Speaking notes for Commissioner Bonakele

Engagement: Panel discussion on Competition Amendment Bill

Time and place: 08h00, Hogan Lovells, 140 West Street, Sandton

Other panellists: Michelle Le Roux, Advocate and Helen Kean, Econex

Format: 10 – 15 min opening statement by all panellists followed by Q&A from the floor

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Opening statement

- The Competition Amendment Bill is primarily a response to persistent high levels of concentration and lack of transformation of the South African economy
- The levels of concentration in the South Africa economy are well documented, and much lamented, but the extent of concentration should alarm us all:
    - A recent Competition Commission study using merger data found that there were **294** firms with **more than 35%** market share across 31 priority sectors
    - In at least **70.4%** of the sectors in the economy, identified by SIC codes, we found that there were dominant firms, and
    - At least **42%** of all dominant firms were identified in the **manufacturing**; a sector whose contribution to GDP has declined from 21% of GDP in 1994 to just 13% in 2016. This is not a good reflection of its productivity and global competitiveness.
- The extent of concentration cannot be divorced from the other challenges in the South African economy, including the worrying levels of inequality:
    - The latest World Bank Economic Update on South Africa puts our GINI coefficient at **0.63**, confirming South Africa's income inequality as the highest in the world
    - Wealth inequality is likely even worse. An analysis of tax data for 2010 – 2011 found that just **10%** of the SA population owns **90 – 95%** of assets[1]. Comparatively, in other advanced economies the richest 10% own around 50 – 75% of assets
    - We know from scholars such as Piketty that these inequalities are not only perpetuated but widened over generations. Because assets generate their own income, small initial differences in wealth tend to grow over time.
- Against this backdrop, the Competition Amendment Bill aims to strengthen the Commission's power to deal decisively with economic concentration and to address the racially skewed ownership profile of the South African economy
- The Bill aims to allow the Commission to focus more on market structure in addition to assessing market conduct and to give the Commission greater power to stimulate the competitive process
- While there can be much debate about certain details of the amendments, the expectations and demands it places on the Commission, whether certain functions could be dealt with more effectively in other institutions or in separate legislation, and

[1] Orthofer, A. 2016. Wealth inequality in SA: Evidence from survey and tax data. REDI 3x3 study. Available here.

the extent of political / Ministerial involvement in certain processes, the scale and urgency of the concentration and transformation challenge cannot be refuted.

Major changes introduced in the Amendment Bill

1. Market Inquiries

- Arguably the main change introduced in the Amendment Bill relates to the market inquiry provisions.
- Market inquiries will become the primary tool to interrogate and correct the underlying causes of market power
- The amendments introduce the following changes:
    - They lower the bar for initiating an inquiry
    - They provide that inquiry remedies will be binding, and
    - They explicitly include divestiture as a remedy
- But they also impose additional demands on the institution:
    - The amendment bill proposes that inquiries must be completed within 18 months, and
    - The amendments give the Minister the power to require (not request) that the Commission conducts and inquiry
- These changes have significant resource implications and may require institutional change
- Concerns have also been raised about the potential implication of these, and other, changes on the operational independence of the Commission. However, the Commission's independence remains enshrined in the Act and the Commission will continue to safeguard this independence.

2. Changes to the merger regime

- The amendments make explicit provision for the assessment of creeping mergers, in recognition of the disruptive effect of smaller players, their importance in the competitive process as potential competitors, and in recognition of challenges in assessing creeping mergers until now
- An issue that will surely prompt some debate is the provision for the involvement of the National Executive in mergers that have national security implications
    - The amendments provide for the establishment of a Committee by the President which will assess whether a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the country and, if so, the merger may be prohibited or it may be referred to the Commission with or without conditions
    - Though the amendments provide some guidelines for what may constitute 'national security interests', these considerations are broad including, for example, the impact of the potential merger on the "social and economic stability" of the Republic
    - We await further details from the President on what constitutes national security interests, as provided for in the Amendment Bill
    - The Commission is also conducting an international comparative assessment of the relationship between competition and investment review authorities in other jurisdictions. In this regard we note that the Canadian and Australian

systems both provide for two independent institutions though with seemingly differing levels of cooperation between them.

- The Canadian Competition Bureau and the Investment Review Division, while carrying out reviews of potential mergers independently and within their own legal mandates, explicitly commit to sharing information on the effect of foreign investment. The Investment Review Division takes the Competition Bureau's competition assessment into account when determining the net benefit of a transaction involving a foreign party.
- In Australia, which has an independent Foreign Investment Review Board, a commitment to cooperation with the ACCC is not explicitly cited. This potentially creates a 'parallel' merger review process raising questions about whether it may be more effective to be explicit about how an investment review process fits into the merger review process.

3. Changes to Abuse of Dominance provisions

- The challenges in successfully prosecuting abuse of dominance are also well noted:
  - Excluding settlements, the Commission has prosecuted 14 abuse of dominance cases since inception
  - Of these, 8 cases were dismissed, 5 were successful and 1 was successful at the Tribunal but overturned at the CAC (Media24)
  - Of the cases that were successful, the prosecutions were against current or former State Owned Companies or they were in the agricultural sector where state-sanctioned cartels operated under the Apartheid regime
- The need for a more effective legal framework against abuse of dominance is clear
- The removal of the definition of excessive pricing and the provision providing greater clarity on the factors that will be used to assess whether a price can be deemed excessive is welcome. Importantly, the factors that will be used to assess excessive pricing such as price-cost margins, IRR, ROCE, profit and non-commercial historical advantage, are not new to the practitioners and have been applied in previous cases.
- The change in the cost benchmarks for predatory pricing to average avoidable cost and average variable cost also serve to bring the provisions in line with international best practice and improve effectiveness of prosecution
- The abuse of dominance provisions also have the intention of bringing the effective participation of small and medium sized business and firms owned by historically disadvantaged individuals to the centre of abuse of dominance assessments. While there are some concerns about whether the Commission is best placed to assess features such as the prices that will ensure the effective participation of smaller firms in the economy, the principle of supporting the entry and participation of potential rivals must be supported.
- In this regard, the removal of the requirement that price discrimination must result in the ***substantial*** prevention or lessening of competition is welcome, albeit too late for Mr Foot's Nationwide Poles

4. Operational matters – deterrence effect of fines and the change to confidentiality regime

- The increase in administrative penalties for all offences from 10% to 25% of (group) turnover is an important signal to businesses on the deleterious effect of competition

offences on the economy and will increase the deterrence effect of administrative penalties

- With respect to confidentiality, the amendments provide that the Commission will no longer be compelled to accept information claimed confidential as being so, but will be able to determine the validity of a confidentiality claim. The changes to the confidentiality regime will limit the abuse of the confidentiality provisions and reduce spurious confidentiality claims. It may also improve transparency of many processes, including merger review, where social partners have often complained about the negative impact that broad and sometimes questionable confidentiality claims have on their ability to contribute to meaningfully to merger review

5. Where we differ – items the Commission hoped will be included

- Of course, there are some areas where the Commission hoped for additional changes:
    - **Protection of witnesses, complainants, and informants:** the protection of complainants, informants and witnesses continues to be a concern of the Commission. The Commission wishes to see explicit protection of these classes of individuals from interference or intimidation by criminalising such conduct and protecting them from subpoenas or processes that constitute harassment
    - **Sanction for cartel facilitators:** the Commission continued to advocate that independent cartel facilitators should face sanction, in line with international best practice in jurisdictions such as the EU. Presently, the cartel provisions still only allow for the prosecution of industry associations but we know that independent firms, such as auditors, have also been instrumental in facilitating certain cartels. Their conduct should not go unpunished.
    - **Development of internal capacity, particularly of legal practitioners:** The Commission prides itself on attracting the most talented economists and lawyers committed to public service. In recognition of the ambitions of particularly younger lawyers, we had hoped that the Act would allow the Commission to conduct articles for Graduate Trainees or any of its staff. The ability to directly brief external counsel would also make more effective use of our internal resources, while reducing expenditure significantly.
    - **Divestiture**: the process for confirming divestiture recommendations currently differ for abuse of dominance (section 8), other prohibited conduct (section 4, 5, and 9) and for market inquiries. It would be more efficient if these processes were aligned

In closing

- The Commission sees the Amendment as a “call to action” for the institution, and all South Africans, to recommit to creating an inclusive economy that supports fair and just participation by all South Africans and particularly by black South Africans in the productive economy
- The additional powers afforded the institution is a vote of confidence in the work of the Commission, but does; of course, come with increasing pressure and requirements for greater institutional agility. The transition may not be easy, but the challenges are clear and the need for transformation and competitiveness undisputable.

- With GDP growth of only 1.2% expected in 2018 and 2019 not much better at 1.9%, it is clear that we must support greater competitive rivalry and dynamism. It cannot be ‘business as usual’.