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**BY EMAIL**

The Secretary to Parliament  
C/o Ms MA Williams  
Parliament of the RSA  
P.O. Box 15  
CAPE TOWN 8000

3 July 2008

Your Ref

Our Ref

Dear Ms Williams

**Submission of views on the Competition Amendment Bill**

As part of the consultation on the Competition Amendment Bill, Absa Bank Limited (“**Absa**”) would like to submit its views on the proposed amendments to the Competition Act and takes this opportunity to thank the Legislator for the opportunity of commenting on this significant piece of legislation.

This submission is limited to the following three aspects of the Competition Amendment Bill, in relation to which Absa has significant concerns:

- the introduction of market enquiries;
- the introduction of complex monopoly investigations; and
- the introduction of criminal liability.

While Absa supports any initiative to increase the effectiveness of the application of the Competition Act, it has concerns that the above three aspects (as currently drafted) are not consistent with this objective. In light of the significant impact of these aspects, Absa considers that further exploration and consultation on these aspects is necessary prior to the adoption of the Competition Amendment Bill.

**1 MARKET ENQUIRIES**

- 1.1 Absa broadly supports the need for the Competition Commission to have formal powers to initiate and conduct market enquiries in sectors or markets where uncompetitive outcomes are not underpinned by any discernible anti competitive conduct.
- 1.2 Any introduction of formal powers should, however, ensure that market enquires are undertaken on a fair and transparent basis. In particular, although the market enquiries are not enforcement actions, any entity in a sector/market being reviewed should have basic procedural rights. For example, all such entities should have formal rights of consultation and transparency throughout a market enquiry and specific timeframes for the duration of the enquiry should be stipulated. In addition, the evidential burden and substantive test that need to be satisfied by the Competition Commission should be clarified.
- 1.3 As a case study to assess the merits and risks arising from market enquiries, Absa recommends that there is a thorough review of the Banking Enquiry prior to the adoption of the Competition Amendment Bill. For example, focus must be given to the need for participants in the enquiry to have rights of consultation throughout the whole process (including on any report prior to its submission to the Minister).

## 2 COMPLEX MONOPOLIES

- 2.1 In addition to the introduction of market enquiries (as envisaged in the Competition Amendment Bill), Absa broadly supports the need for the Competition Commission to have formal powers to investigate sectors where competition is not functioning as it could.
- 2.2 Absa does, however, have significant concerns that the complex monopoly powers will not lead to more effective application of the Competition Act. In particular, Absa is concerned that:
- 2.2.1 the substantive test is vague and empowers the Competition Commission unfettered jurisdiction to investigate certain sectors. There is no objective test laid down in the proposed Section 10(A)(2) to determine what would constitute the particular market characteristics and more pertinently whether all or only one market characteristic is sufficient for a finding of the existence of a complex monopoly;
  - 2.2.2 the substantive test has no relevance to any useful indicator of the effectiveness of competition. For example, uniform pricing could be the result of rigorous competition;
  - 2.2.3 the powers present a possible circumvention of the existing powers relating to anti-competitive behaviour and abuse of dominant positions. For example,
    - a) The proposed provisions seek to treat entities in concentrated markets much more strenuously than it would an entity enjoying a dominant position, the mere existence of which is not contrary to the Competition Act. The introduction of the complex monopoly investigations would be tantamount to prohibiting the mere existence of oligopolies. Further, the provisions in the Competition Act dealing with dominance are subject to the safeguard that the actions of any dominant entity must be weighed up against any pro-competitive gains which may arise. Such safeguards are absent from the proposed provisions thus increasing the burden of proof for entities in such markets; and
    - b) The focus on coordinated behaviour may afford the Competition Commission the ability to lower the evidential burden for cartel-like investigations.
- 2.3 In light of the imprecise and vague nature of the proposed complex monopoly powers, Absa considers that significant further consultation is needed on the type of powers that should be vested in the Competition Commission in relation to the investigation of markets/sectors. In this regard, it may be useful to consider the UK experience where the complex monopoly test was rejected in favour of a competition test based on “... *any feature, or combination of features, of a market ... distorts competition in connection in connection with the supply or acquisition of any goods or services ...*”.

## 3 PERSONAL LIABILITY

- 3.1 Absa does not oppose the principle that certain anti-competitive behaviour should attract individual criminal liability for those individuals directly involved in such behaviour. However, Absa considers that any introduction of criminal liability must be consistent with constitutional safeguards.
- 3.2 In particular, Absa has significant concerns relating to the following aspects of the proposed introduction of criminal liability:
- 3.2.1 Individuals may face sanctions in relation to any actions falling within their responsibility (despite not being personally involved). Cartel offences in other jurisdictions are tightly defined to only create liability for actions committed by the individual. For example, in the UK, an individual is guilty of an offence if he or she dishonestly (according to both subjective and objective tests) agrees with one or more other persons that entities will engage in prohibited cartel activities (e.g. price-fixing, limitation of supply or production, market-sharing and bid-rigging);
  - 3.2.2 Although Section 4(1)(b) of the Competition Act covers price-fixing cartels, it also includes other types of conduct between competitors that may be viewed as pro-competitive. This degree of uncertainty is unconstitutional for an offence. It is proposed that any introduction of criminal liability should be limited to certain anti-competitive behaviour (for example, those falling within the narrow scope of a hard-core cartel as defined in the 1998 OECD Council Recommendation Concerning Effective Action against Hard Core Cartels);

3.2.3 It is not clear whether the criminal standard of proof (i.e. beyond reasonable doubt) will be used in relation to all aspects of the offence. In terms of the proposed section, a person may be prosecuted based on a finding (on the balance of probabilities) that his/her employer has engaged in a prohibited practice; and

3.2.4 Where a person is prosecuted based on an acknowledgement by his/her employer that has engaged in a prohibited practice, the individuals' right to be presumed innocent and against self-incrimination are undermined.

3.3 Absa considers that significant further consultation is required in relation to the proposed introduction of criminal liability.

Absa would be willing to meet with you to provide further clarification on its views relating to the Competition Amendment Bill.

Yours sincerely



**Mark Griffiths**



Group Competition Counsel