

**BUSINESS  
LEADERSHIP**  
SOUTH AFRICA

4 November 2008

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**THE PRESIDENCY  
LEGAL & EXECUTIVE SERVICES**

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Dear President Motlanthe

**COMPETITION AMENDMENT BILL: CONCERNS**

We write to you regarding the Competition Amendment Bill ("the Bill"), which was approved by the National Assembly on 21 October 2008 and is being presented to the President for signature. The Bill proposes several new provisions, including the introduction of a complex monopoly provision and the personal criminal liability provisions for directors and individuals holding management authority for certain offences.

Although the policy principles pursued are broadly supported by us, specific aspects of these two amendments, however, pose significant concerns. Both of these clauses contain technical flaws that will result in either unintended consequences threatening amongst other things the stability of the liquid fuel supply to the inland, in the case of complex monopolies, or, in the case of individual criminal liability be legally challenged based on the Constitution.

**Complex Monopolies: Exemption to enable stability and security of supply in the public interest**

It is often in the public's interest to allow industries to coordinate activities in specific areas to ensure both the stability of the industry in question as well economic stability on the whole. The complex monopoly provision introduced by the Amendment Bill prohibits participants in industries to behave in a "parallel conscious manner" which will preclude any co-ordinating conduct (whether by agreement or not) even if it is in the public interest and/or at the insistence of a government department such as the DME.

An amendment to the Act is required to ensure that co-ordinating activities that are in the public interest can be exempted by the appropriate authorities. Such an amendment will ensure that the procedures for exemption apply equally to the prohibited practices in the existing Act and to the new prohibited practices (i.e. parallel conscious conduct) introduced in the Amendment Bill. Discussions with the dti have confirmed that it was never intended that complex monopoly activities should not be capable of exemption.

The inability to exempt co-ordinating activities required in the fuel industry to secure ongoing fuel supply to the inland might result in supply interruptions. South Africa became a net importer of refined petroleum products in 2005. Most of this demand growth is in the inland, requiring growing quantities of fuel to be transported to South Africa's economic heartland.

**Executive Committee**

Said Macozoma (President) - Bobby Godsell (Vice President) - Derek Cooper (Chairman) - Michael Spicer (CEO)  
Pat Davies - Laurie Dippenaar - Gail Kintworth - Cyril Ramaphosa - Maria Ramos

There is a significant risk of recurring shortages of diesel and jet fuel in Gauteng and other inland areas in the time leading up to mid-2010, as it is expected that fuel demand will increasingly exceed the current inland supply capacity. It is expected that periodic shortages will persist until such time as additional pipeline capacity from the coast becomes operational. This means that the period of shortages could last for a year or more. This risk can be substantially mitigated by allowing the fuel industry to coordinate its fuel supply planning, thereby maximising the use of existing infrastructure such as depots, pipelines and refineries. (Please see the Moerane Report for a more detailed analysis of the security of supply problems facing South Africa and some of the co-ordinating steps required to address security of supply risks.)

The Department of Minerals and Energy is aware of this problem and has embarked upon a cooperative process involving the industry to ensure that investments are made and processes are put in place to avoid shortages. However, the process is not progressing as the required clearances for intercompany co-operation as set by the existing Competition Act have not been received. This has led to progress now being retarded because of fears on the part of the fuel industry that the cooperation involved, no matter how necessary or well-intentioned, may fall foul of the Competition Act.

This risk increases substantially once the Competition Amendment Bill becomes law. It will have the immediate effect of precluding the exemption necessary to enable co-ordination in the public interest. The Competition Act as amended by the Competition Amendment Act does not allow for exemptions from conduct that would constitute a complex monopoly.

In the banking sector too, the complex monopoly provisions of the Bill are damaging and destructive. Banks need to co-ordinate their actions in many instances, for example to broaden access to financial services to more people. Not only is that public interest collaboration jeopardized by these provisions, but worse, they are causing uncertainty and instability in the financial sector precisely at the moment that it is under intense scrutiny given the unfolding international financial crisis.

#### **Criminal liability of individuals**

At least one of the provisions of the clause introducing criminal liability for individuals in respect of some contraventions of competition law is unconstitutional according to senior counsel briefed by us.

In brief, the principle concern is that the individual director or manager accused could be confronted with evidence from a firm's engagement in a prohibited practice, as *prima facie* proof of an essential element of the offence. This means that a finding made in an administrative proceeding (by the Competition Tribunal), where the firm, not the individual, is accused and where the standard of proof is on a balance of probabilities, rather than beyond reasonable doubt, can be used as *prima facie* proof in criminal proceedings against the individual. Normally the state has to prove all the elements of a crime beyond reasonable doubt.

This is clearly unfair and unconstitutional as it reverses the onus of proof onto the accused. The Act in its new form will thus be subjected to legal challenges, thus undermining the intention of the provision.

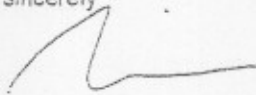
### Conclusion

Signing this Bill in its current form might result in unintended consequences such as putting the security of the liquid fuel supply to the inland at risk with severe consequences for the whole economy. This would be in the period leading up to the commissioning of the new pipeline at the end of 2010. This is also the period during which South Africa will host the 2010 World Cup.

Furthermore, the sections introducing of individual criminal liability might be exposed to constitutional challenges.

In view of our grave concerns, we wish to seek an urgent meeting with you and appropriate officials to discuss the matter further. In the meantime, we respectfully submit that the Bill, in its current form, not be signed by the President until these aspects have been fully debated. As a very last resort, if the Bill is signed the date on which the new provisions would come into effect should be postponed by sufficient time to allow for amendments to address the concerns expressed above.

Yours sincerely

A handwritten signature in black ink, appearing to be 'M. Spicer', written over a horizontal line.

MICHAEL SPICER  
CHIEF EXECUTIVE OFFICER