

REPUBLIC OF SOUTH AFRICA

**PORTFOLIO COMMITTEE AMENDMENTS
TO
COMPETITION AMENDMENT
BILL**

[B 31—2008]

*(As agreed to by the Portfolio Committee on Trade and Industry
(National Assembly))*

[B 31A—2008]

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AMENDMENTS AGREED TO

COMPETITION AMENDMENT BILL

[B 31—2008]

CLAUSE 1

1. On page 2, after line 13, to insert the following paragraph:

“(c) by the insertion after the definition of “*Constitution*” of the following definition:

‘deserving of leniency’, when used with respect to a firm contemplated in section 50, or a person contemplated in section 73A, means that the firm or person has provided information to the Competition Commission, or otherwise co-operated with the Commission’s investigation of an alleged prohibited practice in terms of section 4(1)(b) to the satisfaction of the Commission;”

CLAUSE 3

1. On page 3, in line 49, to omit “or”.
2. On page 3, in line 51, to omit “1995.” and to substitute “1995; or”.
3. On page 3, after line 51, to insert—

“(c) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.”
4. On page 3, in line 57, to omit “to paragraphs (b) and (c);” and to substitute—

“to paragraph (b), such that—

<p>(i) any other regulatory authority contemplated in this subsection will exercise primary authority to establish conditions within the industry that it regulates as required to give effect to the relevant legislation in terms of which that authority functions, and this Act; and</p> <p>(ii) the Competition Commission will exercise primary authority to detect and investigate alleged <i>prohibited practices</i> within any industry or sector, and to review mergers within any industry or sector, in terms of this Act; and”</p>
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5. On page 4, in line 1, to omit “the” and to substitute “details of the administrative”.
6. On page 4, from line 5, to omit paragraph (c).

CLAUSE 4

Clause rejected.

NEW CLAUSE

1. That the following be a new clause:

Insertion of Chapter 2A in Act 89 of 1998

4. The following Chapter is hereby inserted in the principal Act after section 10:

“Chapter 2A

Complex Monopoly Conduct

“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 parallel conscious 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) If the Competition Commission has reason to believe that complex monopoly conduct subsists within a market—

- (a) the Commission may investigate any conduct within that market without initiating or having received a complaint in terms of Chapter 5; and
- (b) Parts A and B of Chapter 5, and section 49D, each read with the changes required by the context, apply to an investigation in terms of paragraph (a).

(3) After conducting an investigation in terms of subsection (2), the Competition Commission may apply to the Competition Tribunal for a declaratory order contemplated in subsection (4) against two or more firms if—

- (a) at least one of the firms—
 - (i) has at least 20% of the relevant market; and
 - (ii) are engaged in complex monopoly conduct as described in subsection (1); and
- (b) the conduct of the firms has resulted in—
 - (i) high entry barriers to that market;
 - (ii) exclusion of other firms from the market;
 - (iii) excessive pricing within that market;
 - (iv) refusal to supply other firms within that market; or
 - (v) other market characteristics that indicate co-ordinated conduct.

(4) If the Tribunal, after conducting a hearing in the manner required by Part D of Chapter 5, read with the changes required by the context, the Tribunal is satisfied that the requirements of subsection (3) are satisfied, the Tribunal may 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, as contemplated in subsection (3)(b).

(5) Contravention by a firm of an order contemplated in subsection (4) is a *prohibited practice*.”

CLAUSE 6

1. On page 5, in lines 8 and 14, to omit “**enquiries**” and to substitute “**inquiries**”.
2. On page 5, in lines 10, 17, 20, 21, 22, 23, 27, 29, 34, 39, 40, 41, 42, 51 to omit “enquiry” and to substitute “inquiry”.
3. On page 5, in line 10, to omit “study” and to substitute “inquiry in respect”.
4. On page 5, in line 12, to omit “exclusive reference” and to substitute “necessarily referring”.
5. On page 5, in line 18, to omit “and (3)” and to substitute “to (4)”—
 - (i) 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
 - (ii) to achieve the purposes of this Act.
6. On page 5, in line 27, after “enquiry” to insert “and to the publication of the report of a market inquiry in terms of subsection (4)”;
7. On page 5, in line 28, to omit “49A(2)” and to substitute “49”.
8. On page 5, in line 30, to omit “49A(3)” and to substitute “49A”.
9. On page 5, from line 31, to omit “any disclosure of information to the Competition Commission in the course of a market enquiry” and to substitute “the conduct of a market inquiry”.
10. On page 5, in line 33, to omit “paragraphs” and to substitute “section 54”.
11. On page 5, in line 33, to omit “of section 54”.
12. On page 5, in line 35, to omit “paragraphs” and to substitute “sections”.
13. On page 5, after line 40, to insert—

<p>“(4) The terms of reference required in terms of subsection (2) must include, at a minimum, a statement of the scope of the inquiry, and the time within which it is expected to be completed.</p> <p>(5) The Competition Commission may amend the terms of reference, including the scope of the inquiry, or the time within which it is expected to be completed, by further notice in the Gazette.</p> <p>(6) The Competition Commission must complete a market inquiry by publishing a report contemplated in section 43C, within the time set out in the terms of reference contemplated in subsection (2).”</p>
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14. On page 5, in line 42, to omit “After” and to substitute “Upon”.
15. On page 5, in line 43, to omit “may report the results of the market enquiry” and to substitute “must publish a report of the inquiry in the Gazette, and must submit the report”.
16. On page 6, in line 9, to omit “enquiry” and to substitute “inquiry”.

CLAUSE 8

Clause rejected.

NEW CLAUSE

1. That the following be a new clause:

Amendment of section 50 of Act 89 of 1998, as amended by section 15 of Act 39 of 2000

8. Section 50 of the principal Act is hereby amended—

- (a) by the substitution for subsections (1) and (2) of the following subsections respectively:

“(1) At any time after **[initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.]**—

- (a) receiving or initiating a complaint, the Competition Commission may certify, in the prescribed manner and form, and with or without conditions, that any particular respondent, or any particular person contemplated in section 73A, is *deserving of leniency* in the circumstances; and
- (b) initiating a complaint, the Commission may refer the complaint to the Competition Tribunal in respect of any respondent, to the extent that the respondent has not been certified as being *deserving of leniency* in terms of paragraph (a).

(2) Within one year after a complaint was submitted to it, or such longer time as may be agreed or allowed in terms of subsection (4), the [Commissioner] Competition Commission must—

- (a) [subject to subsection (3),] refer the complaint to the Competition Tribunal, subject to subsection (3), in respect of any respondent, to the extent that the respondent has not been certified as being *deserving of leniency*, if the Commission [it determines] has determined that a *prohibited practice*, or the implementation of a merger contrary to Chapter 3, has been established; or
- (b) in any other case, issue a notice of non-referral to the complainant in the prescribed form.”

- (b) by the substitution in subsection (3) for paragraph (b) of the following paragraph:

“(b) must issue a notice of non-referral as contemplated in subsection (2)(b) in respect of any particulars of the complaint **[not referred to the Competition Tribunal]** that have not been either—

- (i) referred to the Competition Tribunal in terms of subsection (2)(a); or
- (ii) certified as *deserving of leniency*.”;

- (c) by the substitution in subsection (4) for paragraph (b) of the following paragraph:

“(b) on application by the Competition Commission made before the end of the period **[contemplated in]** set out in subsection (2), or such longer period as agreed in terms of paragraph (a) or previously granted in terms of this paragraph, the Competition Tribunal may extend that period.”

- (d) by the substitution for subsection (5) of the following subsection:

“(5) If the Competition Commission has not **[referred a complaint to the Competition Tribunal, or issued a notice of non-referral]** taken any action contemplated in subsection (3) within the time contemplated in subsection (2), or the extended period contemplated in subsection (4), the Commission must be regarded as having issued a

notice of non-referral on the expiry of the relevant period.”; and

(e) by the addition of the following subsections:

“(6) A decision by the Competition Commission in terms of this section to certify that a respondent, or any other person, is *deserving of leniency* does not preclude the complainant, if any, from applying for—

(a) a declaration in terms of section 58(1)(a)(v) or (vi); or
(b) an award of civil damages in terms of section 65.

(7) Nothing in this section directly or indirectly establishes any right of a person to—

(a) be certified as being *deserving of leniency*, in whole or in part, or with or without any conditions; or
(b) require or demand that the Competition Commission issue such a certificate, or consider doing so.”

CLAUSE 10

Clause rejected.

NEW CLAUSE

1. That the following be a new clause:

Amendment of section 59 of Act 89 of 1998, as amended by section 15 of Act 39 of 2000

10. Section 59 of the principal Act is hereby amended by the substitution in subsection (1) for paragraphs (a) and (b) of the following paragraphs:

“(a) for a *prohibited practice* in terms of section 4(1)(b), 5(2) [or] , 8(a), (b) [or], (d) or 10 A(5);

(b) for a *prohibited practice* in terms of section 4(1)(a), 5(1), 8(c) or 9(1), if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal, or previously acknowledged by the firm in a consent order, to be a *prohibited practice*.”.

NEW CLAUSE

1. That the following be a new clause:

Amendment of section 73 of Act 89 of 1998

11. Section 73 of the principal Act is hereby amended by the substitution in subsection (2) for paragraphs (c) and (d) of the following paragraphs:

“(c) does anything in connection with an investigation that would have been contempt of court or an obstruction of the course of justice if the proceedings had occurred in a court of law;

(d) knowingly provides false information to the Commission or the Tribunal.”.

CLAUSE 11

1. On page 7, in line 54, to omit “A person may not” and to substitute “Subject to subsection (4) a person may”.
2. On page 7, in line 55, to omit “unless” and to substitute “only if”.

3. On page 8, after line 6, to insert—
- “(4) The Competition Commission—
- (a) may not seek or request the prosecution of a person for an offence in terms of this section if the Competition Commission has certified that the person is *deserving of leniency* in the circumstances; and
- (b) may make submissions to the National Prosecuting Authority in support of leniency for any person prosecuted for an offence in terms of this section, if the Competition Commission has certified that the person is *deserving of leniency* in the circumstances.”
4. On page 8, in line 11, to omit “conclusive evidence” and to substitute “, in the absence of evidence to the contrary, conclusive proof”.
5. On page 8, after line 12, to insert—
- “(6) A firm may not directly or indirectly—
- (a) pay any fine that may be imposed on a person convicted of an offence in terms of this section; or
- (b) indemnify, reimburse, compensate or otherwise defray the expenses of a person incurred in defending against a prosecution in terms of this section, unless the prosecution is abandoned or the person is acquitted.”.

CLAUSE 13

1. On page 8, after line 27, to insert—
- “(c) by the substitution in subsection (3) for paragraphs (a) and (d) of the following paragraphs respectively:
- (a) identify and establish procedures including dispute resolution for the management of areas of concurrent jurisdiction;
- (d) be published in the Gazette for public comment.”.