LAW REVIEW PROJECT

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To:
Mr Arico Kotze
Committee Secretary
Portfolio Committee on Economic Development
akotze@parliament.gov.za

Dear Mr Kotze

Re: Walmart/Massmart merger enquiry

The Law Review Project (LRP) hereby makes a submission in response to your request for submissions, and asks for permission to appear before the Committee.

This is a deliberately brief submissions mentioning the LRP's jurisprudential concerns with the state of competition policy and law in South Africa. These points do not, we hope, need elaboration, but we are willing elaborate textually or orally if needed, and can elaborate full if we are afforded and audience with the Committee.

Our concerns are jurisprudential, not economic.

1. Since the Walmart/Massmart matter has been settled by the Tribunal and the Committee, or its government Department, have no case-specific powers regarding the implementation of competition policy (such as the power to review, amend, reverse, confirm or otherwise interfere with the Tribunal's ruling), we assume this enquiry is within the constitutional mandate of the legislature, namely to consider competition law, specifically whether the existing law is effective, efficient and legitimate.

2. Accordingly, the LRP assumes that the Walmart/Massmart ruling is regarded as an opportunity for the legislature to review the legislative and institutional environment in which competition law operates using the Walmart/Massmart ruling as a case study. We are unaware of any other basis within the Committee's powers and functions for this enquiry.

3. LRP therefore uses the request for submissions as an opportunity to address some serious jurisprudential concerns regarding the matter.

4. The existing Act and/or its implementation are jurisprudentially flawed in that:

    4.1. **Section 1 of the Constitution.** The Act is inconsistent with the first section of the Constitution, which specifies the country's foundational provisions, one of which is the rule of law. The rule of law has been fund by the Constitutional Court to be binding and justiciable. In other words, all law and administrative

action must be consistent with the rule of law.

4.2. **The rule of law.** The rule of law consists of three core elements, each with subsidiary elements derived from these three. All three have the purpose of ensuring that every person's rights and obligations are determined by "the rule of law, not the rule of man". The three elements are:

4.2.1. **Separation of powers**, that is legislation by the legislature, adjudication by the judiciary, and execution by the executive.

4.2.2. **Certainty**, that is the ability to know with a high degree of certainty in advance whether what is done is lawful.

4.2.3. **General application**, that is equal and impartial application of law to all.

4.3. **Derivatives and implications of the rule of law.** Derivatives and implications of these three elements are, by way of example:

4.3.1. **Quasi-courts**, such as the Tribunal and the Commission, ought ideally not to exist. According to the rule of law and the separation of powers required by it and by diverse clauses in the Constitution such adjudicative functions ought to be located within the judiciary. If there are compelling reasons for not upholding the separation of powers, quasi-courts must operate according to corresponding rules of procedure, due process and natural justice, that is they must conduct proceedings and make decisions as if they were in the judiciary. This is so for all sorts of well-established reasons, some philosophical and some practical. If, for instance, adjudicating bodies such as the Commission and the Tribunal are in the government department or agency, they should have:

4.3.1.1. "punishments that fit the crime" (ie penalties consistent with what would be awarded by the courts),
4.3.1.2. access by affected parties to all information available to the authorities or under consideration,
4.3.1.3. the right to have allegations unambiguously formulated,
4.3.1.4. the right to face and cross-examine accusers.
4.3.1.5. The burden of proof resting with accusers, not those under investigation.
4.3.1.6. findings according to objective criteria and laws known and readily accessible in advance,
4.3.1.7. the absence of retroactivity.
4.3.1.8. general application as opposed to discretionary.
4.3.1.9. decisions consistent with precedent.

4.3.2. **Practical considerations.** The judiciary not only has elaborate structural features designed to maximise the prospect that justice is not only done, but is seen to be done, but also to maximise the likelihood of adjudicators being impartial. Politically appointed bodies in the executive, especially ones where presiding officers do not have tenure and independent budgets, necessarily entail real or suspected political influence, and adjudicator bias. This is not to suggest that this was the case regarding Walmart/Massmart. In the contrary, the ruling suggests genuine impartiality. The point is that were the ruling in accordance with the revealed preferences of government departments, or members of the ruling alliance, there would have been speculation on whether the

Tribunal was subject to real or suspected undue political influence.

4.3.3. **Right of appeal.** One of the checks and balances necessary to maximise impartiality is that there should always be an automatic right of appeal to the judiciary, which should, needless to say, be truly independent. Despite a popular and tenacious myth to the contrary, a right of review is not the same thing, and is no substitute for the right of appeal *on the merits.* In contrast, review is concerned only with procedural irregularities, not the wisdom decisions. There is much confusion about this in South Africa. In some jurisdictions, such as Australia, confusion is reduced by distinguishing between "merit review" on one hand and "administrative" or "procedure" review on the other.

4.3.4. **Structural aspects**. One of the most conspicuous differences between real courts in the judiciary and quasi-courts in the executive is immediately obvious on entry. Courts are carefully designed following thousands of years of experience for their essential function – they are fit for purpose. They have facilities for court records, special places for presiding officers and legal representatives to sit, "boxes" for witnesses and the accused, and so forth. Quasi-courts make do with whatever rooms and furnishings may be available. These differences are more than cosmetic. They define places that are suitable for adjudication and ones that are not.

4.3.5. **Vague and whimsical criteria**. Our competition law is not confined to the promotion of competition and competitiveness, but allows for rulings on a range of sometimes conflicting consideration. The defined objectives overlap with the functions of other departments and agencies, which are more suited to the task. Instead of being consumer-centred, competition policy is diluted by considerations of protectionism, for which there is a highly specialised and dedicated government agency. It also provides for transformational considerations, again for which there is are other substantial and specialised context-specific departments and agencies. Then there are such considerations as job creation, and small business development. These and other considerations necessarily mean that the law is vague and ambiguous, and in some senses self-contradictory. It is suggested that the Committee recommend that the law be revisited with a view to clipping the eager wings of the competition executive, and provided clearer pro-competition marching orders.

5. For these and related jurisprudential reasons the LRP is of the view that the Portfolio Committee should use this opportunity to revisit completion law and policy. If this enquiry does not allow for a full reconsideration, it is respectfully submitted that the matter should be referred to subsequent comprehensive review.

6. Lest the full implications of the preceding comments are not immediately apparent what follows are practical examples of the extent to which compromised principles of good law have led to serious anomalies and miscarriages of justice. It is paradoxical that the Committee is investigating the Walmart/Massmart ruling, since there no obvious reason to question it. It and procedure leading up to it is, we respectfully submit, as consistent with the principles of good law as can be expected from laws and institutions that are inconsistent with Constitutional provisions and values.

7. **SACCI meeting.** The present writer was present at a meeting of the South African Chamber of Commerce and Industry (SACCI) where the Competition Commissioner

and a senior colleague explained to the business community what their approach is to interpreting and implementing the law.

7.1. Firstly, the meeting was requested by organised business because businesses from small to large believed, justifiable in our view, that there was no way of knowing whether what they were doing was lawful. Aware of the immense fines imposed on hapless companies, and uncertainty expressed by many, they were naturally afraid, some might say terrified, of becoming the next unwitting victim. The law and its interpretation are such that almost anything any business does can arbitrarily and retroactively be declared unlawful and massive fines (euphemistically call "administrative penalties") can be imposed. This is a fundamental constitutionally problematic aspect of the law and its implementation. Cases were cited where companies had been found guilty of charging less than competitors ("predatory pricing"), the same as competitors ("collusive pricing") and more than competitors ("monopoly pricing"). In other words any price at all is potentially a violation attracting extreme fines. Pioneer Foods, for instance, in a single ruling, found guilty of all three and fined R1 billion. It is impossible to charge anything else.

7.2. Secondly, victims are often small and medium business collaborating in order to be competitive, that is improve what they offer and do so at lower prices. The arbitrary nature of competition policy is such that strategies to enhance competitiveness can and sometimes are ruled counter-intuitively to be anti-competitive.

7.3. Thirdly, the Commissioner and his colleague said that all people under investigation should "co-operate". "Co-operate" turned out to be a euphemism for confess guilt, as in a show-trial. They pointed out that all who had tried to defended themselves had ended up with heavier fines (misleadingly called "penalties"). They said that those who "co-operated" were typically fined 6% of turnover and those who did not were fined 10%. Confessing to whatever transgression might be supposed or alleged was, they appeared to be suggesting, to be done regardless of whether there was genuine guilt. What they were in effect saying is that people should never defend themselves, that any attempt at defence was destined to fail, and that people who dared defend themselves would be punished simply because they did so.

7.4. Fourthly, and most seriously, the meeting never served its primary purpose which was to inform justifiably fearful business people what they could do to ensure they never ran fowl of competition law. It was abundantly clear that the law is vague and unpredictable; that violations are (apart from some *per se* violations) essentially whatever the authorities decided retroactively was "anti-competitive".

7.5. Sixthly, it was clear from the subdued nature of the business response to the Commission despite widespread anxiety that there is fear of upsetting the Commission. None of the discontent expressed over tea was aired in the meeting. It is no surprise that businesses which have been victims of competition policy, and paid extreme fines (inevitably recovered in due course at the expense of consumers), said virtually nothing. They had learned the hard way what "co-operation" means. One of them, Pioneer Foods, for instance, did not dare point out that they had not been found guilty of charging too much for bread, as widely reported, but charging too little, that the industry has been forced to raise the price at which bread is sold to the poor. People to whom this fact is mentioned are typically astonished. When a member of the audience asked about this, the Commission representative explained that the Commission was concerned about lower prices driving smaller competitors out of the market.

The LRP points out that this reveals the vague and whimsical nature of the law, that what it amounts to is that *anything* business does can, according to the personal and momentary ideological opinions of Commission or Tribunal members be declared retroactively to be the most heavily penalised crime in the country.

8. **Unnamed Case study.** The present writer has been directly involved in negotiations with the Commission which are unfortunately of a confidential nature in which extraordinary travesties manifested themselves. In one, a government department asked businesses in a sector to find ways of reducing the prices of products and services considered by the department to be essential for the safety and affordability of low-income communities. Industry role-players responded by arranging standard (industry-wide) specifications, shared and central distribution and service centres, bulk imports at lower prices and so forth. By such co-operation they could lower prices by 50%. The Competition Commission got wind of this and said that unless such "price collusion" stopped forthwith, those concerned would be fined. Despite meetings at which the logic of what had been done was explained, and at which the government department concerned said it asked for and welcomed the process, it was stopped.

9. If the manifestly absurd notion that co-operation on such matters as product specifications, efficiency and price reduction is reprehensible "collusion" were applied at crucial times in history, we would not have standard sized spark plugs, bath plugs or clothes. Clearly collusion is often in the interests of consumers. It is true that there is some latitude for exemption under the Act, but this conflicts with the rule of law in that it (a) entails a reverse onus, and (b) presupposes that what business naturally and normally do, which is find ways of being more competitive, is if fact "anti-competitive". That is not the primary concern from a constitutional and good law perspective. The issue of concern is the vague and arbitrary nature of the law. One of the considerations in this matter is that not all enterprises active in the industry were part for the pro-consumer collusion. Needless to say, any non-party will take advantage to the vagueness of the law, or of counter-productive law, to advance narrow vested interests. It is no coincidence that is seldom consumers who complain, but competitors who see the law as an aid to competition rather than concentrating on being competitive in the market.

In conclusion, the law and its implementation appear to have unleashed serious unintended consequences. It is hard to believe that what is happening was what the legislature had in mind. The competition structures have grown from a few officials to a massive, costly and very dangerous bureaucratic empire, which appears to be harming competition more than it is promoting it. That the Walmart/Massmart merger was investigated at all, and was decided as a matter of unfettered administrative discretion rather than clear and objective law, should, for the legislature, be a matter of grave concern. That the Tribunal appears to have been decided in favour of competition is, with respect, to the Tribunal's credit. That it could just as easily have gone the other way – that what might have been decided was entirely unpredictable -- is indicative of how unsatisfactory the law is, and how in need of being legislatively remedied it is.

In the circumstances, the LRP recommends that no attempt be made by the Portfolio Committee or the legislature to interfere with the Walmart/Massmart ruling, which would in any event be *ultra vires,* and that it use this opportunity to consider the reform competition law to enhance its constitutionality. It can use the Walmart/Massmart case as an example of unacceptable legal uncertainty, abrogation of the separation of powers and avoidable damage to investor perceptions and security.

As stated above the LRP requests and opportunity to give oral evidence to the Portfolio Committee.

Footnote: This submission was done under abnormal pressure in adverse circumstances. It has not therefore been subjected to the rigorous editing, proofing and argument supported by evidence that characterises the LRP.