PASA

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Committee Secretary

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Dear Madam,

IMPACT OF THE COMPETITION AMENDMENT BILL

1 INTRODUCTION

1.1 The Payments Association of South Africa (PASA) is the national payment system (NPS) management body recognised by the South African Reserve Bank (SARB) in terms of the National Payment System Act, 78 of 1998, (the NPS Act). PASA has the responsibility to organise, manage and regulate its members in the NPS. PASA has considered the Competition Amendment Bill ("**CAB**") and has identified some concerns which may have an impact on participation in the NPS, including PASA and entities participating in the NPS.

1.2 The concerns are discussed as set out in the paragraphs below.

2 THE IMPACT OF THE COMPETITION AMENDMENT BILL

Concurrent Jurisdiction

2.1 Although the purpose and spirit of the CAB is supported, it is submitted that the issue of concurrent jurisdiction may have unintended negative consequences.

2.2 The proposed amendments to section 3 of the Act seek to elaborate further on the issue of concurrent jurisdiction and to assert the powers of the Competition authorities. While PASA supports the efforts to further clarify issues around concurrent jurisdiction, the proposals are primarily aimed at giving greater certainty to regulators. The approach relies heavily on the existence of Memoranda of Understanding (MOU) being concluded between regulators and gives the Competition authorities powers where no such agreements exist, or where conflicts arise. The industry is however, not privy to the MOUs that are concluded and therefore considerable uncertainty exists about the extent and nature of the jurisdiction of respective regulators. It is strongly recommended that MOUs should be in the public domain and that the legislation require their publication by the Competition authorities.

2.3 The proposed amendments suggest that the Competition Act will, where there is conflict, take precedence. This may result in an untenable position and even legal uncertainty with regards to issues which are specific to the NPS. The NPS is governed by the NPS Act in terms of which oversight (including regulation) is the responsibility of the SARB who is better equipped to take cognizance of specific NPS issues.

2.4 The SARB needs a degree of autonomy and the ability to apply a consistent approach in being a specific legislature. The NPS Act is part of the regulatory toolkit of the SARB, enabling the Central Bank to fulfill its primary obligation to ensure the safety and efficiency of the NPS and the financial system. In developed countries a necessary autonomy of power exists for specifically tasked state bodies which protect consumer interests, notably the judiciary and the central bank, who cannot be compromised by vacillating political drivers. A decision by the Competition authorities to override a decision by the SARB or the NPS Act, may result in a systemic risk having a major impact on the country's financial system.

2.5 The NPS Act requires banks and any person providing and participating in a payment system to co-operate. The principle of cooperation and interoperability is well embedded and accepted by the SARB. See in this regard **"The National Payment System Framework and Strategy Vision 2010"** published by the SARB. The interoperability model approved by the SARB could thus in theory be declared a complex monopoly or anti-competitive.

2.6 The proposed amendments provide that "*The Competition Commission is responsible to: negotiate agreements with any* ***regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector,*** *and to ensure the consistent application of the principles of this Act.*"

It is not clear from this whether such negotiation would take place with PASA as self-regulatory body, and whether it would be in conflict with the NPS Act with regards to the mandate of PASA to perform such function if PASA is indeed regarded as a regulator. PASA does not have a mandate in terms of the NPS Act to regulate competition matters.

Complex Monopoly

2.7 A new category of prohibited business conduct is introduced by the term "complex monopolies". A complex monopoly exists where two or more firms accounting for at least 45% of market for any goods or services conduct their business activities in a coordinated manner. It is irrelevant whether the firms have any specific contract or arrangement or agreement. It is our understanding that any market, where there are 2 or more suppliers or consumers of services or goods, will be a complex monopoly, the proviso being that such is done in a coordinated manner. It could turn out that the way banks and other entities interact in the NPS, could be in a coordinated manner, resulting in a complex monopoly.

2.8 The prohibition is targeted at participants in markets that are characterized by conduct involving (behaviour that is prejudicial to competition) uniform trading terms or parallel pricing, common policies, exploitative pricing, exclusionary conduct, restricting supply and innovation and other similar related conduct. The current PASA rules and agreements may fall foul of the "uniform trading terms, common policies and exclusionary conduct" in that it may be prejudicial to competition.

2.9 The term "complex monopoly" is indeterminate and does not define any **specific** wrongdoing, as a complex monopoly applies to any 2 or more participants engaged in a capitalist free-market. In fact, except for pure monopoly all other market participants are regarded as part of a complex monopoly. The term seems more in line with defining a range of jurisdiction and the powers of the commission rather than identifying wrongful practice directly.

2.10 The *right* to innovation under this banner seems (in the context of the NPS at least) to outweigh and deny the right of existing participants to, by cooperation and collective agreement, be able to reject accepting risky payment types. What may be regarded as innovation by one party can be regarded as risk by others. The mechanism of collective assessment then ensures that participants can reject such risk.

Market Inquiries

2.11 The proposed "market inquiry" provisions will allow the Commission to undertake a formal study of the general state of the competition in the market where there are anti-competitive outcomes without any easily discernible anti-competitive behaviour. According to the DTI, this is not a new provision but builds on section 21 (1)(k) and (2)(b) of the Act. This is basically what has taken place with the current Banking Enquiry.

2.12 Although "Market Inquiry" is defined and provision is made for the initiation of such an inquiry, the reasons for initiating the must be substantiated and clearly outlined in the legislation and the scope of the inquiry needs to be clearly set out and limited to the initial investigation. It is very easy for these inquiries to become wide and unfocused and for damaging public statements to be made.

Your consideration of the above comments would be appreciated.

Yours sincerely,

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Managing Director