1. **Report of the Select Committee on Economic and Business Development on the Competition Amendment Bill [B23B - 2018] (s75), dated 21 November 2018.**

The Select Committee on Economic and Business Development, having considered the ***Competition Amendment Bill [B23B -2018 (s75)***, referred to it, reports that it has agreed to the Bill without amendments.

**Objectives of the Bill**

The main objective of these amendments is to address two persistent structural constraints on the South African economy, namely, the high levels of economic concentration in the economy and the skewed ownership profile of the economy.

This is done through—

1. Strengthening or clarifying the provisions of the Act relating to prohibited practices, restricted horizontal and vertical practices, abuse of dominance and price discrimination and mergers;

2. Requiring special attention to be given to the impact of anti-competitive conduct on small and medium businesses and firms owned or controlled by historically disadvantaged persons;

3. Strengthening the provisions relating to market inquiries so that:

* The outcomes of these inquiries result in action that promotes competition;
* There is guidance on how to evaluate the adverse features of a market; and
* Requiring special attention on small and medium businesses and firms owned by historically disadvantaged persons.

4. Providing the national executive with effective means of participating in competition related proceedings and the power to initiate market inquiries into a sector and to intervene in mergers that affect the national security interests of the Republic; and

5. Promoting the administrative efficacy of the Competition Commission, market inquiries and the Competition Tribunal.

**Process followed by the Committee**

The Competition Amendment Bill [B23B -2018 (s75), was referred to the Select Committee on Economic and Business Development on 26 October 2018. The Economic Development Department was invited to brief the Committee on 09 October 2018.

The Committee advertised the Bill for two weeks inviting all interested stakeholders to submit written submissions. Further, the advert indicated whether stakeholders would like to make oral submission.

The Committee facilitated public participation, and received 18 submissions prior to the closing date, and only one submission received after the closing date. All of the submissions were considered, and all submitters were invited to make oral submissions. Only 8 submitters availed themselves to make oral presentation and 11 submitters declined.

On 19 November 2018 Economic Development Department responded on the submissions received. On 21 November 2018 the Committee deliberated on the content of the Bill and considered the issues raised in the public participation period, and the Department’s response thereto.

Having considered the matter, the Committee agreed to adopt the Bill without amendments.

The following section outline the Minority View:

Minority View

The Competition Amendment Bill gives both the Competition Commission and the line-function Minister considerable scope to try and reshape the economy by intervening in market structures.

The bill is wholly anathema to the DA’s political philosophy and economic policy. Ostensibly, the bill aims to tackle two major structural challenges facing the South African economy: high levels of market concentration and racially skewed patterns of ownership.

This is a laudable objective, but competition legislation is not the right tool for tackling economic exclusion. Making the economy more inclusive doesn’t revolve around breaking up large firms or using a regulator to create a new market structure. There is no guarantee that smaller players will enter the market. Economic inclusion should be about radically transforming our labour laws to create jobs. We should focus on improving access to capital and credit for unbanked entrepreneurs and cutting red tape for small businesspeople. None of this can be achieved by the competition regulators.

The Competition Amendment Bill puts too great a burden on the competition authorities to solve South Africa’s economic problems. And it gives them far too much power to do so.

Alarmingly, Section 18A of the bill enables the President to appoint a committee with the power to decide whether an acquisition by a “foreign acquiring firm” is in the interests of national security. “National security” is too broadly defined and the section introduces a new (and, in all likelihood, onerous, murky process) for mergers involving foreign firms. This is frankly a mad and dangerous provision that is likely to create uncertainty in the and disincentives foreign investment.

* The bill gives the Commission authority to make binding orders (rather than just recommendations, as has been the case until now) after it has conducted market inquiries. The Commission will be empowered to remedy structural features believed to adversely affect competition in a market. In terms of the current Act, market inquiries are fairly informal and co-operative processes and this encourages a degree of transparency and collaborativeness. The Commission’s new powers to impose potentially drastic remedies will create a more adversarial process.
* The amendments provide for the imposition of more onerous and comprehensive administrative penalties for all contraventions of the Act. Previously, only misconduct related to cartels and certain kinds of abuse of dominance would lead to an administrative penalty for a first-time offence. The removal of a ‘yellow card’ for contraventions that aren’t cut-and-dried, and the introduction of a ‘red card’ for both outright and potential violations, will make it difficult for companies to monitor compliance. This may stifle dynamic competition by efficient large firms.
* The bill’s merger control provisions entrench and intensify the current trend to elevate so-called “public interest” considerations over pure competition concerns. This gives the competition authorities the power to range freely and proprietorially over the domain of industrial policy. The amendments now enable the Minister to participate on public interest grounds in all merger proceedings before the Tribunal, whereas before his participation was limited to involvement in intermediate and large mergers. This shift is indicative of a broader power-grab by the Minister.
* The bill’s overriding concern with market concentration in merger control may lead to confusion and uncertainty when mergers are assessed. It may put those smaller players that do exist in concentrated markets at a disadvantage.
* The bill’s abuse of dominance provisions could dis-incentivise medium-sized businesses from growing their market share.

In sum, the Competition Amendment Bill will have negative economic consequences. It will introduce regulatory uncertainty, increase the cost of doing business and deter foreign investment.

The DA will thus not support this Bill.

Report to be considered.