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# VODACOM'S ORAL PRESENTATION ON THE COMPETITION AMENDMENT BILL

**B31-2008**

30 July 2008

# ROADMAP

- **Vodacom's oral commentary on the Competition Amendment Bill covers:**
  - **Notion of historically disadvantaged persons (HDP) as defined in s1;**
  - **Application of the Act as proposed in s3**
  - **Complex monopolies as set out s4; and**
  - **Criminalisation of conduct of directors and managers of firms that engage in a prohibited practice under s11.**
  
- **Concluding Remarks**

**DEFINITION OF *HISTORICALLY*  
*DISADVANTAGED* PERSONS**

## Definition of historically disadvantaged persons problematic...

- ❑ The use of the term HDP in s1(f) of the Bill is in conflict with the definition of black person in BBBEE Act.
- ❑ Vodacom suggests that:
  - Terminology HDP in Bill and black person in BBBEE Act must be aligned.
  - Alternatively, HDP in Bill should be deleted and replaced with the term “black” persons.

# **APPLICATION OF THE ACT**

## S 3 of the Bill supported, but there could be interpretation difficulties... (1)

- ❑ Vodacom support policy rationale behind amendment of s3 of Competition Act.
- ❑ New s3, however, is problematic and could have unforeseen problems:
  - Could be construed to be suggesting that Competition Act trumps all other legislations;
  - Unworkable in context of sector specific legislations, such as ECA, which requires competitors to negotiate tariffs for interconnection – conduct which can easily be construed as anti-competitive under the Bill.
- ❑ Parliament must:
  - ensure that there is harmony between s3 of the Bill and other sector specific legislations – primary and subordinate - as the ECA; and
  - strengthen concurrent jurisdiction provisions of Bill so that benefits accruing to economy as a consequence of efforts of other regulators – whose mandate may be different from that of Competition Commission - are not undermined.

## S 3 of the Bill supported, but there could interpretation difficulties... (2)

- ❑ Vodacom submits that amendment to s3 of Competition Act must be coupled with review of MoU between the Competition Commission and ICASA.
- ❑ New MoU must clarify:-
  - Co-ordination of activities and jurisdiction i.r.o. provisions of ECA dealing with *ex ante* and *ex post* competition matters;
  - Monitoring, investigation and associated penalties *versus* market reviews and imposition of remedies to correct market failures.
- ❑ Vodacom proposes, in context of ICASA-Competition Commission MoU, that:
  - jurisdiction of Competition Commission should cover *ex-post facto* concerns; and not extend to *ex ante* interventions in communications sector; and
  - ECA has comprehensive rules and remedies for managing *ex-ante* anti-competitive behaviour .

# **COMPLEX MONOPOLIES**

# Chapter 2A on Complex monopolies unpacked (1)

- ❑ S4 of Bill provides for the insertion of a new section 10A into Competition Act.
- ❑ A complex monopoly subsists within the market for any particular goods or services if-
  - at least 45% of the goods or services in that market are supplied by two or more firms; and
  - the firms conduct:
    - their respective business affairs in a coordinated manner, irrespective of whether those firms do so voluntarily or not, and
    - either with or without agreement between or among themselves, or as a concerted practice.

# Chapter 2A on Complex monopolies unpacked (2)

- Section 10(2) provides that participation of a firm within a complex monopoly is prohibited if the -
  - complex monopoly has the effect of substantially preventing or lessening competition in that market; and
  - market within which the complex monopoly subsists is characterised by-
    - a restriction on supply;
    - a lack of innovations;
    - exploitive pricing;
    - exclusionary acts;
    - high entry barriers; and
    - uniform pricing, similar trading conditions or other indicators of parallel conscious conduct; or
    - other similar characteristics.

## Our position on complex monopolies as set in s3 of the Bill... (1)

- ❑ Vodacom questions the rationale behind the introduction of the concept of complex monopolies in the Bill.
- ❑ Vodacom proposes that concept of complex monopolies in Bill should be expunged for the following reasons:
  - Market share threshold for a complex monopoly is overly-broad to cover any type of market, whether concentrated or not.
  - Provision of complex monopolies in Bill deals with structure and not conduct of a firm. Firm can therefore be found to be participating in a complex monopoly because it is in market characterised by one or other factor listed in s10A(2).
  - Concept of complex monopoly as proposed flies in face of legal doctrine – rule of law dictates that any person must have a warning of any law which may affect his or her rights in clear and precise language.

## Our position on complex monopolies as set in s3 of the Bill... (2)

- The language of section 10A gives rise to legal uncertainty as firms may find it difficult to structure their conduct to avoid the prohibition in section 10A because:
  - No requirement that firms should be aware that they are participants in a complex monopoly or consented to such participation.
  - Firms cannot predict in advance whether the market they operate in is characterised by the factors listed in section 10A(2), particularly where these characteristics may result from conduct of other firms, of which they may be unaware.

## Our position on complex monopolies as set in s3 of the Bill... (3)

- Complex monopoly concept is foreign to/not supported by other Competition Law jurisdictions around the world:
  - introduction of the concept of complex monopolies in SA will be out of line with international best practice;
  - concept of complex monopoly is not found in European, Canadian, Australian or US jurisprudence; and
  - repeal of certain provisions in the UK's Fair Trading Act of 1973 has resulted in the abolition complex monopoly theory in the UK under the Enterprise Act of 2002.

**CRIMINALISATION OF THE CONDUCT OF  
DIRECTORS AND MANAGERS OF FIRMS WHO  
ENGAGE IN CARTEL OR OTHER COLLUSIVE  
CONDUCT (SECTION 73A)**

## Criminalisation of the conduct of directors and managers under s73A

- ❑ Vodacom support the imposition of sanctions on directors and persons engaged by a firm in position of authority.
- ❑ Vodacom takes the view that:
  - The criteria set out in section 73A(2) of the Bill allows for a conviction on a lesser standard of culpability;
  - S73A(2)(b) of the Bill introduces a negligence standard test which extends to conduct that is not sufficiently blameworthy.
- ❑ Vodacom proposes that s73A(2)(b) should be deleted in its entirety.

# Concluding Remarks

- Vodacom proposes that:
  - The jurisdiction of the Competition Commission should only apply in respect of matters of *ex post* and not *ex ante* regulation.
  - The framework of the ECA is comprehensive in dealing with detection and remedies for anti-competitive behaviour on an *ex ante* basis.
  - The concept of complex monopolies should be expunged in its entirety.
  - Section 73A(2)(b) of the Bill introduces a negligence standard test which extends to conduct that is not sufficiently blameworthy and hence should be deleted in its entirety.

**THANK YOU**

**and**

**QUESTIONS**