DRAFT - awaiting Finalised version

PUBLIC COMMENTS ON COMPETITION AMENDMENT BILL, 2008

Detailed list of issues				
Section of the Bill / CompAct	**Party**	**Comment**	**Party's Proposal**	**Dti response**
Section 1(f) - Historically Disadvantaged Person	Vodacom	The term historically disadvantaged person in the Bill seems to refer to "black persons" and does not include white women and/or people with disabilities.	Amend the term historically disadvantaged person by replacing it with the term **black persons** which will be in line with the BBBEE Act.	It was not the policy intention to change or broaden the scope of category of individuals referred to in section 2 of the Act.
Section 3 - Concurrent Jurisdiction	ICASA	Chapter 10 of the Electronic Communications Act ("ECA") correctly creates an ex ante competition framework designed to address structural problems inherent in the liberalization of the sector. The management of concurrent jurisdiction should facilitate the stated policy imperatives which underpin the objective of regulation. Replication of jurisdictional competence should be avoided. ICASA should be vested with exclusive ex ante regulatory powers as contained in section 67(4) of the ECA while CompComm & CompTrib is vested with ex post competition regulation powers. The principle of administrative deference should be contained in the Competition Act to ensure optimal and efficient regulation. ICASA does not support the inclusion of section 3(3) of the Bill in so far as it allows the CompAct to prevail in case of conflict or inconsistency.	**Proposed Wording for section 3:** (4) In so far as there exists legislation or any other public regulation in an industry, or sector of an industry which, in the view of the CompComm and the other regulatory authority, is adequate to regulate any conduct which occurs in such an industry, or sector of an industry, the regulatory jurisdiction of that other regulatory authority shall prevail, notwithstanding the applicability of this Act. (5) The manner in which the Commission and another regulatory are to determine any deference to each other must be established in accordance with an agreement as provided for in sections 21(1)(h) and 82(1). **Consequential**	The dti supports the notion of clear distinction of responsibilities proposed by ICASA. This however should not be done through ceding of responsibilities as it would create tension. It must be clarified in legislation. Memoranda of Agreement (MOAs) between competition authority and sector regulatory authority should provide framework for cooperation, exchange of information, dispute resolution mechanism and procedural issues on management of concurrent jurisdiction. Section 3(3) of the Bill which allows the Competition Act to prevail in instances of conflict will be deleted as it does not provide for certainty and clarity required.

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			amendment and repeal: Section 67(1),(2) and (3) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) is hereby repealed.	
	Telkom	The Bill does not sufficiently provide clarity regarding concurrent jurisdiction. The Bill does not specifically clarify who in the electronic communications industry will deal with ex ante and ex post regulation between CompComm and ICASA. This becomes more apparent when taking into account that the Electronic Communications Act, 36 of 2005 ("ECA") seems to confer both these powers exclusively to ICASA in the electronic communications industry. With the proposed consequential amendment of section 67(9) of ECA, the normal accompanying problem to concurrent jurisdiction, namely forum shopping is more likely to be compounded. Section 67(9) of ECA arguably have, to a certain degree, been clearing the roles and making a mark of curbing the problem.	The roles and responsibilities of CompComm and ICASA should be clearly and sufficiently dealt with. No proposed text offered.	The Bill seeks to amend section 67(9) of the ECA as it subjects the Competition Act to EAC, and that is inconsistent with section 3 of the Competition Act which creates concurrent jurisdiction between sector regulatory authority and the competition authority in dealing with competition matters in regulated industries. The concurrent jurisdiction clauses in the Bill will be refined to ensure that clear demarcation of roles between sector regulators and competition authorities is provided in order to provide certainty and avoid forum shopping.
	The Banking Association South Africa and Payment	While the Association supports the effort to further clarify issues around concurrent jurisdiction, the approach relies heavily on the existence of Memoranda of Understanding ("MOU's") being concluded between CompComm and sector	It is strongly recommended that MOU's should be in the public domain and that legislation require their publication by the	Section 82 of the Competition Act requires that the MOA be published in the Gazette. The section will be reviewed in order to

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	Association of South Africa	regulators. Industry is however, not privy to the MOU's that are concluded and therefore considerable uncertainty exists about the extent and nature of the jurisdiction of respective sector regulators.	competition authorities.	give the public opportunity to comment on the proposed MOA before it is finalised and implemented.
	Vodacom	Supports the policy objectives and acknowledges consequential amendment of section 67(9) of the ECA. However, Vodacom highlights that this will also require amendment to the MOU between ICASA and CompComm. Requires separation of roles where ICASA will deal with ex ante regulation while CompComm is responsible for post facto regulation.		Agreed.
	Neotel	Supports the principle that the manner by which any concurrent jurisdiction contemplated in section 3(3)(a) is to be exercised, must be determined by an agreement between the Competition Commission and that other regulatory authority, as provided for in sections 21(1)(h) and 82(1).		
Section 3(3) - Default Position: Competition Act prevails to the extent of the conflict or inconsistency	Law Society of South Africa	Law Society agrees in principle with the proposed amendments to the concurrent jurisdiction provisions. However, it cautions that the manner in which the new section 3(c) of the Bill has been drafted may give rise to unintended consequences. In this regard, a possible interpretation can be that the CompAct will prevail over other legislation. This would apply, for example, if other legislation obliges firms to engage in certain conduct which the CompAct may prohibit, resulting in firms being placed in a situation where they are faced with two conflicting obligations. Law Society is of the view that sector specific regulators should be able to implement their own policy objectives but should consult with CompComm where such policy objectives have adverse effect on competition in that sector.	Suggest that CompAct should prevail only in relation to jurisdictional conflicts (and not in relation to policy). The Bill must clarify that the default exclusive jurisdiction of CompComm apply only in respect of matters of substantive jurisdiction and not ex ante policy making actions. Further the MOA should be published for comment prior to it coming into force.	Although the Bill proposes the Competition Act to prevail in instances of conflict or inconsistency, the concern is that this intervention does not go far enough to provide clarity and certainty in terms of exercise of concurrent jurisdiction. Instead the default clause would allow the competition authority to deal with a matter which would ordinarily fall within the mandate of a sector regulator.

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				In order to provide clarify and certainty, the Bill is amended in order to assign distinct roles between sector regulator and competition authorities e.g. the former should deal with primary regulatory market conditions within the sector whereas the latter is vested with *ex post* review of competition considerations.
	Payment Association of South Africa ("PASA")	It is feared that the proposed provision will give the competition authorities the power to override a decisions of South African Reserve Bank or PASA taken in terms of National Payment System Act, which may result in a systemic risk having a major impact on the country's financial system. Furthermore PASA alleges that it is a self regulatory body and therefore unsure whether CompComm will be willing to conclude MOU's with it. PASA concedes that it has no mandate in terms of National Payment System Act to regulate competition matters.		The concern raised in relation to the default position proposed in section 3(3) of the Bill is noted. Section 82 of the Act recognises a regulatory authority established in terms of any national or provincial legislation responsible for regulating an industry or sector of the industry. In terms of this section, the regulatory authority is required to conclude MOA if it is mandated to regulate conduct or competition matters regulated in the Competition Act. Therefore, the Commission

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				may not conclude MOAs (with PASA) contemplated in section 3, 21(h) and 82 of the Act.
	NERSA	Legal status of MOU's questionable. Requires clarification of roles rather than leaving it to the authorities to clarify it in the MOU's. In principle NERSA is against ceding of responsibility through MOU's.	Add 3(3): (c) "any agreement as contemplated in paragraph (b) must be promulgated by the Minister as Regulations and must be published by notice in the Government Gazette. (d) to the extent that any agreement as contemplated in paragraph (b) does not resolve any conflict or inconsistency between this Act; and other national legislation, such agreement must be amended to resolve the conflict or inconsistency.	Comment regarding ceding of responsibility through MOAs is noted, and the dti attempts to avoid this approach as it does not resolve challenges of overlapping jurisdiction, but rather promotes forum shopping and uncertainty. The Bill is amended in order to clarify the status of the MOA as to deal with administrative and procedural issues only. It is merely a framework for cooperation. The dti is satisfied that this approach and will address the challenges concerning the status of MOAs especially if responsibilities are clearly clarified in legislation.
	BUSA	BUSA believes that the key challenge with concurrent jurisdiction is to clarify the roles of the competition authorities and any sectoral regulator in respect of dealing with anticompetitive behaviour.	BUSA will propose acceptable wording at NEDLAC and this will be presented to the Portfolio Committee on 8 August	The relevant provisions of the Bill will be amended to reflect this.
"3(1)(e)" of CompAct	SACTWU	The submission proposed section 3 omits section 3(1)(e). This section is not shown as deleted in the	Be included as section 3(2)(c) "concerted conduct	This section was deleted by mistake and will be

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		Bill, i.e. it is not in bold type in square brackets in the way that other deletions from the existing Act are shown.	designed to achieve a non-commercial socio-economic objective or similar purpose."	reinstated.
"8(d)" of CompAct	Shuttleworth Foundation	The submission does not engage issues raised in the Bill, but raises issues which it regards as critical; the authority of the competition authorities to regulate the anti-competitive use of intellectual property rights. The Shuttleworth Foundation is of the view that CompAct grants the competition authorities the power to regulate use of intellectual property rights in order to curb anti-effects of intellectual property rights. However the wording of the CompAct does not unambiguously empower the competition authorities. As a result some commentators have read the Competition Act as ousting the jurisdiction of the competition authorities to regulate the use of intellectual property rights, or limiting the scope for the regulation of intellectual property rights.	Section 8(d) be amended by insertion of "abusive enforcement of intellectual property rights" into the list of exclusionary acts. Consequential amendment: Deletion of subsections 10(4) and 10(4A) of the CompAct. Amendment of the definition of essential facility in section 1 to explicitly include intellectual property rights.	Issues concerning intellectual property can be dealt with under the existing provisions of the Act including those proposed by Shuttleworth. Further, the Bill is focused on specific areas aimed at strengthening the provisions of the Competition Act, but not to overhaul the current competition regime. The proposed amendments are beyond the scope of the Bill.
"10A" **Complex monopolies**	CompTrib & CompComm	Problems which complex monopolies provisions seek to address may be addressed through market inquiry.	Increase the powers of CompComm to investigate markets in order to explore in depth whether or not there is indeed underlying anti-competitive conduct which the CompComm would then use its prosecutorial powers for remedy. See the proposed draft.	Proposal is noted. There is complex monopoly conduct that can be dealt with through e.g. those competition problems caused by regulatory barriers or structure. In this instance, competition authorities may not deal effectively with these through an inquiry except to merely recommend regulations or changes to legislation.
"10A(1)(a)" Complex	CompTrib &	This element would apply to the overwhelming		The dti will revise the

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monopoly subsists within the market for any particular goods or service if at least 45% of the goods or services in that market are to, or by two or more firms.	CompComm	majority of markets in SA. In fact the only market that would not meet this element of the definition is one in which a single firm has more than 55% of the market b/c, per definition, if the largest firm has less than 55% of the market then all the other firms in the market collectively possess more than 45% of the market.		current drafting of this section in order to ensure the threshold deals with concentrated markets which produce uncompetitive outcomes.
	BUSA BUSA & Webber Wentzel	**General comment**: BUSA is concerned that the proposed amendment focuses on the structure of the market as opposed to the behaviour of firms in establishing anti-competitive conduct. Not all complex monopolies impact negatively on consumer welfare or the public interest. By way of illustration, the petroleum industry is organised in a manner that ensures continuity of supply at various locations, sharing shipping and storage facilities. **Specific comments**: The threshold of 45% constitutes an arbitrary threshold and catches within its net an infinite number of firms. In its current construction, small firms by mere virtue of the fact that they operate within a market characterised as a complex monopoly would be penalised for merely operating within such a market.		The intention of this section is to deal with collective or multi-firm conduct or actions that result in uncompetitive behaviour which behaviour cannot be dealt with under the existing provisions of the Act. It is not the intention of this section to deal with structural aspects but a conduct that results from such structures.
	PASA	It is our understanding that any market, where there are 2 or more suppliers or consumers of services of 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 National Payment System, could be in a coordinated manner, resulting in a complex monopoly. The problem is that the clause does not define any specific wrongdoing.		The drafting will be fine tuned in order to provide certainty on what is illegal in terms of that section.

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	Vodacom	The section is vague and will create uncertainty in that the majority of markets if not all markets, including the telecommunication market, will fall within the ambit of the proposed section because, where there is more than one participant in a market, it is inevitable that two or more firms will supply at least 45% of the products or services in that market. The section provides no ceiling on the number of firms that may be considered. Vodacom submits that the concept of complex monopoly is contrary to the principle of the rule of law which demands that a person must be afforded a fair warning of what the law requires of them. The rule of law therefore requires that legal rules be clear and precise.	Recommend that section 10A be deleted in its entirety.	The section will not be deleted as it is intended to deal with competition problems that falls in between the cracks; that cannot be dealt with under the existing provisions of the Act. The current drafting of the section is revisited in order to deal with concerns that the section seeks to prohibit certain structures of the market, and that it will punish market participants (even small ones) who were not aware the market is characterised by complex monopoly.
"10A(1)(b)" Firms conduct their respective business affairs in a co-ordinated manner, irrespective of whether those firms do so voluntarily or not, or with or without agreement between or among themselves, or as a concerted practice.	CompTrib & CompComm	Constitutional challenges: Provision provides for what may be termed a "no fault offence". For the purpose of participating in a complex monopoly the firms will have done nothing to actually co-ordinate their conduct, in fact they may not even know that their conduct is construed to be co-ordinated. Courts do not consider "no fault offences" in a favourable light as it violate the principle of innocent until proven guilty.		The section will be redrafted to address the concern. See comment above.
	BUSA	The extension of this provision to involuntary conduct would result in firms falling foul of the provision simply on the basis that they operate within a market that falls within the ambit of a complex monopoly and		See comment above.

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	Webber Wentzel	irrespective of whether they are directly involved in anticompetitive conduct. Firms and directors may find it very difficult to structure the firms' conduct to avoid the prohibition in the proposed section 10A. In particular, it will be very difficult for firms and their directors to predict in advance their share (or combined share) of a particular market; whether they will regarded as engaging in "coordinated conduct" particularly where such conduct may be involuntary.		
	Vodacom	Vodacom note that the concept of coordinated conduct is central to the existence of complex monopoly but that is not defined in the Bill and hence its meaning is unclear. Vodacom submits that it will be difficult for firms and their directors to predict in advance whether they will be regarded as engaging in coordinated conduct particularly where such conduct may be involuntary.		There is no need to define "coordinated conduct" as is self explanatory. Please also refer to definition of concerted practice.
	CompTrib& CopmCom	Remedies: Participation in a complex monopoly is prohibited. This suggests that the competition authorities would be compelled to order firms to cease business. In case of lack of innovation, competition authorities would be compelled to order firms to innovate. Consequences: Extremely difficult to prosecute firms given that no conduct is actually impeached.		The interpretation is inappropriate. The dti will revisit the current drafting. See response provided above.
	Law Society of South Africa	**General comment**: Complex monopoly provisions are unworkable and egregious and should be scrapped in its entirety. The Bill may outlaw legitimate parallel conduct of market participants who have no ability to prevent falling foul of the prohibition.	Scrap the complex monopoly provision. Insofar as involuntary co-ordination is concerned (which Law Society accepts is not regulated by the CompAct), the Law Society suggests	See our response provided above.

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		Specific comments: Law Society is of the view that complex monopoly provision would raise serious practical and substantive difficulties if it was implemented in its current form. The most glaring concern lies with the prohibition of participation in a complex monopoly in circumstances where such participation was involuntary or unconscious. Firms with small or even *de minimis* market shares could be regarded as complex monopolists for following the example of dominant monopolist. Furthermore Law Society submits that the complex monopoly provision as it stands, deals with structure and not conduct.	that the **proposed market enquiry provision be amended** so as to provide CompComm powers to deal with the conduct of firms as contemplated under the proposed complex monopoly provision.	
"10A(2)(a)(i)-(vii)" Restriction on supply, exploitative pricing, exclusionary acts.	CompTrib & CompComm Vodacom BUSA Webber Wentzel	The Bill does not define these complex terms		Comment noted, but some terms already exist in the Act and there is no need to define them.
	The Banking Association South Africa	Provisions currently contained in the Bill regarding complex monopolies are so wide that they could encompass almost every sector of the economy. Furthermore, there is very little precedent for such provisions in the laws of other jurisdiction. UK no longer has these provisions in their legislation.	Proposed that market inquiry provisions be used to deal with issues raised in the complex monopolies provisions. Alternatively substitute market inquiry with a wider definition of "dominance"	See comment above in respect of this proposal. Complex monopoly conduct provision should be separate from market inquiry in order to allow the Commission to use its discretion to deal effectively with a particular uncompetitive behaviour without commencing an inquiry first when in fact the uncompetitive outcomes

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				are obvious.
	ABSA	Concerned that the substantive test is vague and empowers CompComm unfettered jurisdiction to investigate certain sectors. There is no objective test laid down in section 10A(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.	The dti should 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 with the supply or acquisition of any goods or services..."	The test is not vague, it is a standard competition test.
	MasterCard represented by Webber Wentzel	Oppose to the introduction of complex monopoly on the basis that the Banking Enquiry Report found no existence of complex monopoly in the banking sector. Concerned that the current draft of complex monopoly provision has the potential to outlaw four party payment schemes, such as MasterCard's. This, in turn, would force operators of such schemes either to radically restructure their businesses (eg to adopt less open business models) to the detriment of South African consumers and merchants, or even withdraw from South Africa altogether. Furthermore complex monopoly provision is too vague, creates uncertainty and not generally accepted at international jurisdictions.		Current drafting will be revised to make it clearer what the complex monopoly conduct is. As stated, the provisions are not intended to deal with structural aspects but conduct. Therefore, the provision would not outlaw the four party scheme that Mastercard belong to. It would only deal with the uncompetitive outcome / behaviour if any produced by the Mastercard within the four party scheme.
	BUSA	Section 10A(2) is unconstitutional: This provision is impermissibly vague, as persons potentially affected by it would not know how to regulate their conduct in order to ensure that they do not participate in a "complex monopoly". This is contrary to the principle of the rule of law, which is entrenched as a founding		The current drafting is revised in order to avoid any ambiguity in the complex monopoly provisions. The "no fault" section will be eliminated.