Department of Economic Development (South Africa): Invitation to comment on Competition Amendment Bill, 2017

Consultation response from the

Centre for Competition Policy

University of East Anglia, Norwich Research Park, Norwich NR4 7TJ

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Author:

- Dr David Reader

This consultation response has been drafted by a named academic member of the Centre, who retains responsibility for its content.

The Centre for Competition Policy (CCP)

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Response to draft Competition Amendment Bill, 2017

1. I welcome the opportunity to respond to the Department's invitation to comment on the draft Competition Amendment Bill. I am a Senior Research Associate at the Centre for Competition Policy (CCP) at the University of East Anglia, where I undertake legal research within the areas of competition policy and regulation. My PhD thesis examined merger regimes around the world to evaluate the various approaches that countries have adopted when seeking to accommodate so-called 'public interest' considerations within their merger assessments.[1] The merger regime in South Africa has been a particular interest of mine, given that its assessment procedure affords equal prominence to public interest and competition criteria. I have consequently taken steps to engage with key actors within the South African regime by presenting my doctoral research in Durban,[2] in addition to responding to the Competition Commission's consultation on its *Guidelines for the Assessment of Public Interest Provisions in Mergers*.[3]

2. The draft Competition Amendment Bill, 2017 proposes a number of significant reforms which, if adopted, are likely to have a substantial impact on the incentives of potential investors to invest in South African companies. They will also influence how these investors approach and frame their merger bids. For the purposes of this response, I wish to focus on one particular aspect of the South African merger regime (namely, the role of the Government in merger proceedings), which I believe requires clarification within the Competition Act No.89 of 1998 in order to mitigate the risk of the new public interest ground (proposed under clause 7(c) of the draft Bill) having a detrimental effect on merger activity.

3. The role of the Government in merger proceedings is currently afforded a statutory footing under section 18(1) of the 1998 Act, which states: 'In order to make representations on any public interest ground referred to in section 12A(3), the *Minister* may participate as a party in any intermediate or large merger proceedings before the Competition Commission, Competition Tribunal or the Competition Appeal Court, in the *prescribed* manner'. Adopting a literal interpretation, this implies that the Government's role is confined to representations made in front of one of the relevant assessment bodies. It would require a far broader interpretation to infer that section 18(1) grants Government the power to directly interact with the merging parties with a

[1] David Reader, 'Revisiting the Role of the Public Interest in Merger Control' (DPhil thesis, University of East Anglia 2015).

[2] David Reader, 'Public Interest Considerations in Domestic Merger Control: Empirical Insights' (9th Annual Conference on Competition Law, Economics and Policy, Durban, 11 September 2015).

[3] David Reader, *Consultation Response for Competition Commission of South Africa: Guidelines for the Assessment of Public Interest Provisions in Mergers* (CCP, 5 March 2015); and David Reader, *Consultation Response for Competition Commission of South Africa: Revised Guidelines on the assessment of public interest provisions in merger regulation* (CCP, 11 February 2016).

view to resolving public interest concerns, wholly separate from the proceedings of the Commission, the Tribunal or the CAC. Yet in each of the three merger cases mentioned in the draft Bill's Background Note (i.e. *Walmart/Massmart*, *AB InBev/SABMiller*, and the *Coca-Cola/SABMiller* bottling operations merger) the Government has sought to do exactly this.

4. It appears that the *Walmart/Massmart* case has created an unwritten precedent that offers procedural legitimacy to this broad interpretation of section 18(1).[4] Professor David Lewis' widely-cited account of the Government's intervention in the case offers a convincing critique of this process: '*[N]ot only did the minister intervene extremely late in the investigatory process, but he chose to intervene not by making submissions to the Commission's investigators – as he is entitled to do – but rather by entering into private negotiations with the merging firms, clearly holding out the promise that, were the firms to reach agreement with him, he would ensure that the agreement would be rubberstamped by the competition authorities. In other words, it would be supported by the Commission in making its recommendation to the Tribunal and by the Tribunal in accepting the recommendation*'.[5]

5. In the two high-profile merger cases since the *Walmart/Massmart* case, i.e. *AB InBev/SAB Miller* and *Coca-Cola/SABMiller*, the merging parties have appeared much more willing to enter into early private discussions with the Government. This may well be reflective of the parties' eagerness to avoid a repeat of the unexpected delays that the *Walmart/Massmart* case faced owing to Government opposition. Engaging in a dialogue with the Government at an early stage could have been viewed as a means for the parties to avoid unforeseen opposition at a later date. Professor Lewis' second assertion (that any public interest commitments the parties agree with the Minister will be 'rubberstamped' by the competition authorities) is also corroborated by these two high-profile cases, where there is very close alignment between the public interest commitments agreed between the parties and the Minister, and those ultimately recommended/sought by the competition authorities.

6. In *AB InBev/SABMiller*, the parties agreed commitments with the Government that would see the merged entity (i) refrain from making job cuts for a period of 5 years, and (ii) make a R1 billion investment to support small-holder farmers and to promote enterprise development.[6] Each of these remedies were adopted by the Commission and Tribunal in

[4] Indeed, some commentators suggest that Walmart/Massmart may be most significant from a procedural point of view, in that it lays the foundations for the Minister of Economic Development (rather than the competition authorities) to become the ultimate arbiter of the public interest dimension of mergers; Mark Griffiths and Wiri Gumbie, 'The public interest test in the South African merger control regime' (2015) 3(2) Journal of Antitrust Enforcement 408, 418.

[5] David Lewis, *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table* (Edward Elgar 2013), 124.

[6] AB InBev, *The South African Government and Anheuser-Busch InBev agree approach on public interest commitments in proposed acquisition of SABMiller by Anheuser-Busch InBev* (Press Release, 14 April 2016).

an unaltered form.[7] In *Coca-Cola/SABMiller*, the Government extracted commitments from the parties to (i) impose a 3-year freeze on lay-offs, and (ii) undertake to invest R800 million for supporting enterprise development in the agricultural value chain and for downstream distribution/retail (R400 million each).[8] The Tribunal signed-off on identical public interest remedies a week later.[9]

7. As a result of these high-profile cases, there now exists a palpable expectation from potential investors that, in addition to the 'formal' procedure outlined within the 1998 Act, large-scale mergers will also be the subject of additional 'informal' scrutiny by the Government (which will, in turn, have a bearing on how the competition authorities rule on any public interest concerns). This is potentially problematic for several reasons:

   (i) The clarity that investors can derive from the Competition Commission's *Guidelines on the Assessment of Public Interest Provisions in Merger Regulation*[10] is limited by the prospect of the Government adopting its own approach in informal 'behind closed doors' negotiations. As the initial incentives for firms to merge is very much dependant on their ability to predict the outcome of the assessment process, a lack of transparency in the process can act to inhibit these incentives.

   (ii) Further predictability, which is facilitated by assigning decision-making powers to competition authorities (rather than government ministers) and by publishing the rulings of the Competition Tribunal, is also undermined by the potential for ad hoc political intervention. Given that South Africa is one of a minority of countries that considers public interest criteria in every merger assessment,[11] it is arguable that its merger control regime has a greater need than other jurisdictions to adopt transparency-enhancing measures that are immune from political override.

   (iii) Ad hoc political interventions may undermine the positive effect that a regime enforced by independent competition authorities can deliver (inc. a decision-

[7] Nqobile Dludla, 'South Africa clears AB InBev's takeover of SABMiller' (*Reuters*, 30 June 2016).

[8] SABMiller, *The Coca-Cola Beverages Africa Merger Parties and the South African Government Reach Agreement on Public Interest Conditions for Merger* (Press Release, 4 May 2016).

[9] Coca-Cola Company, *The Coca-Cola Beverages Africa Merger Parties Welcome Competition Tribunal Approval for Formation of CCBA* (Press Release, 10 May 2016).

[10] Competition Commission South Africa, *Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No.89 of 1998* (Government Gazette No. 40039, 2 June 2016), Notice 309 of 2016. One of the main purposes of the Guidelines was to offer transparency for what is an inherently blurred aspect of the merger assessment procedure. By being able to refer to the Commission's common practices, the Guidelines would have enabled merging parties to more readily identify and address any public interest concerns posed by their transaction.

[11] In a study of 75 merger regimes across the globe, less than one-in-five countries utilise public interest criteria in every assessment; David Reader, 'Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights' (2016) CCP Working Paper 16-3, 19. For a brief overview of the study, see 'Accommodating 'public interest' considerations in merger control' (2016) 31 CCP Research Bulletin 10.

maker with access to ample economic expertise and resources;[12] allowing for a holistic balancing of competition and public interest considerations within a single body;[13] avoiding the prospect of political short-termism entering into the decision-making process;[14] and adhering to predictable timetables[15]).

(iv) There is a danger that a competition authority 'might tailor its competition decisions to limit the prospect of ministerial override'.[16] This could, for example, see senior members of the authorities make decisions that are aligned to the Government's position on a merger, on the basis that departing from the Government's stance may have a negative effect on their prospects of being reappointed in the future. In the case of the Competition Commission, this would evidently run counter to its duty to 'perform its functions without fear, favour or prejudice' (section 20(1)(b) of the 1998 Act), but a risk of regulatory capture is nonetheless facilitated by the provisions of the 1998 Act which task the Minister with (re)appointing senior members of the Commission (section 22 for the appointment of the Commission, and section 23 for the appointment of Deputy Commissioners).[17] The potential for regulatory capture is also apparent within the Tribunal by virtue of the Minister's role in making recommendations to the President on the (re)appointment of Tribunal members (section 26(3) of the 1998 Act).

8. The problems outlined in paragraph 7 of this response are not dissimilar to those referred to in the Background Note of the draft Bill, which demonstrates that the Government is disinclined to assign the Minister a greater role in the decision-making process (e.g. via a 'veto-power') on the basis that: (a) the need for dual regulatory and ministerial approval would create uncertainty, (b) separating out the public interest and competition assessments would prevent a holistic balancing of the two, and (c) political decision-making increases the likelihood of 'improper' and opaque considerations entering into the decision-making process.[18] However, the irony is that these weaknesses already exist in practice by virtue of the Minister's de facto decision-making role when it comes to public interest concerns in large-scale transactions.

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[12] The Minister for Economic Development has himself stated that 'Solomon's wisdom' was often necessary when balancing competition and public interest issues, alluding to the complexities of the economic and social trade-offs; Ebrahim Patel MP, 'Keynote Address' (4th BRICS International Competition Conference, Durban, 12 November 2015) at [1:31:50 – 2:05:30].

[13] Antonio Capobianco and Aranka Nagy, 'Public Interest Clauses in Developing Countries' (2015) Journal of European Competition Law & Practice 46.

[14] See e.g. the perceived issues of political short-termism in the UK context; David Reader, 'Does Ofcom Offer a Credible Solution to Bias in Media Public Interest Mergers in the United Kingdom?' (2014) 4(1) CPI Antitrust Chronicle.

[15] Michael Cardo MP, 'Meddling muddies merger method' (*fin24*, 6 May 2016).

[16] Lewis (n 5) 127.

[17] I certainly make no suggestion that previous or incumbent Commissioners and Deputy Commissions have succumbed to regulatory capture, but merely note the potential for capture under the 1998 Act.

[18] Department of Economic Development, *Competition Act (89/1998): Call for Public Comment; Background Note on Competition Amendment Bill; Competition Amendment Bill, 2017 and Explanatory Memo on Objects of Bill* (Government Gazette No. 41294, 1 December 2017), Notice 1345 of 2017, 22.

9. The Background Note states that the Government's 'preferred option' is: '*to keep the decision-making processes within the Commission, Tribunal and CAC, but to provide the responsible Minister with more effective means of participating in competition-related inquiries, investigations and adjudicative process. […] This promotes transparency and a rational consideration of all related matters*'.[19] To achieve this, the draft Bill proposes to grant the Minister a right to appeal against any decision of the Tribunal (clause 11, amending section 17 of the 1998 Act).[20] This appears to be a reasonable measure for providing the Government with a broader and more transparent role in the adjudication process under the 1998 Act, in lieu of the role it has adopted in the three merger cases mentioned above.

10. My anticipation is that the clause 11 amendment should avoid the perceived need for the Government to enter into 'behind closed doors' discussions with merging parties in the future. Yet if the Government intends to retain these discussions as part of the amended regime, it seems appropriate that the wording of section 18(1) of the 1998 Act should be amended to represent this (and thereby formalise the procedural precedent that *Walmart/Massmart* has established). This amendment might also take the opportunity to facilitate greater transparency by outlining how the Government will approach merging parties (or vice versa) and how the deliberations/outcomes of these meetings will be reported. As referred to above, continuing to afford this extensive role to the Government poses numerous practical problems, and there is a clear need to undertake a cost-benefit analysis between these and the substantive goals that the draft Bill seeks to deliver.

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[19] ibid.

[20] ibid 23. The Background Note states that this amendment would address a gap in the 1998 Act by allowing the Executive 'a meaningful means of participating in the Act's adjudicative processes'.

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