

20090203 PCBASEL & INDUSTRY

Ex parte:

THE PRESIDENCY

Consultant

In Re:

COMPETITION AMENDMENT BILL ("the Bill")

OPINION

I.A.M. SEMENYA SC

Chambers, Johannesburg

23 January 2009

To: STATE ATTORNEY: PRETORIA

TEL: [REDACTED]
REF: 0201/09/21/LM

INTRODUCTION

1. I have been instructed, on an urgent basis, to furnish an opinion on the constitutional validity of the Competition Amendment Bill, 2008 ("the Bill"). The Bill, having been passed by Parliament has been referred to the President for his assent, in terms of Section 79 of the Constitution, 1996 ("the Constitution"). The President has, in terms of Section 79(1) of the Constitution, the power to refer the Bill back to the National Assembly for the reconsideration if he has reservations about the constitutionality of the Bill.
2. Mastercard International Incorporated ("Mastercard") through its attorneys and Business Leadership South Africa ("BLSA") have made submissions to the President contending that certain provisions of the Bill are unconstitutional. Chemical Allied Industries Association has also obtained a legal memorandum from a Senior Counsel ("the memorandum") commenting on the Bill and concluding that the Bill, in some respects, offends against certain provisions of the Bill of Rights and is to that extent unconstitutional.

3. The constitutional integrity of a piece of legislation can be impugned on many and varied grounds. The broad test for validity of any statute is to measure whether the formal processes for the initiation and passing of that piece of legislation have been met (whether there has been formal compliance with the passing of a particular statute) and once that has been positively answered, the next enquiry becomes whether the statute is consistent with the Constitution which is the Supreme Law. For the purposes of this opinion, I will restrict my opinion to those concerns raised and conclusions challenging the validity of the Bill mentioned in the representations made to the President and those identified in the memorandum. These are:

- 3.1 the implications of the complex monopoly provision;
- 3.2 the criminal liability provisions for directors and individuals holding management authority;
- 3.3 exemption provisions relating to the complex monopoly provisions;
- 3.4 compliance with public participation; and

3.5 Other issues.

4. I now turn to deal with each aspect in turn.

The implications of the complex monopoly provisions

5. Mastercard submits that the introduction of Section 4 into the Bill has the potential to outlaw four party payment schemes. The argument is that it is often in the public interest to allow industries to coordinate activities in specific areas to ensure both the stability of the industry in question as well as the stability of the economy.
6. The complex monopoly provisions¹ prohibit participants in industries to behave in a "parallel conscious manner"² which will preclude any coordinating conduct. The concern raised is that the

¹ Complex monopoly conduct

10A. (1) Complex monopoly conduct subsists within the market for any particular goods or services if-

- (a) at least 75% of the goods or services in that market are supplied to or by, five or fewer firms;
- (b) any two or more of the firms contemplated in paragraph (a) conduct their respective business affairs in a conscious parallel manner or co-ordinated manner, without agreement between or among themselves; and
- (c) the conduct contemplated in paragraph (b) has the effect of substantially preventing or lessening competition in that market,

Unless a firm engaging in the conduct can prove that any technological efficiency or other pro-competitive gain resulting from it outweighs that effect.

² "Conscious parallel conduct" occurs when two or more firms in a concentrated market, being aware of each other's action, conduct their business affairs in a cooperative manner without discussion or agreement. See Section 4(2)

section will strike at conduct that may even be in the public interest.

7. The argument further goes on to suggest that the Bill should be amended to ensure that coordinating activities that are in the public interest can be exempted by the appropriate authorities. It is suggested that the Bill be amended to ensure that the procedures for exemption³ apply equally to prohibited practices in the existing Act as well as to parallel conscious conduct.

8. It is argued that failure to provide for exemption, in respect of complex monopolies, may harm the fuel industry resulting in significant risk of recurring shortages of fuel and jet fuel inland areas. The risk is said to also affect the banking sector. Banks, it is argued, need to coordinate their actions in many instances to broaden access to financial services to more people.

³ Section 10 of the Competition Act, 1998 empowers the Competition Commission to grant an exemption from the application of Chapter 2 of the Act upon application if a firm is able to show that the practice is required to attain the maintenance of promotion of exports; promotion of the ability of small businesses, of firms controlled or owned by historically disadvantaged persons, to become competitive; change in productive capacity necessary to stop decline in an industry; or the economic stability of any industry designed by the Minister after consulting the Minister responsible for that industry.

9. The memorandum observes that complex monopoly provisions are directed towards preventing conduct which has the effect of substantially preventing or lessening competition in a particular market unless it can be proved that there are technological, efficiency or other pro-competitive gains resulting from such conduct which outweighs the effect of substantially preventing or lessening competition.

10. The memorandum further observes that the exemption in Section 10 of the Act relating to restrictive vertical and restrictive horizontal practices has as its object the same end result that complex monopoly provisions are intended to address and the exemption of one and not the other would be unjustified. The conclusion is that the differentiation would offend against the right to equal protection and the benefit of the law enshrined in Section 9(1) of the Constitution and such differentiation would not be a justifiable limitation in terms of Section 36 of the Constitution.

11. It is useful to indicate that whereas Section 10 of the Competition Act, 1998 ("the Act") deals with exemptions from the provisions of Chapter 2, the Bill as framed, also has in my opinion, an internal exemption. Complex monopoly conduct is defined in the Bill unless a firm engaging in that conduct can prove that any **technological,**

efficiency or other pro-competitive gain resulting from it outweighs that effect.

12. A close examination of the exemption provision in Section 10 of the Act will reveal that the test for the exemption, though framed differently, is in substance the same as the proviso in the provisions relating to complex monopoly conduct in the Bill. To this end, the distinction is without a difference.
13. I am also in respectful disagreement with the opinion of the Senior Counsel in the memorandum that any distinction which I contend does not exist would be a differentiation offending the provisions of Section 9(1) of the Constitution (equal protection and benefit of the law provision). The constitutional provision does not require that same matters be, in law, treated in like-manner. What it does require is that all people must be affected in like-manner by the same legal provisions.
14. Accordingly, it is my opinion, with great deference to the opinions expressed in the memorandum and the submission to the President, the concerns raised relating to the appropriateness or otherwise of addressing competition issues by introducing prohibitions against complex monopoly conduct and defining the

conduct in the manner described in the Bill would not be a basis for attacking the legal integrity of the Bill. These matters are polycentric issues and besides being tested on the principles of legality are not justiciable. Various jurisdictions may elect different methods to balance competition in their own markets and what constitutes an appropriate tool to achieve a particular result is largely a matter left to the executive and the legislature.

15. It is also my considered opinion that the qualification to what is complex monopoly conduct in Section 10A of the Bill is in substance no different to the exemption provisions in Section 10 of the Act. This is particularly so when the public interest motivations given in the memorandum relating to fuel and the banking sector could be demonstrated that the gains resulting from such conduct (technological, efficiency or other pro-competitive gain) outweighs the effects of the complex monopoly conduct.