

Presentation  
on the Competition Amendment Bill, 2008 and  
Consumer Protection Bill, 2008

*MasterCard Merchant Advisory Group*

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# Structure

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## 1: Competition Amendment Bill (“the Bill”):

1.1: Introduction

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## 2: Consumer Protection Bill (“the Consumer Protection Bill”)



## 1.1 Introduction

- In this presentation, I aim to give a brief history of the legislative process but will primarily focus on two controversial provisions in the Bill. These sections are:
  - proposed section 10A, inserted under clause 4 of the Bill, which deals with “Complex monopoly conduct”  
**(“the complex monopolies provisions”);**and
  - proposed section 73A, inserted in terms of clause 12 of the Bill, which deals with the criminal liability of directors.  
**(“the directors’ liability provisions”)**

# Competition Amendment Bill: Introduction

- Brief legislative history
  - The Bill was published on 29 May 2008.
  - The Parliamentary process, in which MasterCard actively participated, was concluded on 22 October 2008, when the National Assembly (“**NA**”) passed the fourth version of the Bill and submitted the Bill to the President for assent.
  - The President exercised his powers under section 79 of the Constitution of the Republic of South Africa 1996 (“**the Constitution**”), and referred the Bill to Parliament for reconsideration on 29 January 2009. He raised his constitutional concerns with :
    - the complex monopoly provisions, in particular, the lack of public participation in the legislative process; and
    - the directors’ liability provisions.
- Both the NA and the National Council of Provinces (“**NCOP**”) unusually refused to amend the Bill and returned the Bill to the President for assent on 18 February 2009.

Christy van der Merwe “Motlanthe tells Parliament to reconsider Competition Bill” *Engineering News*, 29 January 2009.

# 1.2: Complex Monopolies -problematic aspects

- Under the proposed section 10A of the Bill, a complex monopoly exists in a market where:
  - **five or fewer firms supply 75% or more of the goods or services in the market; and**
  - **two or more of these firms conduct their respective business affairs in a “conscious parallel” or co-ordinated manner *without agreement* among themselves; and**
  - **such conduct has the effect of substantially preventing or lessening competition in that market.**
- **A firm can avoid liability under the complex monopoly provisions if it can prove that its conduct results in technological efficiency or other pro-competitive gains which outweighs the anti-competitive effect.**
- **The firm thus bears the onus of proving a technological efficiency or other pro-competitive gain.**

# Complex monopolies



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- The proposed section 10A is designed to catch multi-firm conduct, which has an anti-competitive effect, but falls *outside* the current provisions of the Competition Act, 1998.
- Complex monopoly conduct occurs, for example, when two firms, which collectively provide 75% of the goods in a market, consciously align certain of their business practices. For example, a firm sets prices based on its competitor's price, which results in a lessening of competition in the market.
- Such coordination could simply be a reaction to market forces.
- MasterCard raised concerns with the Bill's complex monopoly provisions, which could outlaw interoperable payment systems and potentially prohibit ordinary commercial behaviour, for example, goods purchased from a common supplier at a common price.

## 1.3: Problematic provisions: definition of “conscious parallel conduct”



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- “**conscious parallel conduct**” referred to in the proposed section 10A(1)(b), 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.”**
- This definition is vague, ambiguous and creates great uncertainty. An ordinary commercial decision may amount to “conscious parallel conduct”. For example, if two firms acquire a commodity from a common supplier and retail the commodity at a similar price.
- Essentially, the requirement of intention on the part of the firm is removed by the proposed section 10A. A firm can commit an offence even when it is unaware that it is co-ordinating its conduct with another firm.
- For example: if two major retailers which collectively provide 75% of washing powder to the market, set similar prices for a washing powder that they bought from a common supplier, they could contravene the proposed s10A.

# Problematic provisions: International perspective

- Developed countries have rejected this concept of complex monopolies:
  - In 2002 the UK abandoned the concept of complex monopolies in their law when the Enterprise Act, 2002 replaced the Fair Trading Act, 1973 (“**the Fair Trading Act**”).
- The UK’s Department of Trade and Industry envisaged that the removal of the complex monopoly concept would:
  - make the UK competition law regime more transparent and created greater certainty for business; and
  - modernise the UK’s competition law regime and align it with that of its major trading partners.

(Productivity and Enterprise: A World Class Competition Regime CM 5233 (2001))
- In the United States, the US Federal Trade Commission found no basis for introducing the concept of complex monopolies into the USA’s legal system, following extensive investigations in the early 1970s.

## 1.4: The directors' liability provisions



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- Under the proposed section 73A of the Bill, if a director of a firm, or a “person having management authority” within the firm, is found to be responsible for causing a firm to contravene s4(1)(b) or has “knowingly acquiesced” in the firm engaging in a prohibited practice, that person will be guilty of an offence and liable for a fine not exceeding R500 000 or a term of imprisonment not exceeding 10 years or both.
- A director or person with “management authority” may only be prosecuted for an offence under this section if the relevant firm has acknowledged, in a consent order, that it engaged in a *prohibited practice* or the Competition Tribunal or the Competition Appeal Court has made a finding that a *firm* contravened s4(1)(b).
- Subsection 5 stipulates that in criminal proceedings instituted against a director, an acknowledgement in such a consent order is *prima facie* proof of the fact that the firm contravened section 4(1)(b).

# Directors' liability provisions: Section 4(1)(b)



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- Section 4(1)(b) of the Competition Act, 1998 (“**Competition Act**”) provides that; agreements between parties in a horizontal relationship are prohibited if it involves any of the following restrictive practices:
  - (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
- For example: If Spar and Friendly Grocer formed a joint purchasing group in order to achieve favourable terms and conditions from a supplier
  - (ii) dividing markets, by allocating customers, suppliers, territories, or specific types of goods or services
- For example: Two suppliers of tennis balls agree that one will only manufacture white tennis balls, while the other will exclusively manufacture yellow tennis balls (product allocation).
  - (iii) collusive tendering
- For example: If two companies: A and B agree that A will tender a price that will effectively allow B to win the supply tender; if in return B does the same for A in the future.

## 1.5: Problematic aspect of directors' liability



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- Section 35(3) of the Constitution protects a defendant's right to be presumed innocent as well as the right to remain silent
- Under the proposed section 73A, a director or “person in management authority” will be required to adduce evidence in his or her defence, without the State having established his/her guilt beyond a reasonable doubt.
- In all criminal prosecutions, the State bears the onus of proving a defendant's guilt beyond a reasonable doubt.
- In the absence of a rebuttal, the *prima facie* proof (ie the consent order) hardens to become conclusive proof.



## 1.6: Current status of the Bill

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- As indicated, Parliament returned the Bill to President Motlanthe on 18 February 2009.
- Webber Wentzel in a letter dated 9 March 2009 to the President once again expressed its concerns regarding the constitutionality of the Bill and has urged the President to refer the Bill to the Constitutional Court in terms of s79(4)(b) of the Constitution.
- Other interested parties, including Business Leadership South Africa, have also written to the President.
- The Presidency has indicated that it is most likely that the Bill will be referred to the Constitutional Court. A formal decision is yet to be made.

# 1.7: Competition Amendment

## Bill: Conclusion



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- The proposed sections 10A and 73A will, however, have unintended consequences, including, the weakening of the Competition Commission's ability to investigate and prosecute cartels.
- The Commission has a plea bargaining system where, in exchange for immunity, a participant in the cartel agrees to co-operate fully with the Commission's investigations including giving evidence in support of the Commission's prosecution.
- In terms of the proposed section 73A the Commission can no longer grant immunity in criminal proceedings.
- The Bill may lead to:
  - uncertainty in various sectors;
  - directors rethinking their position owing to the imposition of personal liability; and
  - the possible elimination of interoperable systems.



## 2: Consumer Protection Bill

- The Consumer Protection Bill was published on 6 May 2008 and was eventually passed by the NA on 11 November 2008. The Consumer Protection Bill will become law once it is signed by the President. Its implementation, however, will be phased, with the majority of provisions coming into force eighteen months after Presidential assent. (ie May 2010)
- The Consumer Protection Bill is currently awaiting Presidential assent.
- The explanatory memorandum, which accompanied the Consumer Protection Bill, indicated that the Bill aims to remedy weaknesses in South Africa's consumer protection legislation, including:
  - discriminatory and unfair market practices;
  - the proliferation of low quality and unsafe products;
  - the lack of awareness of consumer rights;
  - the limited redress available to consumers; and
  - the inadequate protection for consumers.

# Consumer Protection Bill: goals



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- Important aspects of Consumer Protection Bill are, briefly, that:
  - Consumers will, in certain circumstances, be able to terminate fixed term contracts on 20 days notice during the contract's term;
  - promotional competitions will be regulated by the Consumer Protection Bill and not the Lotteries Act;
  - A person may not, *inter alia*, supply or market goods/services on contractual terms that are “unfair, unreasonable or unjust”;
  - Exemption from liability / disclaimer clauses / notices must now be written in plain language and the fact, nature and effect of such provision must be drawn to the attention of the “ordinarily alert” consumer before the transaction is concluded;
  - Any notice, document or visual representation required by the Consumer Protection Bill is required to be in plain language.

# Consumer Protection Bill: Conclusion

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- The Consumer Bill will have far-reaching effects on the South African economy, on the law of controls and on commerce generally.
- Compliance costs may be considerable.