In fact, there is no logical consequence between state support and market dominance.

3.2.5 To demonstrate further why the proposed section 8(3)(e) is of little use and, with respect, might be unwarranted, we set out below:

3.2.5.1 Why considering state support given years ago is of little value;

3.2.5.2 Why the position taken in the Competition Bill is unprecedented, and how state support assessment regimes function in other jurisdictions; and

3.2.5.3 How large firms which might have received state support benefit the economy.

Past state support taken into account

3.2.6 The broad provisions of the new section 8(3)(e) enable the competition authorities to take into account *past or current* state support. The legislation does not contemplate a cap on how far back one could look when assessing the structural characteristics of the current market given that state support. This means that a firm which once received state support is subject to different standards regarding the Competition Act in perpetuity, even where the firm concerned is fundamentally different today than at the time the state support was given.

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granted without discrimination related to the origin of the products concerned; and (b) aid to make good the damage caused by natural disasters or exceptional occurrences.

3.2.7 Prior state support is unlikely to still be relevant when considering and analysing barriers to entry and a firm's current competitive edge – especially when the firms concerned have, for decades, functioned on their own ingenuity without state support or subsidisation. Such a provision may unnecessarily penalise firms for an advantage no longer enjoyed.

3.2.8 Certainly, Sasol, as an example, was formed in 1950, but was ultimately privatised and listed on the Johannesburg Stock Exchange in 1979. It would be unreasonable to attribute a firm's current success to state support received some forty years ago. Furthermore, such an approach is not in line with other jurisdictions, such as the European Union (**EU**) or Russia, where the effects of state support are assessed on a case-by-case basis with regard to the present and future as opposed to the distant past and considering the nexus between the use of public funds for such purpose and the competition.

The position adopted in the Competition Bill is unprecedented

3.2.9 Building on the above, insofar as Sasol is aware, the position adopted in the Competition Bill is unprecedented. Few jurisdictions provide an opportunity for competition authorities to take into account state support received by some firms over others, let alone state support received years ago. In fact, we are not aware of any jurisdiction which permits a past assessment. We set out below the state support position in two other jurisdictions, which might be of use to the NCOP when assessing the value and appropriateness of the proposed section 8(3)(e). These are the EU and Russia:

<u>The EU</u>

3.2.9.1 State aid unduly favouring certain firms over others is prohibited in Article 107(1) of the TFEU (Treaty for the Functioning of the European Union), which reads as follows:

"*aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*"[4]

[4] There are numerous policy objectives for which state aid can be considered to be compatible with the internal market such as "(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences."

3.2.9.2 The assessment regime operates on a current and forward-looking basis with notification having to be made for state aid meeting certain criteria.[5] Importantly, over and above functioning on a current and forward-looking basis, it aims to assess the potential distortion of competition in general, not just in relation to whether a price charged may be excessive. Put differently, the question asked is whether the conferring of state support on one firm over another might negatively impact competitive dynamics within a market.

3.2.9.3 As is the case in Russia (discussed below), certain elements have to be met before the European Commission will consider that the provision of state aid or support will have a negative effect on competition in the European Common Market. In this regard:

3.2.9.3.1 There first has to have been an intervention by the state or through state resources, which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.);

3.2.9.3.2 The intervention must give the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions;

3.2.9.3.3 Competition may be distorted; and

3.2.9.3.4 The intervention is likely to affect trade between EU Member States.

3.2.9.4 As is apparent from the above, the Europeans assess state aid on a case-by-case basis and not from a historic perspective, but from a current one.

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[5] Exemptions to this mandatory notification procedure include:

- aid covered by a Block Exemption (giving automatic approval for a range of aid measures defined by the European Commission);
- *de minimis* aid not exceeding €200,000 per undertaking over any period of 3 fiscal years (€100,000 in the road transport sector);
- aid granted under an aid scheme already authorised by the Commission.

Note, there may be differing thresholds for notification from sector to sector.

3.2.9.5 The nexus to the distortion of competition is an important one. The South African competition authorities should not view the history of state support in a vacuum, but have to draw a link between state aid and excessive pricing and the unreasonableness of an excessive price. To neglect this step could lead to the penalisation of firms for receipt of state support, which has in no way increased their competitive advantage in a market.

3.2.9.6 In addition, and again as in the case in the BRICS countries — in particular, Russia — a far more robust approach has been adopted in respect of monitoring and assessing state aid. State aid is generally not permitted unless such government interventions are necessary for a well-functioning and equitable economy. As such, EU Member States must apply to the European Commission in order for certain state aid measures to have an effect.

Russia

3.2.9.7 In Russia, a member of BRICS, state aid, or "state or municipal preferences" may be provided only if one of fifteen listed purposes is met, such as the development of education and science, support of scientific research, and protection of the environment. State aid, which is defined as "*the provision by a state or municipal body or by a body or organization exercising their functions of advantages to specific economic entities which provides them with better conditions for their activity by means of the transfer of state or municipal property or objects of civil-law rights or by means of the provision of privileges having a property or monetary value, or state or municipal guarantees*"[6] requires the prior consent by Russia's Federal Antimonopoly Service (**FAS**), subject to certain exceptions.[7]

3.2.9.8 The FAS may refuse to approve an application for state aid if, *inter alia*, it will result in restriction of competition in the market.

3.2.9.9 Again, critically, the assessment is of: (i) current state support proposed to be granted; and (ii) is prospective in nature, taking into account how the granting of state support might negatively affect competition in general. In this regard, one of the elements that the FAS looks at when determining whether state aid should be permitted or not is whether such aid results in specific firms enjoying better trading conditions and advantages than they otherwise would have received. No such nexus to competitive advantage exists in the Competition Bill.

Large firms such as Sasol have benefited and continue to benefit the South African economy

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[6] *OECD Country Studies Competition Law and Policy in the Russian Federation* 2013, pages 78-79

[7] For example, aid that is provided on the basis of federal, regional or local laws on the budget that define (or specify a procedure for defining) the amount of the preference and those to whom it is to be provided.

3.2.10 Whilst Sasol acknowledges that certain sectors of the South African economy are characterised by high levels of concentration, it should nonetheless be taken into account that this concentration does not necessarily always result in an increase in market power.

3.2.11 Sasol submits that a position cannot be adopted where little or no regard should be had to the benefit derived by growth and success of big business in South Africa (especially those which, like Sasol, are significant tax contributors); to treat a history of state support as a "*one way street*" would be entirely misguided – especially when that history dates back many decades and any support has long-since been repaid in many multiples (we deal with this below as well).

3.2.12 Further, Sasol is heavily invested in SME development, which it views as vital for broadening economic participation and delivering on South Africa's economic development objectives. In this respect, Sasol's Enterprise and Supplier Development function was established to nurture, grow and sustain SMEs by providing technical and business development support, through mentoring and coaching. In addition, Sasol provides loan funding to SME suppliers through the Sasol Siyakha Enterprise and Supplier Development Fund (Sasol Siyakha Fund) and has disbursed about ZAR 427 million to SMEs in loan funding at preferential rates since inception. Sasol has also established a ZAR 53 million Sasol Business Incubator facility, which was developed in partnership with the Department of Trade and Industry, and which provides start up SMEs with business development support, funding solutions, infrastructure and offices.[8] Sasol's transformation objectives include creation of meaningful opportunities for transformed businesses as well accelerating the development of SMEs in line with the local supplier development principle set out in Sasol's procurement policy.

Conclusion

3.2.13 As noted above, the broad reference to past state support in section 8(3) of the Competition Bill is, with respect, unwarranted in circumstances where:

3.2.13.1 the Commission is not required to show that the provision of state support resulted in a firm enjoying a competitive advantage over its competitors; or even had the effect of influencing competition in the market. This could enable the Commission to take into account a factor which may be entirely irrelevant to the conduct being investigated;

[8] See for further details: https://www.sasol.com/sustainability/enterprise-and-supplier-development.

3.2.13.2 there is no time limit imposed on how far back the Commission can look when assessing the relevance of state support in relation to the impugned conduct. Again, this could enable the Commission to penalise a firm for a history of state support where such state support no longer has an influence on a firm's current position in the market. Rather it is the current position that is relevant.

Recommendation: *Accordingly, Sasol submits that section 8(3)(e) of the Competition Bill should be amended by:*

(i) In the first instance, the removal of the state support provisions; and

(ii) In the alternative, that reference should only be made to current or future state support, or if the notion of past state support is maintained, state support received within a specific reasonable time, e.g. in the last ten years.

Furthermore, it is recommended that guidelines could be introduced – or better yet, provisions in the legislation - which allow for certain exceptions to this provision, for example, where state support is necessary to achieve certain social policy objectives, or where government intervention is required in order to promote a stable economy.

4 ABUSE OF DOMINANCE: BUYER POWER

4.1 In the Competition Bill, the proposed section 8(4)(a) reads as follows:

"It is prohibited for a dominant firm 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."

4.2 In respect of the above, Sasol submits the following:

4.2.1 The Minister's power to designate dominant firms to which section 8(4)(a) applies, may not be constitutional as, in the absence of a defined objective formula or methodology, may potentially result in outcomes that are capricious, unreasonable and unfair. Greater certainty would be achieved through such designation being done through objective criteria.

4.2.2 The introduction of an "unfairness standard", particularly in comparison to the specificity introduced in the predatory and excessive pricing provisions, results in significant uncertainty, as there appears to be no rational basis by which the Commission can assess whether a price or trading term is "unfair". All unfair business practices that are relevant to competitive outcomes are already encapsulated in the current provisions of the Competition Act (such as price discrimination). Without guidance as to how this standard will be applied, compliance with this provision is almost impossible.

4.2.3 Furthermore, it is very difficult for firms such as Sasol to gauge what would constitute an "unfair" price or trading term from the perspective of each of its HDP and SME suppliers without, for example, considering the financial statements of each firm in detail in order to determine their margins, which might in and of itself undermine the bargaining power of such firms. Not only is such conduct unviable in terms of a mode of doing business, but it could also raise information sharing concerns if Sasol is engaging with suppliers which are also actual or potential competitors of the business. In addition, no "participation" requirement is present in this section. Given this, and without some evidence of negative competitive effects or effects on SME and HDP participation in the economy, the provision is overly broad, and could perceivably force dominant firms to subsidise the HDPs and SMEs, where this is not justified (especially for larger firms controlled by HDPs, (which do not require this protection) the subsidisation of which might result in skewed competitive outcomes). Further, Sasol is not in a good position to determine what conduct would be unfair from the perspective of HDPs and SMEs and efforts to perform this assessment on a case-by-case basis would be overly onerous.

4.2.4 Lastly, without proper guidance as to how this standard will be applied, compliance with this provision is almost impossible. Although the Minister is permitted to regulate how to determine unfairness, this raises constitutional issues (which we discuss below under 0). Furthermore, the provision introduces vagueness and unpredictability for dominant firms. No policy debate or thoughtful framework has been developed around marrying "unfairness" with "competition" and rivalry, which has adverse outcomes for less competitive firms. It potentially incentivises inefficiency, with attendant consumer price increases, as a result of firms blunting their pricing or trading terms.

4.3 Following on from this, section 8(4)(b) reads:

"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)*."

4.4 In respect of the above, the competition authorities might interpret decisions of the firm not to engage with an HDP or SME supplier as avoidance, rather than an efficient business practice. The section raises other issues in relation to overreaching by the Executive, which we deal with under 8 below (specifically 8.4). Sasol remains committed to the advancement of HDPs as well as SMEs in accordance with the Broad-based Black Economic Empowerment Act, No. 53 of 2003. Sasol has been significantly increasing its procurement from Black-Owned suppliers from ZAR 2.3 billion in financial year 2015 to ZAR 12.7 billion in financial year 2018. Sasol is aiming to increase this substantially in the coming years with added emphasis on the development and inclusion of SMEs in our procurement value chain.

4.5 It would be inconsistent with Sasol's own values, for example, to discriminate unfairly against firms owned or controlled by HDPs. There may, however, be rationally sound business factors that may justify, in certain circumstances, not procuring from small and medium businesses or any other firm, not because such firm is owned or controlled by HDPs. We take the liberty to advise that through the preferential procurement measures we have put in place and our constant increase in spend on preferential procurement, we seek to transform more and more the supplier space. That being said, we would strongly caution against the prohibition as currently set out in the Competition Bill as, in some circumstances, it may have unintended adverse consequences that may ultimately undermine the competitiveness of South African businesses.

Recommendation: *On the basis of the above, Sasol submits that:*

i. Section 8(4)(a) be deleted on the basis that any uncompetitive conduct which has a negative effect on HDPs and SMEs is appropriately covered in the existing provisions of the Competition Act;

ii. Alternatively, that section 8(4)(a) applies only where an anticompetitive effect can be shown, for example, to be designed to impede the ability of HDPs and SMEs to enter into or effectively participate in a market.

5 PRICE DISCRIMINATION

5.1 Section 9 of the Competition Bill has been amended significantly since the initial July 2018 iteration, and now reads as follows:

"An action by a dominant firm, as the seller of goods or services is prohibited price discrimination, if:

(a) it is likely to have the effect of –
  (i) substantially preventing or lessening competition; or
  (ii) impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively;
(b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers…"

5.2 The proposed new section 9(b) retains the commonly accepted definition of price discrimination. However, section 9(3)(a) read with section 9(2)(a)(iii) now provides that quantity/volume cannot be a basis to justify differential treatment for HDPS or SMEs.

5.3 International competition law principles recognise that, from an economics perspective, quantity discounts (along with other forms of cost-based differentiation) can be efficiency enhancing if they are due to cost savings. In addition, such differentiation could result in sales to customers that would not otherwise occur, thereby increasing consumer welfare, and should not be treated as prohibited price discrimination towards customers who purchase fewer good or services.

5.4 Removing this justification with respect to SMEs and HDPs could have the following negative repercussions:

5.4.1 Cost savings from economies of scale will no longer be passed down to purchasers of large volumes, which will result in, for example, increased prices to those customers or reduced margins for the seller; or

5.4.2 HDPs and SMEs will receive discounts on their orders that are not cost-based, which could result in increased prices for customers of large volumes where margins do not allow for the absorption of these discounts, as well as the effective cross-subsidisation of SMEs and HDPs. Where margins are very low, discounts could potentially result in below-cost pricing, resulting in a tension with the predatory pricing provisions. Sasol also constantly strives to build and maintain competitive and sustainable supply chain.[9]

5.5 What decision suppliers make to mitigate the effects of the provision will depend largely on the relative split of their sales across each group of customers and the firm's margins in each market. Where HDPs and SMEs account for a fairly large percentage of sales, as is the case for Sasol, it is unlikely that the seller would simply be able to absorb the price increases or discounts, as the case may be. In some instances, in particular with respect to internationally competitive goods or services, any price increases could render Sasol uncompetitive, with negative consequences for its reinvestment and economic viability. Over time, the cross-subsidisation may be unsustainable and the resulting higher prices will be passed down to the customer as well as the end consumer.

5.6 The industries in which Sasol operates are characterised by high fixed costs and low marginal costs, and consequently minimum efficient scale is achieved only at large volumes of production. Thus, economies of scale are fundamental to Sasol's operations and pricing that is proportionate to costs at the same level of production is vital for Sasol to pass through cost savings to the right degree.

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[9] For further details, please see Sasol's Supply Chain policy available at https://www.sasol.com/sites/default/files/content/files/SC%20POLICY%20ENGLISH.pdf.

5.7 Many of Sasol's products are vital to the proper functioning of the South African economy and it must be borne in mind that its selling prices have a significant impact on customers in almost all industries in South Africa. Any price increases could result in those industries in turn becoming uncompetitive, resulting in diminished consumer welfare.

5.8 In the event that such non-competitiveness could result in import substitution by large customers, this would have significant detrimental effects for South African firms, including HDPs and SMEs, and South Africa's Gross Domestic Product (**GDP**).

5.9 The anti-avoidance provision in section 9(3A) places the onus on the dominant firm to show that it has not avoided selling, or refused to sell, goods or services to avoid complying with section 9(2)(a)(iii). This provision addresses the concern that SMEs and firms owned by HDPs do not have the resources to demonstrate effects, as illustrated by the factual matrix behind the *Nationwide Poles*[10] judgment.

Recommendation: *We propose the deletion of section 9(3) from the Competition Bill, thus allowing for reasonable discounts on the basis of volumes.*

6 PENALTIES

6.1 The proposed section 59(2A) increases the maximum administrative penalty to 25% of a firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year if the conduct is substantially a repeat by the same firm of conduct previously found to be a prohibited practice. With the removal of the yellow card for certain offences, this penalty would apply to all sections of the Competition Act.

6.2 While appreciating that penalties can achieve optimal deterrence with regards to cartels, Sasol is of the view that the penalty is excessive given the South African context, particularly when viewed in light of the existing stringent instruments in the Competition Act - including criminal sanctions and possible civil damages - to achieve deterrence. As was noted in *Federal Mogul*[11], *"the upper threshold of 10% of turnover should be reserved for the most egregious contraventions and an absence of mitigating factors."*[12]

6.3 An excessively high penalty could not only result in over deterrence, but it could also be overly burdensome for firms, in particular, in the current economic climate.

6.4 The potential of a 25% fine is also higher than that in other jurisdictions, including in Australia, India, the EU and Russia:

6.4.1 **Australia:** There have been no decisions in the Australian courts imposing higher fines for recidivism (i.e. the tendency of a firm to reoffend).[13]

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[10] Sasol Oil (Pty) Ltd v Nationwide Poles CC. Case no. 49/CAC/Apr05

[11] *Commission v Federal Mogul* [2003] ZACT 43 (CT)

[12] Ibid at para 167

[13] OECD *Pecuniary penalties for Competition Law Infringements in Australia*, 2018 Page 67 – 68

6.4.2 **Germany**: In Germany, recidivism is taken into account as an aggravating factor, but no specific aggravation percentage is prescribed.

6.5 With respect to other BRICS countries:

6.5.1 **India**: In India, the penalty is not more than 10% of the average of the turnover for the last three preceding financial years.[14] Whether a party is a repeat offender may be relevant to the determination of a fine.[15]

6.5.2 **Russia**: The Russian authorities are entitled to impose a first-time fine of 15% of the company's turnover in the market concerned for the preceding year but is limited to 4% of the total turnover of the offender. Russia also imposes criminal sanctions but these only apply in the event of large-scale damage or if crimes entailed some kind of violence being caused as a result of anti-competitive behaviours. [16] In determining the scope of a fine, Article 14.31 of the Administrative Code of Offences provides that where there is repeated infringement by a firm, this will be an aggravating factor in the determination of a penalty.

6.6 Further, it is generally understood that what matters for deterrence purposes is not the size of the fine if found guilty, but the expected fine, namely the amount of the fine multiplied by the probability of being detected and the probability of being found liable.[17] As the Commission's prosecutorial and investigative experience has become increasingly sophisticated over the years, the Commission has become better-equipped and adept at identifying and prosecuting cartel behaviour. Consequently, the latter two factors—probability of detection and being found liable—have increased, justifying a decrease in the applicable penalties.

6.7 The amendment does not sufficiently clarify whether violations of the amended sections would be considered recidivism in circumstances where the standard of assessment has changed considerably, or that the provision is intended to apply prospectively rather than retrospectively. This lack of specificity is contrary to the approach in other jurisdictions, for example, Germany, Japan and the United States.

6.7.1 **Germany:** In Germany, the prior infringement must have taken place within the last 5 years.[18]

6.7.2 **Japan:** In Japan, the prior infringement must have taken place within the previous 10 years.[19]

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[14] The Competition Act, 2002 section 27(a)

[15] Suo Moto Case No. 03 of 2011.

[16] Criminal Code of the Russian Federation. and an official may be disqualified from practicing for up to three years in the event that there is a repeat offence (per the Criminal Code)

[17] Massimo Motta, *Competition Law and Policy. Theory and Practice.* 12 ed (2009) at p 191.

[18] See note 8 at p. 45.

[19] Article 7-2 (7) of the Antimonopoly Act.

6.7.3 **United States:** In the United States, the antitrust agencies impose higher penalties for recidivism only if the previous infringement was committed between 5 – 10 years prior and the penalty is increased if the previous infringement occurred less than five years ago.[20] Conduct predating that period is no longer of relevance due to the effluxion of time.

6.8 This lack of clarity may contribute to strong grounds for a constitutional law challenge. Sasol proposes that the amendment specify that it is applicable only prospectively i.e. from the date the Competition Act is amended. The argument against a retrospective application of the increased penalty provision finds support throughout South African case law, for example the Appellate Division (the predecessor of the Supreme Court of Appeal) noted *"regard must certainly be had to the general principles that statutes should, if reasonably possible, be construed as operating for the future only and not as taking away or interfering with existing rights or as penalising acts done before the statute came into operation."*[21]

6.9 In any event, given an acute awareness of the provisions of the Competition Act derived over the last twenty years, potential abuses of market power are mitigated by the fact that many large businesses in South Africa do implement rigorous compliance programmes, including training, in response to consent agreements or findings of anticompetitive conduct and, as such, are unlikely to be conscious repeat offenders. Sasol, in particular, has entered into several consent agreements in respect of anticompetitive conduct and has undertaken the following measures as remedial measures:

6.9.1 The Competition Law Centre of Expertise (CoE) – which has been established so that Sasol employees can receive advice on competition law compliance from a team of full-time internal competition lawyers;

6.9.2 Obligations on relevant employees, locally and internationally, to undergo face-to-face or online competition law training every twelve months;

6.9.3 The provision of "Competition Law Induction Training" for all relevant new or newly promoted employees to ensure that all of the relevant employees have been trained within a period of eight weeks (i.e. two months or 60 calendar days) of receiving an email advising that employee of the need to complete the training or of the training appearing on their learning profiles;

6.9.4 Obligations for Sasol agents to undergo competition law training either through online training or review/ consideration of training material;

6.9.5 A requirement that all employees strictly adhere to the following Policies as well as Standard and Guidelines, implemented through the distribution and provision of downloads on the Legal CoE Competition Law Intranet Site. These downloads cover the full gamut of competition law compliance and include:

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[20] Federal Sentencing Guidelines Manual §8C2.5.

[21] *R v Grainger* [1958] 2 All SA 471 (A) at 474

6.9.5.1 Competition Law Policy Statement;

6.9.5.2 Standard and Guidelines on Agents and Distributors: to help to evaluate competition risks when using agents or distributors;

6.9.5.3 Standard and Guidelines on Agreements and contractual terms: to help ensure that Sasol's agreements and contractual terms do not contravene competition laws;

6.9.5.4 Standard and Guidelines on Dealing with Competitors: to help to evaluate the competition law risks when dealing with competitors;

6.9.5.5 Standard and Guideline on Joint Ventures: to explain the risk associated and the procedure one should follow in relation to the establishment, implementation and termination of a joint venture;

6.9.5.6 Standard and Guidelines on Dominance and Market Power: to provide guidelines on dominance and market power, including guidance on what behaviour would be considered an abuse of dominance and how to avoid such behaviour.

Recommendation: *We suggest that the 25% should not be applied retrospectively, as to factor infringements that an entity had been penalised for prior to the coming into force of the amendments. In any event, when applied prospectively (as we suggest), given the harshness of the provision, it should only apply in respect of profits rather than turnover or the base amount of the fine only, retaining the upper bound cap at 10% of turnover. In Sasol's view, this would be an adequate limitation on the provision.*

7 CONCENTRATION

7.1 The amendments contained in the Competition Bill are prefaced on a concern that the high levels of concentration in the South African economy resulting from discriminatory laws have increased barriers to entry, collusion and excessive and predatory pricing, with second round effects of reduced innovation and income inequality.[22]

7.2 Sasol has a strong history of showing that it is committed to addressing the inequalities that persist in our economy as a consequence of such discriminatory practices and has engaged in significant measures aimed at doing so.

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[22] Explanatory Memorandum to the December 2017 Competition Amendment Bill; Thembalethu Buthelezi, Thando Mtani and Liberty Mncube, *The Extent of Market Concentration in South Africa's Product Markets*, WORKING PAPER CC2018/05, page 3.

7.3 Extensive empirical economic research has, over time, recognised that there is not a linear causal relationship between concentration and market power of firms in an industry. Small economies such as South Africa can by necessity only support a few players with economies of scale and their performance (prices and market power) is related to the unique characteristics of the industry (such as barriers to entry and product differentiation) rather than necessarily the concentration in the industry.

7.4 In any event, it is inappropriate to assess market concentration on the basis of markets defined in merger analysis, as the Commission has done in its recent Working Paper on concentration, which can be overly narrow and not reflective of substitution in a market, especially where market shares have been estimated for completeness sake for narrow markets in respect of no-overlap mergers.

7.5 Sasol would like to point out that the Commission's own Working Paper, which supports the statistics in the Explanatory Memorandum to the Competition Bill acknowledges that it is only a preliminary assessment of the degree of competition a market and that "*[d]ynamic models of measuring concentration require complex economic analysis and extensive data which is not readily available*".[23] The Working Paper also points out that the "*causes underlying the persistent high levels of market concentration and corresponding market power are not clear*".[24]

Recommendation: *We respectfully submit that a preliminary analysis of this ilk should not form the basis of legislative amendments. Further, we understand and have confirmed through simple arithmetic calculations internally that the concentration study either misstates the data or contains significant measurement errors.*[25]

8 INCREASED SCOPE FOR THE MINISTERIAL INTERVENTION/POWERS

Introduction

8.1 The Competition Bill does allow for greater intervention by the Minister in the competition authorities' processes through, for example, the Minister being:

8.1.1 permitted to make regulations regarding the application of certain sections of the Competition Act; and

8.1.2 granted rights to participate in any merger proceedings before the competition authorities (regardless of whether or not the thresholds have been met), and may appeal decisions by the Commission or the Tribunal on public interest grounds.

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[23] Ibid at page 8.

[24] Ibid. at page 10.

[25] Theaverage market shares in the Working Paper are not in line with practical observations of the industries considered. For example, the Working Paper states that there is a 62.2% average market share for Financial Services. In a subsequently published Business Day article, Tim Cohen estimates the market shares of the largest banks as follows: Standard Bank (21%), Absa (19%), FNB (19%), Nedbank (14%), Capitec (11%) and Investec (6%) and 1% for each of the remaining banks. These shares would give an average market share of 15% for the top six banks and a significantly lower concentration index than the Commission has measured. See Tim Cohen, *The New Competition Bill is Based on Some Dodgy Numbers*, BUSINESS DAY (5 October 2018), available at: https://www.businesslive.co.za/bd/opinion/columnists/2018-10-05-tim-cohen-the-new-competition-bill-is-based-on-some-dodgy-numbers/.

Power to make regulations

8.2 Under the Competition Act as it currently stands, the Commission functions as an independent body. The Competition Bill introduces new powers for the Minister that alter that position fundamentally. The independence of the Commission is important given its extensive powers, especially now that those powers have been expanded considerably by the Competition Bill, assuming it is passed. The concern raised is that these interventionist powers may well impair the independence of the competition authorities. We expand upon this below.

8.3 Members of the Executive should not dictate to independent agencies how to perform their functions. For example, the Minister of Justice cannot dictate to the National Prosecuting Authority (**NPA**) how to apply the powers given to the NPA by the legislature. The Competition Bill may well serve to compromise the Commission's independence by affording wide-ranging, and potentially unconstitutional, powers to the Minister. It also raises a legal question as to whether subordinate regulations can constrain the legislation in this way. To this end, in the *Executive Council, Western Cape Legislature v President of the Republic of South Africa*,[26] the legislature purported to delegate to the President the ability to amend an Act of Parliament, which was held by the Constitutional Court to be a subversion of the manner and form of the Constitution. Furthermore, members of the Constitutional Court emphasised that delegating powers of this nature gives away too much of the legislature's law making ability.

8.4 Related to this, the amendments to sections 8 and 9 that permit the Minister to designate sectors and establish benchmarks for determining HDPs and SMEs to which the sections will apply, and the provisions that the Minister will determine the factors and benchmarks for determining whether price discrimination impedes HDPs and SMEs, are vulnerable to similar challenge. These provisions appear to contemplate establishing the application of the section. This is beyond the lawful realm of regulations to give effect to the sections. Section 3 of the Competition Act determines the application of the Act to all economic activity within or having an effect within the Republic. The section 4, 5, 8 and 9 amendments carve into that provision, raising potential constitutional issues.

8.5 Similarly, the amendments to sections 8 and 9 that permit the Minister's regulations to determine the factors/benchmarks in determining the scope of the prohibited practices themselves (as opposed to the potential respondents/parties) also intrude into the independent adjudication of the contraventions. Under the statutory scheme, it is for the Tribunal and the Competition Appeal Court to determine these questions.

8.6 The doctrine of separation of powers is key to the maintenance of our constitutional democracy and, accordingly, should be guarded jealously.

Participation in merger proceedings

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[26] 1995 (4) SA 877 (CC).

8.7 A prominent concern with respect to these amendments is whether, from an external perspective, a more interventionist approach could have a cooling effect on foreign investment in South Africa due to the (actual or perceived) increased regulatory costs and ease of doing business in South Africa.

8.8 We would strongly advise against the Competition Bill being cast in terms that could be perceived as being at odds with the objectives of President Ramaphosa of increasing direct foreign investment in South Africa. A recent study by Quantec Research, commissioned by Business Leadership South Africa (**BSLA**)[27] includes some key findings, we would advise be taken account of, such as the fact that big business:

8.8.1 is the greatest direct contributor to the growth of the South African economy, but also supports smaller SMEs throughout the supply chain through significant expenditure paid to suppliers;

8.8.2 contributes to the public sector and supports the most important institutions of state through taxation; and

8.8.3 business is a key contributor to South Africa's GDP. BLSA members contributed roughly 36% of the total South African domestic economy's output in 2016, compared to government's 11.7%, while contributing 34% of the country's GDP.

8.9 It may be difficult, however, to marry the approaches being pursued through the Competition Bill on the one hand and President Ramaphosa's government's drive for regulatory certainty that encourages domestic and foreign direct investment on the other, notwithstanding that both approaches purport to seek to achieve the same goals.

8.10 More generally, it is worth considering whether the competition authorities will be able to retain their position as independent competition regulators after the Competition Bill comes into force. Providing the Minister with far-reaching rights of appeal has the potential to apply pressure (whether intentional or not) on the competition authorities to promote the Minister's broader policy objectives, as the Minister will be in a position to appeal decisions made in a merger context on public interest grounds even in circumstances where a proposed merger may not raise any competition concerns.

8.11 Whilst the Minister's goals are no doubt laudable, the competition authorities may not be in the best position to assist with implementing these goals, particularly in circumstances where an increased focus on public interest issues could result in a decreased focus on a robust competition analysis.

Conclusion

[27] Available online at: https://www.blsa.org.za/news-and-articles/news/the-corporate-footprint-of-business-leadership-south-africas-members/.

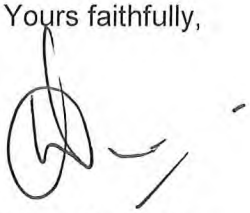
8.12 These, combined with other powers afforded to the Minister by the Competition Bill (e.g. powers in relation to market inquiries), create a "package" of powers that would be considered to represent, with respect, an undermining of the institutional infrastructure and independence of the competition authorities. .

9 CONCLUSION

9.1 As noted above Sasol, which is itself committed to increasing employment levels and transforming the South African economy, fully supports the aims behind the introduction of the Competition Bill. That being said, Sasol does have concerns regarding some of the proposed amendments, particularly those which may lead to commercial uncertainty which could result in a decrease in investor confidence in South Africa as well as reducing investment by local market participants, thereby undermining the very objectives of the Competition Bill.

9.2 Furthermore, Sasol believes that big business is an important contributor to the South African economy, and that these benefits will be better enhanced in a properly articulated and unambiguous competition regime.

Yours faithfully,



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