TBCSA Offices, 3 Amethyst Avenue, Lyttleton Manor Ext 3, Centurion,
Pretoria, 0157, PO Box 11655, Centurion, 0046, Gauteng, South Africa,
Telephone: +27 12 664 0120 | Facsimile: +27 12 664 0103,
Email: tourism@tbcsa.travel | Website: www.tbcsa.org.za
Reg: TBCSA - 2008/011486/08

FINAL VERSION

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TOURISM BUSINESS COUNCIL OF SOUTH AFRICA's (TBCSA) COMMENTS COMPETITION AMENDMENT BILL

1. Introduction

The Tourism Business Council of South Africa (TBCSA) is an umbrella organization which represents the unified voice of business for the Travel and Tourism (T&T) private sector.

TBCSA is a non-profit, private organization working to unite and influence the diverse Travel and Tourism private sector behind one core mission to contribute to a competitive, responsible and inclusive Travel and Tourism (and South African) economy. Our mandate is to serve the needs to our members who broadly constitutes 20% of the sector's leading business enterprises and whose output represents 80% of the sector's overall economic contribution. These members are in the main, made up of airline associations, bus operators, vehicle rentals, hospitality and accommodation sector, travel agents, professional hunters and tour operators, to name a few. TBCSA serves to provide a VOICE to this community of businesses and to ensure that they play a constructive role in the country's economic development, growth and transformation: and to create an environment in which businesses of all sizes and in all sectors can thrive, expand and be competitive.

The tourism industry is one which contributes significantly to the GDP of this country. According to the World Travel and Tourism Council (WTTC), the industry directly contributed R 127.9 bn or 3.0% total GDP in 2016. It has also contributed 1 533 000 total jobs or 9.8% of total employment in 2016. This includes jobs indirectly supported by the industry. The industry has also seen R 128.3bn in visitor exports generated or 9.9% of total exports in 2016.

The Competition Amendment Bill provides additional proposals to strengthen the Competition Act, 1998 (Act 89 of 1998, as amended). Building on amendments in the Competition

Amendment Act of 2009, the Bill provides key provisions for dealing with market inquires; introduces additional considerations for transformation, deals with economic concentration, provides for matters dealing with administration of Competition law, including institutional arrangements; and a more bolder consideration of public interest in Competition Law. Some proposals also indirectly set out the interface between Competition Authorities and Sector Regulators.

The proposed Bill and explanatory note are specific in stating the objective of using the Competition Law to address "structural and transformation constraints in the South African economy". Accordingly, the draft Bill notes that the "Legislature's explicit reference to these structural and transformative objectives in the Act clearly indicates that the legislature intended that competition policy should be broadly framed, embracing both traditional competition issues, as well as these explicit transformative public interest goals". The use of competition law for addressing broader social and public interest goals can have unintended consequences. The Tourism Business Council of South Africa believes that it is important to guard against mandate creep, as this can cause uncertainty and overlaps amongst regulators.

TBCSA recognizes the importance of Competition Policy in driving economic growth and development of the South African economy. The Council has appreciated the professional rigour and fairness with which Competition Authorities have approached competition law matters. Additionally, we supported the introduction of various Competition legislations and amendments. Our principal position is that competition policy should be used to enhance economic efficiency and therefore growth of the South African economy – policymakers should be careful and not overly rely on competition policy to address other pressing matters in the South African economy. Additionally, the advocacy approach has historically focused on a cooperative relationship between Competition Authorities and the private sector. This relationship and approach has been instrumental in improving competition policy outcomes over the years.

Our comments on the Amendment Bill are divided into two sections: General Comments and Specific responses.

2. General Comments

One of the priorities of the Bill is market inquiries or studies. It is proposed in the bill that provisions relating to market inquiries must be strengthened so that their remedial actions effectively address market features and conduct that prevent, restrict or distort competition in the relevant markets.

2.1. Market Studies

a) The introduction of market studies in the Competition Amendment Act, 2009 brought South Africa's competition law in line with international standards. The UK's Office of Fair Trading (OFT) defines market studies as "a study of how sectors, markets, or market practices are working." They are conducted primarily in relation to concerns about the functioning of markets arising from one or more of the following: (i) firm behaviour; (ii) market structure; (iii) information failure; (iv) consumer conduct; (v) public sector intervention in markets and (vi) other factors which may give rise to consumer detriment .The output of a market study is a report containing findings based on the research, which may conclude that the market is working satisfactorily or set out the problems at hand. The UK approach prioritizes consumer welfare and protection – perhaps unsurprising, given the broader focus of OFT on both competition and consumer protection.

b) Similarly, European Union (EU) sector inquiries are industry wide probes which take place where there are concerns that markets may not be working as well as they should, but where the problem does not appear to be related to unlawful action by individual companies.

c) OFT market studies are examinations into the causes of why particular markets are not working well for consumers, leading to proposals as to how they might be made to work better. They take an overview of regulatory and other economic drivers in a market and patterns of consumer and business behaviour.

d) Through market studies, competition authorities can help markets work better, especially when obstacles and distortions to competition are not caused by competition law violations. Competition authorities often use this tool to inform governments on problematic markets and recommend areas of improvements.

e) The use of market studies in South Africa has been limited and with mixed outcomes. It is expected that the market studies will gain more prominence over the next few years. As such TBCSA is of the view that it is important for the private sector, that the market study is procedurally fair or at least perceived as being fair by all stakeholders.

f) Competition Authorities should also commit enough financial and human resources to ensure that the analysis is detailed and reflects an understanding of market dynamics.

g) All role players who might consider undertaking market studies should ensure that they have in place rules and procedures against any public disclosure of confidential and sensitive information that may be provided by market players and by other government agencies, as part of a market study and ensure that stakeholders are appropriately informed about their existence to encourage the use of market.

h) As with other markets, market studies should be one of the available tools for addressing competition or consumer protection problems, alongside its enforcement and advocacy activities. The Authorities should thus make sure that all inquiries are completed judiciously – and should not be used to impose unnecessary costs and burden on business.

i) The principle of separation of powers should be upheld given the possible sanctions available to the Commission and Minister under the proposed amendments. The ability to direct divesture can have significant impact on investment decisions and must be reconsidered.

2.2. The Role of the Minister in Market Studies

j) Whilst the Competition Legislation has always assigned a specific role for the Minister in competition matters, the proposed amendments include additional responsibilities. In line with other jurisdictions, considerations ought to be given on the circumstances under which the Minister is expected to be involved with Competition cases in order to lessen concerns of "political interference' in application of competition law.

k) Due to limited time, we benchmarked against the UK approach to Ministerial Intervention in market studies only and it is highlighted below as guidance for the Ministerial involvement: The Secretary of State in the UK also has powers to make both ordinary and cross-market investigation references itself, but only in two circumstances:

- *When he or she is not satisfied with the Competition and Markets Authority's (CMA) decision not to refer a market for investigation; or*
- *When he or she has brought to the CMA information relevant to a reference decision, but is not satisfied that the reference decision will be made within a reasonable time.*

In addition, the Secretary of State has powers to intervene in pre-existing references which raise defined public interest issues.

There are two types of public interest interventions available to the Secretary of State: namely, interventions leading to a 'restricted' CMA reference (where the CMA investigates the competition issues, whilst the Secretary of State examines the public

interest issues) and interventions which maintain a 'full' CMA reference (where the CMA must examine the public interest issues itself alongside the competition issues).
To begin any of these interventions, the Secretary of State must issue an intervention notice between the date of publication of the market study notice and the date of the CMA's decision (i.e. to make a reference, not to make a reference or to accept undertakings in lieu).

Our proposal therefore is that there should be clear instances for the intervention of Minister and also a predefinition of public interest that would warrant a Minister's participation in market studies.

2.3. Institutional Support

TBCSA supports efforts to better capacitate the Competition Authority – this can result in effective implementation of competition policy and reduce ambiguities about Competition Law in South Africa. In addition to strengthening competition bodies, Business submits that perceptions of excessive political pressures can reduce effectiveness of policy – as such perceptions eliminate trust and confidence in the fairness of bodies in managing competition cases. It is worth considering how the amendment process can be used to address some of the concerns.

3. Specific comments on Bill

a. The explanatory note states that cases involving the abuse of dominance through charging excessive pricing have not to date been successfully prosecuted. This may continue to be the case unless the allocation of evidentiary burdens between the Commission and the dominant firm is clarified.
b. Certainly, if the argument is that there is a prima facie case of abuse of dominance the burden ought to rest with Competition Authorities. Similarly, subsection (3) can have unintended consequences in setting out guidelines for excessive pricing. How will this be measured across sectors? How will various market dynamics be considered? An

example is cases of early mover advantage creating certain outcomes. Will this consider risk/reward matrix?

c. The rationale behind the deletion of S (9)1 is not clear. "(a) it is likely to have the effect of substantially preventing or lessening competition". Is this assumption that the impact of competition is not a factor for prohibited conducted under section 9?

d. Is the intention of the Drafters to alter the entire Section 9? in which case, should the text not read (1) An action by a dominant firm, as the seller or purchaser of goods or services is prohibited price discrimination, if that is the intention.

e. The deletion of section 2a and 10a are noted: The previous section 2a stated that "*Republic in order – (a) to promote the efficiency, adaptability and development of the economy*." The concern we have is that efficiency should not be removed as a priority or one of the principles for competition. We are of the view that competition is about efficiency and ensuring that the economy becomes competitive, stable and grows. Removing the word "efficiency" may have a negative bearing on how we will ultimately measure the impact of this legislation.

f. Clause 4 (2) and (3) refer to differential treatment of purchasers. It seems as if the differential treatment's effects should be determined by the dominant firm? Is this not problematic and opening this determination to interpretation and possible abuse by dominant firms?

g. Section 13 talks of impact studies on decisions by the Competition Commission to study the impact of the decisions they make, etc. Will that not affect its objectivity or would such studied be outsourced? Or should these studies not be done by an independent government department such as the Department of Monitoring and Evaluation?

h. Section 16 (Substitution of section 26 (2) in Act 89 of 1998 - when the minister recommends members of a tribunal, what will inform him to make such a recommendation? Should there not be a process in place, with a clear set of criteria? This would pre-empt political bias.

i. Amendment to Section (17). This is a significant change for merger notifications and can be open to abuse. It is worth considering conditions under which a Minister can appeal a decision by the Tribunal and more broadly other decisions of Competition

Authorities. This will be crucial to reduce perceptions of "politicisation of competition policy".

j. Section 43 A: Suggested change to subsection (III) - either correct the typo or redraft. It is not clear if the broad objective of the Amendment Bill is to usurp some powers given by BEE Act and other statutory structures and more broadly to subject BEE legislation and charters to Competition Legislation? Consistent reference suggests that this might be a philosophical thought from drafters.

k. Subjecting a single firm to a market study would be considered a departure from international norms and approaches to market enquiries. Generally, the approach is often sector wide and it is not clear under what circumstances a single company would be a subject of a market study. This is also not consistent with proposal in the Note that "The proposed amendments to section 43A(b) (clause 18) identify three categories of market features that may be relevant to the market inquiry: (a) market structure; (b) observed market outcomes; or (c) the conduct - whether of suppliers, customers or firms active in a concentrated market and that A market inquiry's focus remains on the general state of competition in a market, rather than on the conduct of a particular firm".

l. It might be worth considering an exchange with Regulators responsible for sector regulation. For example, for ICASA, telecoms matters would be the lead in dealing with competition matters in the sector. The proposed market study would thus require a much more coordinated effort from Competition Commission and ICASA. Similarly, for the banking sector – there would have to be a mechanism to manage tensions between regulators and competition authorities.

m. Section 43 (G) – (1) (c) - This seems procedurally unfair. Can a responsible Minister not elect to participate given her/his understanding of sector dynamics? What is the process of managing cross regulator conflicts? It is stated that "the central concept of a market inquiry is to empower the Commission to inquire into market structure, and decide on interventions and remedies to address any features of the markets that would enhance competition and advance the purposes of the Act." However, there are other economic considerations, which are sector specific, that determine the level

of competition in such a sector. Competition Policy cannot be the only consideration in this process. For instance, globally, financial stability factors are used to determine the optimal number of financial sector players. Our view therefore is that the minister should not unilaterally decide to invite people to participate in a market inquiry.

n. The proposed amendment to section 60 (clause 32) enables divestiture as a remedy following a market inquiry, and on terms that have regard to the purposes of the Act, with the safeguard that a divestiture remedy can only be imposed by the Tribunal, following a recommendation from the Commission. In addition, there is the right of appeal to the Competition Appeal Court. The Tourism Business Council submits that this provision be subjected to a regulatory impact assessment prior to implementation. Given the wide-ranging scope of the market study, this could create uncertainty for investors and businesses.

o. The explanatory note identifies the problem that "there is insufficient alignment of competition-related processes and decisions with other public policies, programmes and interests and with the policies that voters embrace through the democratic process." However, the Amendment seems to further contribute to policy inconsistency. In an environment of sub-par economic growth, policymakers and regulator have to agree on a mutually reinforcing approach to addressing economic growth challenges and supporting investor confidence.

4. **Conclusion**

TBCSA submits that Competition Policy and effective implementation thereof is important for the South African economy. However, the approach in developing and implementing policy must be supportive of economic growth and employment creation. More broadly, new legislation ought to provide certainty for business and investors. We are proposing that sections of the Bill be subjected to an impact assessment prior to the promulgation – and a detailed impact study be submitted to the portfolio committee as part of the Parliamentary process.

Yours Sincerely

Ms. Mmatšatši Ramawela
CHIEF EXECUTIVE OFFICER
Tourism Business Council of South Africa

TRANSMITTED ELECTRONICALLY, THEREFORE SENT UNSIGNED