

Detailed list of issues

| Section of the Bill / CompAct | Party | Comment | Party's Proposal | Dti response |
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| the firm engaged in that conduct | Law Society of South Africa; Vodacom; BUSA & Webber Wenzel | <p>Problem: Constitution entitles an accused person the right to test, on a criminal standard of proof, any evidence used against him in criminal proceedings and this would include evidence of existence of a cartel.</p> <p>Problem: Violation of the constitutional right to a fair trial enshrined in section 35. This would constitute an attack on the right to be presumed innocent until proven otherwise. The Constitutional Court has emphasized that the right to be presumed innocent requires the prosecution to prove the guilt of the accused beyond reasonable doubt.</p> | <p>Challenges: Defeat the rationale for establishing competition authorities as specialist bodies to investigate and adjudicate anti-competitive conduct. Further success for prosecution of anti-competitive conduct under the criminal justice system cannot be guaranteed.</p> | <p>Concern appears to be on institutional turf.</p> <p>The individual's offence will be proven on a higher standard, and the court will still be required to prove evidence /facts linking the individual to the violation committed by the firm.</p> <p>See also response provided above.</p> |
| | CompTrib & CompCom BUSA | <p>Impact on consent orders: Serve as disincentive for firms to enter into a consent order. Directors will be loathe to conclude consent orders on behalf of their firms, if an admission by a firm that it has participated in a cartel may be used as the basis for securing a later criminal conviction against those very same directors.</p> <p>This may also lead to a significant decrease in the number of cases that are settled without the need for prosecution before CompTrib as a consent order that acknowledges guilt in respect of a prohibited practice could lead to the prosecution of the directors involved. Rather than settle matters which could eventually lead to their prosecution, directors are likely to adopt more aggressive litigation strategies.</p> | | <p>A consent order is not the only tool to resolve matters before the Commission. Firms are often induced by several reasons to want to settle a matter with the Commission through a consent order. This includes the strength of evidence against them, speedy resolution of the matter, reduced fine and avoids clear admission of guilt. Often, it is not the directors responsible for causing the firm to engage into cartels who come</p> |

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|-------------------------------|---------------------|--|------------------|---|
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| | Blacksash | Consent orders should not indemnify or be used as a plea bargain by directors to absolve them from further prosecutions. | | forward to negotiate consent order for the firm. Firms will still conclude consent orders for the same reasons as above. The argument is unfounded but intended to cloud the issue. We believe leniency on individuals will also avoid this outcome if it were to arise at all. |
| | CompTrib & CompComm | Impact on CLP: CompComm has no authority to grant immunity in criminal proceedings – only the NPA enjoys that discretion – this provision creates uncertainty for a would be informant as to the extent of the immunity that he could enjoy in exchange for information and is likely to discourage such informants from coming forward. Problem: Undermine the CompComm's ability to investigate and prosecute cartels. | | It is clear from the current drafting of the leniency clause that the Commission is given authority to grant leniency to firms as it has competent jurisdiction to do so. The clause was not intended to cover individuals. |
| | BUSA | Impact on CLP: Directors involved in cartel conduct are unlikely to volunteer information that would assist the Commission to get rid of the cartel if by doing so risk going to jail. Further, this would raise constitutional issues in respect of self-incrimination. | | |

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| | <p>Webber Wentzel</p> <p>Blacksash</p> | <p>The proposed section does not provide for directors or managers of a firm, who co-operate with the competition authorities, to be excused from prosecution with the result that, even where a firm is granted total immunity, such directors and manager may still be criminally liable. It is submitted that this is likely to severely undermine the efficacy of CLP, as it is unlikely that directors would agree to their firm applying for corporate immunity, or to co-operate with the competition authorities, if they themselves may face criminal prosecution as a result.</p> <p>The controversial policy of leniency should merely be used to extract full disclosure and cooperation of the company with the investigation process.</p> | <p>A provision should accordingly be made in the proposed section for individual immunity.</p> | <p>Given that we introduced a personal liability scheme and criminal sanctions, we revised the clause in order to extend leniency to individuals. But it will be the NPA that grants such leniency on recommendation from the Commission. The NPA will invoke the leniency clause in the Competition Act in order to grant leniency from prosecution on cartel activity only for individuals who come forward to disclose his or her involvement in cartel activity. This will ensure that leniency and criminal sanctions work well together. Leniency will serve as an incentive and reward for those who blow the whistle against other cartelists. Leniency serves as a tool for detection and destabilisation of cartel whereas criminal sanctions serve as a strong deterrent.</p> |
| | | <p>Technical problems: Firms and individuals seeking to apply for leniency are not sure which agency to approach, that is, whether approaches CompComm or NPA.</p> | | <p>This is an implementation issue which can be clarified through formal arrangement between the</p> |

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| | | Can evidence in a warrant obtained by CompComm using civil standard of proof for authorising the warrant be introduced into a criminal proceeding, where the standard for obtaining such a warrant is proof beyond reasonable doubt? | | Commission and NPA, and in the Leniency Policy itself. Commission as an investigative body will gather evidence sufficient for criminal prosecution which will be handed over to NPA. |
| | | Proposed parallel or separate trial of firms by CompTrib and trial of directors by criminal courts. Problem: This will create separate streams of jurisprudence should the criminal court interpret cartel provision in a different way to the competition authorities. | Separation b/n civil trial & criminal trial does not cure the adverse impact of this provision on CLP. | The argument on negative impact of criminal sanctions on Leniency policy is unfounded. The Competition Tribunal failed to produce evidence showing that introduction of criminal sanctions against individuals impact negatively on Leniency policy. In fact, international jurisdictions who introduced criminal sanctions confirm that leniency and criminal sanctions complement each other. These include Ireland, UK, Canada, and Germany. These countries commented on successes they have had. Australia is in the process of criminalising hardcore cartels. An argument that criminal sanctions discourage individuals from |

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| | | | | <p>coming forward to disclose their involvement in cartels is artificial and unfounded. In fact, since jail term threatens one's personal freedom, people will be encouraged to come forward first. This will make leniency work as it would destabilise the cartel.</p> <p>Most of leniency applications before the Commission were brought after the latter taken an action. In other words, those firms were still hiding; they did not alert the Commission to the illegal cartel activity but came forward after such activity was uncovered. To the contrary, we may now see a shift where cartelists come forward to alert the Commission to the cartel activity.</p> <p>The current provision seeks to separate civil trial by CompTrib and criminal trial, but to the extent that the use of "conclusive evidence" pose constitutional problem by breaching presumption of</p> |

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|-------------------------------|--------------------------------------|--|------------------|---|
| | | | | innocence, an alternative text will be considered. |
| | The Banking Association South Africa | Proposed amendments are a significant departure from the current regime, which decriminalised the law completely. Introducing criminal sanctions in such an environment brings complexities, as the burden of proof in a decriminalised environment is lower than in a criminal case, for good reason. | | It is important to note that the Bill does not criminalise the entire conduct prohibited in the Competition Act but introduces criminal enforcement only in respect of "hardcore" cartel prohibited in section 4(1)(b) only to the extent of individuals but not firms. Firms act through natural persons. It is important to hold personally liable these individuals in order to deter cartels. Therefore, the Bill does not change the current standard of proof of the Competition Tribunal but where individuals are face charges before the ordinary courts, the standard is higher. There is nothing extraordinary with this. Personal liability scheme introduced is in addition to penalties levied on firms, and does not seek to change the standard of proof for anti-competitive practices as claimed. |

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|--|--------------------------------|---|--|--|
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| | Imraahn Ismail- Mukaddam | In support of criminalisation of the cartel conduct to serve as a sufficient deterrent to "corporate collusion". Directors and Managers should be held liable in their personal capacity. | Furthermore, this cartel offence should be limited to certain anti-competitive behaviour (for example, those falling within the narrow scope of a hard-core cartel). | The Bill addresses this concern. |
| ers | Imraahn Ismail- Mukaddam | There is no sufficient provision for complainants and affected parties to claim damages. Pursuing of a claim of damages in a High Court is costly and risky. In general, the CompAct is not victim-friendly. | | Although section 65 of the Act allows for those who suffered harm to claim damages against offenders, the system is not victim-friendly. For that reason, it is rarely used until recently when Nationwide Airline filed civil claim against SAA. That claim was settled. Ordinary consumers are not able to approach courts without incurring huge legal costs to do so. This matter may require extensive debate. An alternative measure to assist victims of anti-competitive can be looked at e.g. compensation fund to be established from the fines paid to the Commission which currently goes to the Revenue Fund (National Treasury). |
| | Blackseah | Financial sanctions against companies should be determined and based on the extent and duration of the illegal activity and the penalties imposed under the leniency programme should not be lesser than 50% of the total amount. | | |
| ublic comments: | | | | |
| t and associates | | | | |
| lity South Africa (BUS) | | | | |
| n Commission and Competition Tribunal | | | | |
| mal-Mukaddam | | | | |
| Communications Authority of South Africa | ABSA | In general, not opposed to the principle of personal liability. However ABSA is concerned that individuals may face sanctions for actions/conduct falling within their responsibility (despite not being personally involved). | Cartel offences in other jurisdictions are tightly defined to only create liability for actions committed by the individual. | Agreed. The Bill seeks to hold individuals personally liable for hardcore cartels only, |