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		value in section 1(c) of the Constitution. The rule of law demands that a person must be afforded fair warning of what the law requires of them. The rule of law thus requires that legal rules should be clear and precise.		
"17" Appeal of merger decisions of CompTrib	CompTrib & CompComm	Not in favour of CompComm being empowered to appeal merger decisions of the Tribunal Reason: This would make for an unusually lengthy final decision making process in respect of mergers.		The appeal of merger decisions of the CompTrib by the Commission is not part of the CABill.
"21(f)" CompCom is responsible to negotiate and conclude consent orders in terms of section 63.	CompTrib & CompComm	CAC's recent decision suggests that section 49D orders can only be entered into before a complaint is referred to the CompTrib. However CompComm can still settle cases but not under that section. Hence it is best to widen CompComm's powers to settle cases not narrow them to a particular section of the Act. Furthermore CompComm frequently settles contravention of merger provisions through settlement agreements and it needs the power to do so expressly conferred.	Section should read thus: CompComm is responsible to negotiate and conclude settlement orders in terms of section 63.	This section was intended to correct the "incorrect reference" to section 63 instead of section 49D. Widen powers of the commission for settlement of cases has not been part of the policy deliberations on these amendments. The proposal still makes reference to section 63 which is incorrect.
"43A" **Market enquiries**	CompTrib & CompComm	Not in support of the current formulation of market enquiries by the dti: **Reasons**: Does not contain a legal test and does not give the CompComm the right to subpoena documents or to require the production of evidence under oath. Requires market enquiries clause which would enable the Commission to use its powers of investigation, in particular its power to subpoena documents and take sworn statements from industry	Formulate a market enquiry clause with a legal test (a trigger for the market enquiry) and to confer subpoena powers.	It is important to distinguish a market inquiry from a normal investigation of an alleged prohibited practice against particular firms. An inquiry is an exploratory tool intended to unearth uncompetitive and anti-competitive behaviour if any, and to find out why consumer's need are not met.

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		participants, in circumstances where anti-competitive outcomes are detected but where there are, as yet, no grounds for alleging contravention of the CompAct and so no grounds for initiating a formal investigation into an alleged contravention of a particular provision of the CompAct. Possibility of constitutional challenges: Even though no contraventions of law can be specified, a firm and its officers will be compelled to co-operate in an investigation in which no offence has been alleged (fishing expedition).	Constitutional requirements will be met as long as a legal test is put in place that will specify the circumstances in which the CompComm will be entitled to invoke its market enquiry powers.	A legal test for initiating such inquiry may be restrictive such that it defeats the purpose of an inquiry contemplated in section 21(2)(b) of the Act. If we include a test, parties may find an opportunity to challenge or review the basis for such inquiry. This would lead to possible protracted legal proceedings when in fact there is no complaint against a particular firm. The inquiry is intended to understand how the market operates and why competition is inadequate. We however appreciate the need or importance of the Commission to use its subpoena powers to obtain information and documents especially in instances where parties do not want to cooperate. However, if subpoena powers are provided, it will be necessary to provide triggers for such inquiry although in our view such triggers would in any event be part of the terms of

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				reference to be publish before initiation of the inquiry. Any wording of such trigger should incorporate the wording of section 21(2)(b) to ensure that the legal test does not undermine the objectives of market inquiry.
	The Banking Association South Africa	The Bill provides for Minister or CompComm to initiate a market inquiry. It is not clear what the basis for initiating such an inquiry would be. Requires that the Bill set out the process or alternatively must provide for rules and procedures to be published by way of regulation. Requires timeframes for the market inquiry Requires publication of the market inquiry report in which the public will be given an opportunity to make further submission to the Minister, if legislative or other regulatory changes are recommended. The dti is advised to look at UK's Enterprise Act, 2002, as a guide.	There should be a clear basis for a market inquiry which should be set out in the Bill.	Section 21(2)(b) of the Act provides basis for initiating a market inquiry. The Bill provides for procedures and process of a market inquiry. We believe such rules are adequate. The Bill will be amended to allow for publication of a market inquiry report as well as timeframe for completion of such market inquiry. See also comment above.
	PASA	Reasons for initiating market inquiry must be substantiated and clearly outlined in the legislation and the scope of the inquiry needs to be clearly set out and limited to the initial investigation. It is very easy for these inquiries to become wide and unfocused and for damaging public statements to be made.		Please see comments above.

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	ABSA	Supports the need for CompComm to have formal powers to initiate and conduct market inquiry. However it should be ensured that market inquiries are undertaken on a fair and transparent basis. Requires timeframes for the duration of the market inquiry; legal test for initiation of market inquiry; and need for participants to have rights of consultation throughout the whole process (including on any report prior to its submission to the Minister).		Refer to the response provided above.
	Law Society of South Africa	**General Comment**: The proposed market investigation regime is welcomed, but a reasonable and objective jurisdictional threshold should be present before such an investigation. **Specific Comment:** It is of great concern to the Law Society that the right to conduct a market inquiry is not predicated on a determination or suspicion that uncompetitive conditions exist within a market. Put it differently, there is no jurisdictional threshold stated in the proposed section which needs to be crossed before the investigative powers are triggered. Outcome of market inquiry: Law Society requires that in the interest of transparency, the report and any recommendations to the Minister should be made available to parties who have participated in the inquiry and those parties should have an opportunity to comment on the report and recommendations.		See response above.
	BUSA	In BUSA's view the amendments does not go far enough in that the approach to market enquiries as currently drafted places no obligation on the competition authorities to have reasonable grounds to suspect anticompetitive behaviour before commencing an enquiry.	Proposes: Obligation on the CompComm to demonstrate observations of features in the market that restricts competition before commencing such an inquiry. Reasons for	See response above.

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	BUSA & Webber Wentzel	Provisions regarding outcome of enquiry are not clearly set out and no timeframes for the conclusion on an enquiry are provided. Both of which contributes to the open-endedness of the approach. Webber Wentzel further requires the provision to curtail the number of enquiries to which a particular sector may be subjected to.	initiating the enquiry must be substantial and clearly outlined in the legislation. Outline timeframes. Specific steps must be set out for dealing with the outcome of an enquiry.	
	Apffelstaedt	Cartel conduct in the medical profession: Radiologists unilaterally and monopolistically attempt to suppress competition from other specialist in the field of imaging.	It is proposed that the amendment include a formulation to make it possible for the CompComm to investigate and act upon instances in the medical profession and industry where prices are "manipulated" by way of barring specialist on the basis of alleged special expertise.	The Commission may deal with this problem within its existing powers unless it amounts to a complex monopoly conduct which forms part of the amendments in this Bill. Regarding the proposal, it should be noted that market inquiry provision will allow the CompComm to conduct formal inquiry and take enforcement action within its powers or recommend regulations and/or changes to legislation.
	Blacksash	In agreement with section 43C(3) of the market enquiry empowering CompComm to take certain specific actions (e,g. initiation of a complaint against the firm for further investigation or take any other action within its powers) following the conclusion of market enquiry.		
"49B" ComComm may initiate a complaint against an alleged	CompTrib & CompComm	The proposed provision is misplaced in Chapter 5 and furthermore not all merger investigations involve unlawful implementation.	Propose insertion of sections 13B(4)&(5) which will read thus:	Proposed text is noted. The reason for locating the provision there was to

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prohibited practice or an alleged implementation of a merger contrary to Chapter 3.			(4)CompComm may direct an inspector to investigate any contravention of Chapter 3 and may designate one or more persons to assist the inspector. (5) Section 49A of the CompAct applies to an investigation in terms of subsection 4.	ensure that any investigation on unlawful implementation would follow complaint procedures set out in Chapter 5 of the Act.
"50" **Excusal of respondents or CLP**	CompTrib & CompComm	Requires a major redraft. It contains unfamiliar language such as "excuse any respondent" which has no echo in legal practice. Furthermore the provisions suggest tests that indicate a fundamental misunderstanding of the nature and purpose of Corporate Leniency Policy (CLP). It uses reasonable and just tests which has nothing to do with the decision to offer CLP – "CLP is an expedient act designed to ensure success of a prosecution".	Redraft the section. Make use of familiar language such indemnity and immunity. Extend the immunity to immunity from civil liability.	We note the comment, and we amended the immunity provision to ensure they refer and are consistent with the Leniency Policy of the Commission. It is not the policy intention to grant cartelists immunity to civil damages. The Bill states clearly that the immunity is not extended to civil damages. This will in fact violate the rights of an individual to redress particularly those suffered harm.
	Law Society of South Africa	As currently drafted, the section provides for a broader scope for excusal (on just and reasonable grounds) and not only for excusal on the basis of corporate leniency	If the section is intended to mean excusal in the narrow sense of corporate leniency (and not a broader sense of reasonable and just) then it is suggested that the lack of clarity in this regard be	The Bill seeks to give legal backing to the Leniency Policy of the Commission which is granted to those who come forward to provide useful information and disclose their

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			remedied by making specific reference to the fact the section refers to excusal under a corporate leniency policy.	involvement in cartel activity. See also response above.
"50(6)(a-b)" A decision by the CompComm in terms of this section to excuse a respondent from any part of a complaint does not preclude the complainant, if any, from applying for a declaration order or an award of civil damages.	Eskom	This provision may deter a respondent from coming to the assistance of the Competition authorities in the detection and investigation of prohibited conduct. The respondent will fear being liable for huge damages claims should the complainant's claim be successful in a civil action. Hence this provision will defeat the purpose of the leniency or excuse afforded to a respondent in terms of section 50(1).	Recommended that a respondent that is excused by the CompComm in terms of section 50(1) be granted full or partial immunity from all future civil claims from the complainant or any other party.	This is not the intention of the Bill. Please see also response above.
	Imraahn Ismail-Mukaddam	Competition authorities do not take into account the severity of damage when offering CLP and concluding consent orders. Furthermore there is no consultation with complainants prior to offering CLP or concluding consent orders.		Section 49D(3) of the Act requires the Commission to find out whether or not the complainant would want award for damages to be included in a consent order. However, a consent order does not prevent a complainant from applying for award of damages in terms of section 65 of the Act. Regarding leniency, it is important to note that a firm granted leniency by the Commission is not immunised from civil claims by those suffered

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				harm as a result of its illegal activities.
"73A" **Causing or permitting firm to engage in prohibited practice**	CompTrib & CompComm	**General Statement**: Proposed provisions will lead to unintended consequences and may weaken rather than strengthen competition authorities. Too early to determine whether administrative fines imposed by the Act are an effective deterrent. Implication: what informs the review of admin penalty?	Amend the Comp Act to permit administrative penalty based upon the number of years for which the anti-competitive conduct has been practiced. (Suggested draft provided) Remove yellow card clause, particularly in **abuse of dominance.** Increase the penalties that may be imposed for existing criminal provisions of the Act (suggested draft provided) Furthermore, introduce a general offence for obstruction of justice which would include interfering with witnesses or destroying documentary and electronic evidence.(suggested draft provided)	The policy objective is to strengthen current provisions of the Act dealing with cartel enforcement. Cartel conduct such as bid rigging and price fixing are serious contraventions which rob consumers and tax payers. They are harmful to the economy; involve moral wrongfulness and therefore deserve severe punishment such as criminal penalty. It is not too early to strengthening our fight against hardcore cartels in this manner. Both the Commission and the Tribunal were apprised about the need and rationale for holding individuals personally accountable for engaging in cartel conduct. The Chairperson of the Tribunal has for years called for criminal sanctions even during his ruling on cartel cases at the Tribunal. In the Tiger Brands ruling in November 2007, he said he would make sure that

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				this measure forms part of the review by the dti. The sudden change of mind begs a question as to whether policy decisions should be based on individual's disposition or the need to address particular challenges. The basis for objecting to criminal sanction is based on turf rather than principle and the need. Other penalty proposals made here do not deal with the issue we seek to address which is to deter individuals from engaging in cartel activities, but are rather more general. We therefore do not engage on discussions regarding the rationale for criminal sanctions, but rather engage on how to make it work or refine the provision such that they are constitutionally sound. The dti response to these general proposals is set out below: Section 59(3) allows firms

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				who contravened the Act by engaging in particular conduct to escape a fine for first instance contravention. These are termed "yellow card" clauses in sec 59(3) are still important as firms would not know upfront whether or not the conduct is illegal. Hence there are efficiency defences provided. The dti would however consider removing "yellow card" clauses in section 59(3) of the Act particularly those referring to abuse of dominance. Fixing maximum penalty to the duration of the prohibited practice may have unintended consequences e.g. it would cripple business leading to firms exiting the market. Further, it is worrying that those companies after paying a fine they still have audacity to increase their prices to the detriment of the consumer, as opposed to reducing their prices. It is too early to heed the proposal as there has

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				never been a 10% fine imposed on firms who contravened the Act, and for the reasons stated above.
	Law Society of South Africa Law Society & Webber Wentzel	**General comments:** Law Society acknowledges that executives of firms who engage in cartels or other collusive actions should be deterred from doing so; however, the criminalisation of such conduct will hamper the efficient functioning of the competition authorities; are unconstitutional as presently drafted; are premature given the success of the competition authorities in exposing cartels; may hamper the effective detection of cartels; and should be replaced by less problematic personal sanctions with similar deterrent effect. <u>Constitutionality</u>: One of the fundamental principles of law enshrined in the Constitution is the rule of law, which finds expression in section 1(c) of the Constitution. One of the essential requirements of the rule of law is that legal rules must be clear and accessible. This is particularly critical when the provision in question deals with a criminal offence. A provision that establishes a criminal offence must be sufficiently clear to offer a person the opportunity to ascertain with reasonable certainty the conduct proscribed by that provision and to take the appropriate action to avoid it. However, where it is difficult to determine with reasonable precision the conduct proscribed, the requirements of the rule of law may be compromised. Whilst there may be reasonably clear cases proscribed by section 4(1)(b) of the CompAct which a director could reasonably avoid, it must be appreciated that it is often difficult for a director to know with any certainty that a firm is	In order to ensure that executives who are found to have participated in or condoned the collusive are effectively punished, the Law Society believes that the CompTrib should be given the power to disqualify such executive from becoming a director for a specific period of time; order reimbursement to the employer of all or part of any bonus which the executives may receive or have received linked to the enhanced financial performance of the company flowing from the collusive conduct; order attendance of compulsory training sessions on competition compliance presented by the CompComm. In addition, disqualify the firms from participating in state or parastatal tenders.	The dti has revised the section which appears to raise a constitutional challenge in that one element of the offence on cartel is decided on a lower standard of proof by the Tribunal. The section though did not breach presumption of innocence on the par of individual but rather charging that the individual has a case to answer. The prevalence of cartels in fact necessitates stringent measures in dealing and deterring them and to send a strong message to those who wish to engage in that. Those engaged in cartel will face severe punishment as the conduct itself involves a moral standard. Please also refer to the above response. Regarding proposal to only impose administrative fines

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		engaging in a prohibited practice.		on directors or individual employees found guilty of cartels, it is important to appreciate that such proposal would not provide deterrent effect and punishment provided in the Bill because firms may pay such fines on behalf of its directors. They may even take out insurances to cover such and internalise those costs and increase the cost of doing business. Consumers are likely to bear those costs through high prices. A jail term will not be transferred to the firm as is the case with admin fines. Admin fines are based on the principle of restitution / compensation. It would be difficult to quantify benefits generated or accrued by individual from engaging in a cartel activity. However, the dti could consider this in addition to criminal penalty. Constitutionality: Section 1(c) of the Constitution under founding provisions provides thus "The

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				Republic of South Africa is one, sovereign, democratic state founded on the following values … supremacy of the constitution and the rule of law". Law Society's argument is unfounded. Criminalisation is in respect of hardcore cartels proscribed in section 4(1)(b) of the Act. This section differs from section 4(1)(a) in that it specify particular conduct to be dealt with under it. The Competition Appeals Court has, in addition, provided guidance in terms of interpretation of conduct to be dealt with in terms of those two sections. We think that the ordinary courts will be in a position to characterise conduct and look into the factors pointed by the Appeals Court in addition to the specific conduct provided in the relevant section.
" An a a ding BAC .sive ehat	CompTrib & CompComm	**Constitutional concern**: Attempt to use finding reached using civil law standard of proof, i.e. "balance of probabilities" as the basis for the conviction in a later criminal proceeding where standard of proof is a proof beyond reasonable doubt.	Remove responsibility for cartel prosecution and adjudication from the competition authorities and hand it over to the criminal justice system.	No policy decision taken at this stage for criminal prosecution of cartel conduct against firms before the criminal justice system.