

PRESIDENT

REPUBLIC OF SOUTH AFRICA

27 January 2009

Dear Madam Speaker

**REFERRAL OF THE COMPETITION AMENDMENT BILL, 2008 (THE BILL) TO  
THE NATIONAL ASSEMBLY**

I have received the above Bill from the Secretary of Parliament for me to assent to and sign into law.

I have received submissions from interested and affected parties, who requested that I should not assent to nor sign the Bill, because of the perceived unconstitutionality of certain provisions of the Bill. The submissions are attached herewith for your information and consideration. The concerns raised in the submissions can be summarised as follows:

- Introduction of complex monopoly provisions: it is submitted that clause 4 of the Bill, which introduces "complex monopoly" is vague and in conflict with the rule of law principle enshrined in section 1(c) of the Constitution of the Republic of South Africa, 1996 (the Constitution). It is argued that the introduction of "complex monopoly" concept may outlaw four party payment schemes, such as MasterCard's. It is further argued that, the introduction of this concept would compel the operators of such schemes either to restore their businesses radically to the detriment of South

African consumers and merchants, or even to withdraw from South Africa altogether.

- Compliance with public participation: It is submitted that none of the interested parties and stakeholders was afforded an opportunity to comment on the second revised Bill, before it was passed by the National Council of Provinces (NCOP) and National Assembly (NA).
- Criminal liability for directors and individuals holding management authority: it is submitted that clause 12 of the Bill, violates the right to a fair trial guaranteed by section 35(3) of the Constitution, in that it "reverse onus".

I have also been favoured with a legal opinion which deals with the issues raised in the submissions. The legal opinion is also attached for your attention. The legal opinion concluded that, the only aspect of the Bill that may not survive constitutional scrutiny is the "reverse onus" provision in clause 12(5) of the Bill.

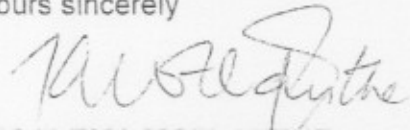
However, it has also concluded that, the Bill may be constitutionally challenged, if the stakeholders had not been given an opportunity to comment on the second Revised Bill, before it was passed by the NCOP and NA, as alleged by MasterCard International Incorporated.

I have perused the Bill accordingly, however, I am concerned that clause 12 of the Bill may not survive constitutional scrutiny.

The Constitution requires that the President must assent to and sign the Bill referred to him by National Assembly. However, in terms of section 79(1) of the Constitution, if the President has reservations about the constitutionality of the Bill, he may refer it back to the National Assembly for reconsideration.

In terms of section 79(1) of the Constitution, I hereby forward the attached Bill to the National Assembly for reconsideration.

Yours sincerely



**KGALEMA MOTLANTHE**

Ms G Mahlangu-Nkabinde, MP  
Speaker of the National Assembly  
P.O. Box 15  
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cc Minister of Trade and Industry  
Leader of Government Business: Deputy President B Mbete