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# **Amendments to the South African Competition Act**

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Heather Irvine

Deneys Reitz

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The South African Department of Trade and Industry (“DTI”) has proposed significant amendments to the South African Competition Act (“Act”). These amendments focus on the powers of the Competition Commission (“Commission”) to investigate and prosecute prohibited practices by firms operating in South Africa. The DTI was motivated by concerns expressed in Parliament about the recent spate of high profile cases involving anticompetitive conduct by companies (such as Tiger Consumer Brands (bread) , Adcock Ingram (pharmaceuticals), and Clover (milk)) supplying basic goods to poor and vulnerable consumers.

In its presentation to the Select Committee of Foreign And Economic Affairs on August 28, 2008, the DTI indicated that the purpose of the amendment bill was to strengthen the existing provisions of the Competition Act to deal with anti-competitive practices (in particular with cartels, collusive tendering, and market division), and enable the Commission to play a more proactive role in investigating markets and ensuring market transparency. The Bill proposes four major amendments to the Act:

- individual directors and managers who are responsible for (or who knowingly acquiesce in) the fixing of prices and trading conditions, market division, or

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\* Heather Irvine is Director of the Competition Law team for Deneys Reitz, one of the largest corporate law firms in South Africa.

- collusive tendering may be fined or serve prison terms. At the same time, new provisions in the Act will allow individuals to seek leniency;
- the Commission will be able to investigate whether firms are participating in a “complex monopoly” and, if so, to apply to the Competition Tribunal for an order to mitigate the effects of this conduct;
  - the Commission will be entitled to conduct formal inquiries into the general state of competition in South African markets; and
  - the exercise of jurisdiction by the Commission and industry regulators such as the Independent Communications Authority of South Africa (“ICASA”) will be regulated.

## **I. CRIMINAL LIABILITY**

The Bill introduces fines of up to R500 000, or prison sentences of up to 10 years—or both—for individuals who are involved in price fixing, market division, or collusive tendering in contravention of section 4(1)(b) of the Act. Until now, only firms could be fined for contravening the prohibited practices provisions of the Act.

This sanction will apply to a director, or any person “engaged or purporting to be engaged in a firm in a position having management authority within the firm, who either “caused” the firm to engage in a prohibited practice, or who “knowingly acquiesced in” contravening this section of the Act, by:

- having actual knowledge of the firm’s conduct; or
- being in a position in which he/she ought reasonably to have had actual

knowledge of this conduct, or to have investigated the matter, or taken other measures which could reasonably have been expected to have provided him/her with actual knowledge of this conduct.

Firms will be prohibited from directly or indirectly paying any fine imposed on a manager or director who is convicted of an offence in terms of the amended section, or from indemnifying, reimbursing, or compensating that person, unless the prosecution is abandoned or he is acquitted.

An individual can only be prosecuted if the firm involved has acknowledged in a consent order that it contravened section 4(1)(b) of the Act, or either the Competition Tribunal or the Competition Appeal Court has made a finding to this effect. Because the competition authorities lack any criminal jurisdiction, however, prosecutions in terms of this section will have to be conducted by the National Prosecuting Authority in the normal criminal courts.

This proposal would bring South African competition law into line with the approach adopted in jurisdictions such as the United Kingdom and the United States. However, South African practitioners have questioned whether introducing liability of this nature at this stage will make cases considerably more protracted and costly and further strain the already overburdened South African criminal justice system. A system of administrative fines imposed by the Competition Tribunal at the same time that fines are imposed on firms would be easier to enforce.

Concerns have also been expressed that introducing criminal liability for

individuals might reduce the number of applications for leniency in terms of the Commission's Corporate Leniency Policy ("CLP"), because directors and managers who fear they will be personally at risk of conviction may be hesitant to approach the Commission. In order to mitigate this risk, the DTI has now made provision for leniency to be granted to individuals, as well as to firms.

The drafting of the proposed provision has also been heavily criticized. First, it places a heavy burden on management to detect and deal with anticompetitive conduct. Not only are directors or managers who actually directed anticompetitive conduct potentially liable, but those who knew—or even ought reasonably to have known about the anticompetitive conduct—are as well. Second, it is not clear how far down the management chain personal liability for anticompetitive conduct might extend, because the Bill does not define what a "position having management authority within a firm" is. Most worryingly, however, this provision provides that an acknowledgement in a consent order or a finding by the competition authorities that a firm engaged in a prohibited practice is "in the absence of evidence to the contrary, conclusive proof of the fact that the firm engaged in that conduct." Presumptions of this kind have been declared to be unconstitutional by the Constitutional Court.

## **II. COMPLEX MONOPOLIES**

The amendment introduces the concept of "complex monopoly conduct," which is defined as conduct which subsists in a market if:

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

If the Commission has reason to believe that complex monopoly conduct exists, then it may investigate without having received a complaint from a party like a customer or competitor. If the Commission concludes that firms are engaged in “complex monopoly conduct,” and establishes that two or more firms in the relevant market have at least 20% of the market, then it may apply to the Tribunal for 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.” Contravening such an order constitutes a prohibited practice.

This amendment has also been widely criticized. In particular, the criteria used to define a complex monopoly are vague. For example, what does it mean to say that firms conduct themselves “in a parallel conscious manner or co-ordinated manner”? Moreover,

the conditions which must exist in order for the Tribunal to order a remedy are extremely broad, because they include not only conditions where the conduct has resulted in “high barriers to entry” or “excessive pricing within that market” but also any “other market characteristics that indicate co-ordinated conduct.” The Act already gives the Commission the ability to address conduct of this nature, because section 4(1)(b) not only prohibits written and oral agreements between firms but also “concerted practices” (broadly defined as “co-operative, or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement”). Since the existing prohibitions contained in section 8 of the Act are very broad, they could arguably be applied to the abuse of collective dominance by firms in concentrated markets. These prohibitions include, for example, any “exclusionary act” which prevents or inhibits firms from entering or expanding within a market. It is thus not clear that this amendment is really necessary.

It seems that this provision is intended to assist the competition authorities to address conduct by firms in concentrated industries where they are unable to prove that the practices prohibited in section 4(1)(b) are occurring. In practice, however, this provision may be almost impossible to enforce. Even if the Commission succeeds in demonstrating that a complex monopoly exists in a particular market, the firms involved will have an opportunity to demonstrate that there are “technological, efficiency or other pro-competitive gains” outweighing any substantial lessening or prevention of competition caused by their conduct.

### **III. MARKET INQUIRIES**

The Bill empowers the Commission to conduct “a formal study of the general state of competition in a market for particular goods or services, without exclusive reference to the conduct or activities of any particular named firm” at any time, if “it has reason to believe that any feature or combination of features of a market for any goods or services prevents, distorts or restricts competition within that market” or to achieve the purposes of the Act. An inquiry may also be initiated in response to a request by the Minister. The Commission can simply publish a notice in the Government Gazette at least 20 business days before the commencement of the market inquiry announcing its commencement and inviting members of the public to provide information.

In carrying out a market inquiry, the Commission does not have the authority to enter and search premises with or without a warrant and may not summon a market participant to give evidence, but it may conduct a formal hearing and hear evidence given under oath. The Commission is required to treat information claimed as confidential by participants as such, in terms of the existing provisions of section 44 and 45 of the Act. Parties presenting evidence or information to the Commission in the course of a market inquiry have the right not to incriminate themselves, but will be liable for having committed an offence if they fail to answer fully or truthfully, or act in a manner calculated to improperly influence the Commission or Tribunal, or which, had it occurred



in a court of law, would be considered to be contempt of court. They may also not knowingly provide false information or interrupt the proceedings.

Upon conclusion of a market inquiry, the Commission must publish a report on the inquiry in the government gazette and must submit it to the Minister. The Commission may make recommendations, including for new or amended policy, legislation, or regulations. The Commission may also make recommendations to other regulatory authorities regarding competition matters. If the Commission finds evidence of a prohibited practice, it may also initiate a complaint which may be referred to the Tribunal for adjudication.

Unfortunately, the Bill does not set a threshold for the initiation of a market inquiry. Business managers have expressed concerns that they will be required to expend significant amounts of time and resources participating in proceedings which may not ultimately generate any positive outcomes for competition. Although market players cannot be required to participate in an inquiry, any findings may ultimately be imposed on all players whether they participated or not. Firms may thus find themselves responding to a complaint to be heard by the Competition Tribunal, even if they did not participate in the inquiry. Therefore, the risks associated with non-participation can be significant. This may be unfair to smaller players who are unable to brief large teams of lawyers and experts to convey their perspectives in the course of an inquiry.

#### **IV. CONCURRENT JURISDICTION**

As it is currently drafted, it is not clear to what extent the Act applies where there is other national legislation in place regulating a particular sector of the economy. For example, a High Court review application was brought by Telkom on the basis that the competition authorities lacked any jurisdiction to investigate and prosecute complaints about pricing in the telecommunications sector, because this sector is exclusively regulated by the Independent Communications Authority of South Africa (“ICASA”). The case was eventually decided on procedural grounds, leaving no clarity on this issue.

The Bill attempts to clarify the application of the Act in order “to provide for consistent application of common standards and policies affecting competition within all markets and sectors of the economy.” The amended section provides that the Act will apply to all economic activity in South Africa “despite anything to the contrary in other legislation” (subject to certain existing exceptions which are already set out in the Act, such as collective bargaining by employees). Thus, even where parliament has passed specific legislation in relation to a particular industry, and has appointed a specific regulator to oversee it, the competition authorities will exercise concurrent jurisdiction over conduct by firms in that sector. However, the amendment provides that while the Commission will exercise the primary authority to detect and investigate alleged prohibited practices in that industry or sector and review mergers, the other regulatory authority will exercise the primary authority to establish conditions within the industry required to give effect to the legislation in terms of which it functions (and the Competition Act). The manner in which this ‘concurrent jurisdiction’ is to be exercised

must be determined by an agreement between the Competition Commission and the regulatory authority concerned.

This section has also been subjected to criticism. In particular, practitioners have noted that national legislation should prevail over competition legislation in respect of “forward looking” regulation of market conduct or market structures, as well as conduct giving rise to a breach of a license granted in terms of such legislation. Otherwise, firms may be found to have acted anti-competitively even when conducting themselves in accordance with particular legislation governing their industry.

However, debates about which regulator exercises jurisdiction over a particular conduct will still arise.. Whether particular conduct constitutes a prohibited practice or falls within the primary authority of a sector specific regulator is a question of statutory interpretation which either the Tribunal or the courts will have to decide on a case-by-case basis.

## **V. CONCLUSION**

South African practitioners were hoping that the Bill would address some of the deficiencies in the current legislation—such as the cumbersome merger review procedures or the narrowness of the grounds on which firms can seek an exemption from the Act. They were also hoping that the DTI would clarify provisions which have proven difficult to apply since the Act was enacted in 1998, like the prohibition on horizontal restrictive practices (which may outlaw legitimate efficiency-enhancing joint ventures). Unfortunately, the amendments do not address these aspects.

Other commentators have questioned whether these amendments to the Act are required at all. As it currently stands, the Act is a highly efficient and sophisticated piece of legislation based on years of best practice developed in a number of international jurisdictions. The Commission has done an excellent job of enforcing it—since the start of 2007, companies have agreed to pay fines of nearly R300 million. As the recent bread and milk investigations demonstrate, the Commission’s corporate leniency policy has yielded spectacular results. The Commission has started to tackle anticompetitive conduct in concentrated industries such as steel and fertilizers. Commitment by South African business to ensure compliance with the Act is at an all time high. Exposing individuals to prison sentences and creating new offences that are not clearly defined may jeopardize these healthy developments and embroil the South African competition authorities in protracted and costly litigation.

However, it seems likely that the Bill will be passed into law in substantially its current form. Although further amendments to the drafting of these provisions may still be effected, the amendments are expected to come into effect before the end of 2008.