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Competition Amendment Bill

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Legal Brief

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Introduction

The Competition Amendment Bill ("the Bill") introduces significant reforms to the Competition Act including criminalisation provisions and provisions relating to regulation of so called "complex monopolies". The Bill has been passed by Parliament and is currently with the President for signature. Constitutional concerns are however delaying signature of the Bill by the President.

Constitutional concerns on new criminalisation provisions delay Competition Amendment Bill

One of the most important (and contentious) reforms contained in the Bill is its criminalisation provisions which provide that a director or person with "managerial authority" will commit a criminal offence (subject to a fine of up to R500,000 and/or imprisonment of up to ten years) if he either caused the firm to engage (or "knowingly acquiesced" in the firm engaging) in a prohibited practice referred to in section 4(1)(b) of the Competition Act. The term "knowingly acquiesced" is defined in the Bill as "having acquiesced while having actual knowledge of the relevant conduct by the firm". The need for actual

knowledge is an important qualification (and potential defence) for criminal liability to be incurred by a director or manager.

Section 4(1)(b) prohibits so called cartel conduct, namely an agreement between or concerted practice by competitors (or a decision by an association of competitors) which involves:

- ▶ directly or indirectly fixing a purchase or selling price or any other trading condition;
- ▶ dividing markets by allocating customers, suppliers, territories or specific types of goods or services;
- ▶ collusive tendering.

The Bill provides that a person can only be prosecuted if the firm has acknowledged, by way of a consent order (or settlement agreement) with the Commission, that it engaged in cartel conduct or if the Competition Tribunal or the Competition Appeal Court finds that the relevant firm engaged in such conduct. The Bill also prohibits a firm from either directly or indirectly paying a fine imposed on a director or manager or from indemnifying, reimbursing, compensating, or otherwise paying the expenses incurred by a director or manager in defending himself unless the prosecution is abandoned or he is acquitted.

These offences will be prosecuted not by the competition authorities but by the National Prosecuting Authority in

the criminal courts in accordance with and subject to the procedures and laws applicable to criminal trials. One of the key protections of an accused in a criminal trial is the requirement that the State must prove guilt beyond reasonable doubt. Section 12(5) of the Bill controversially provides that an acknowledgement by a firm in a consent order (or a finding by the Competition Tribunal or the Competition Appeal Court) that a firm has engaged in cartel conduct is *prima facie* proof thereof in such criminal proceedings. Findings by the Competition Tribunal are however based on a lesser burden of proof, namely a balance of probabilities. In addition, an admission by a firm in a consent order (or settlement agreement with the Commission) will generally be based on a view that the firm would be found by the Tribunal (on a balance of probabilities) to have contravened the Competition Act. The effect of section 12(5) is accordingly to prejudice the accused by partially reversing the normal onus of proof on the State to prove all elements of the criminal offence allegedly committed by the accused (including that the firm engaged in cartel conduct and that the accused caused or knowingly acquiesced in the firm engaging in such conduct) beyond reasonable doubt.

Section 12(5) has raised concerns that it contravenes the constitutional right to a fair trial. In February 2009, then-President Motlanthe refused to sign the Bill and referred it back to Parliament for revision due to such concerns. Parliament however refused to make any changes and sent the Bill back to the President for signature. President Zuma's options are now either to sign the Bill (with the resulting strong possibility - if not probability - that section 12(5) will be challenged before the Constitutional Court) or to refer section 12(5) to the Constitutional Court for its opinion.

The Bill is accordingly not yet in force and is being delayed by the dispute over the interpretation of a procedural provision. Meanwhile directors and managers of firms engaging in cartel conduct are being given a reprieve (and opportunity to cease such conduct) as the Bill does not operate retrospectively.

Although the criminalisation provisions of the Bill are in line with current international trends in competition law, it is likely that they will have a "chilling effect" on the Commission's leniency policy (which has been very successful in unearthing cartels). Directors of a company may be more reticent to allow the company to apply for leniency if they personally face criminal prosecution. Furthermore the leniency process and investigations by the Commission into cartels are likely to be complicated and delayed by individual directors and managers appointing their own attorneys and relying on rights available to them under criminal law (for example the right to avoid self-incrimination). The personal interests of individual directors and managers in avoiding prosecution may accordingly conflict with the company's interest in settling a consent order with the Commission.

The complex monopoly concept

The Bill introduces a new form of conduct for regulation under the Competition Act. Complex monopoly conduct will exist where:

- ▶ at least 75% of the goods or services in a market are supplied to or by five or fewer firms;
- ▶ any two or more of those firms conduct their business affairs in a "conscious parallel manner or co-ordinated manner **without agreement between or among themselves**";

- ▶ such conduct has the effect of substantially preventing or lessening competition in the market; and
- ▶ a firm does not show efficiency, technological or other pro-competitive gains which outweigh that effect.

The Bill provides that "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 co-operative manner **without discussion or agreement**".

The Bill significantly expands the scope of the conduct which is subject to regulation under the Competition Act. The concept of complex monopoly conduct does not require an agreement, arrangement or understanding between firms. Even discussion or other communications falling short of an agreement, is not required. Complex monopoly conduct effectively appears to consist of unilateral conduct by individual firms which together amount to cooperation or co-ordination. The current Competition Act only regulates the unilateral conduct of so-called dominant firms (dominance is defined in the Competition Act with relation to the market share and market power of the relevant firm and a 35% market share is rebuttably presumed to be dominant). The new complex monopoly provisions however apply even if the individual firms are not dominant. Five firms each with a market share of 15% (a much lower threshold than the general 35% threshold for dominance) could accordingly find that their unilateral decisions fall within the complex monopoly definition.

The Bill does not however prohibit complex monopoly conduct (and no administrative penalty is imposed on the firms) but provides a procedure whereby the Competition Commission may investigate such conduct. After its investigation, the Commission may approach the Competition Tribunal for a declaratory order against two or more firms (i.e. an order cannot be made against an individual firm) if:

- ▶ at least one of the firms engaged in the complex monopoly conduct has at least a 20% market share; and
- ▶ the conduct of the firms has resulted in high entry barriers to the market, the exclusion of other firms from the market, excessive pricing in the market, the refusal to supply other firms in the market or "other market characteristics that indicate co-ordinated conduct".

The Tribunal may (after a hearing) make an order "reasonably requiring, prohibiting or setting conditions upon any particular conduct by the firm, to the extent justifiable to mitigate or ameliorate the effect of the complex monopoly conduct on the market". The Bill provides that a contravention of the Tribunal's order is a prohibited practice (which may result in the imposition of an administrative penalty on the firm).

The effect of the complex monopoly provisions is to allow the competition authorities to intervene in more concentrated markets in cases where the conduct of individual firms do not amount to contraventions of the more traditional existing provisions of the Competition Act dealing with dominance, cartels and restrictive practices between a firm and its suppliers and customers. The motive appears to be to ensure that firms do not simply follow one another's actions in the market if this will have an anti-competitive effect. However conceptual problems remain. Is it justifiable to penalise a firm for independently making the same commercial decisions as its competitors? How will the concept of "conscious parallel conduct" be applied where competitors respond in the same (commercially rational) way to changing market conditions (for example an increased oil

price, increases in tariff barriers or shortages of raw materials due to drought or other force majeure events)? Furthermore the Tribunal's ability to make an order with regard to complex monopoly conduct is circumscribed by "reasonableness" and "justifiability" criteria which could result in disputes and uncertainty. Another interesting qualification is that the Bill states that the purpose of the Tribunal's order is to "mitigate or ameliorate" (as opposed to absolutely preventing or eliminating) the effect of the complex monopoly conduct. The manner in which the complex monopoly provisions will be interpreted and

applied in practice remains unclear and will no doubt be the subject of heavy debate and litigation when the first test case is decided. However each firm in markets where at least 75% of the goods or services are supplied by five or fewer firms should immediately consider these provisions and assess how they may affect its business.

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Pieter is a director in the firm's Commercial department with strong expertise in competition law. In relation to this field of law, he specialises in merger control, as well as cartel investigations and other prohibited practices. Pieter has consistently been recognised in international ratings as one of South Africa's foremost competition lawyers. Currently, he is named as a leading lawyer in Competition/Antitrust by the International Who's Who Legal, PLC Which Lawyer and Best Lawyers International. Pieter is also chairperson of Lex Africa (a network of leading law firms in 26 African countries) and chairperson of the NEPAD Business Foundation's Legal Sector. He has BSc. (LAB MED) and LLB degrees from Wits University as well as an LLM (Competition, Patent and Trade law) from Unisa.



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Seroshan is a candidate attorney at the firm. He is currently serving his second year of articles with Pieter Steyn. During his time at Werksmans, Seroshan has worked in the Litigation department for a year and is currently gaining experience in the firm's Commercial and Competition law departments.

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