

COMPETITIVE EDGE

Concern over criminalisation of competition findings



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It effectively translates into the ability of a criminal court to make use of a finding in a forum where the burden of proof is only on 'a balance of probabilities'

FROM a policy perspective, the Competition Act, 1998 broadly aims to regulate the behaviour of market participants and prevent the formation of anti-competitive market structures (through merger control).

When one takes stock of the competition authorities' successes and achievements over the past 10 years, including the fact that they have uncovered numerous incidents of prohibited practices across a wide variety of industries and that they have successfully prosecuted transgressors, it would be safe to say that the act and the bodies incorporated under its auspices are certainly doing their job.

Despite this, during the second quarter of 2007, the trade and industry department presented a summary of proposed amendments to the Competition Act in the form of the Competition Amendment Bill. When the department first published the bill, it was touted by its proponents as significantly increasing the powers of the competition authorities to, amongst other things, act against price manipulators and to root out cartel activity, thereby augmenting one of the aims of the act.

The bill contemplates various amendments, including personal fines and criminal liability for directors and management of firms which cause those firms or knowingly acquiesce to those firms engaging in cartel conduct. If the bill is eventually passed, a director who has knowledge of cartel conduct and takes no steps to bring it to an end could face fines of up to

R500 000 or imprisonment for up to 10 years. Presumably, no reasonable consumer would oppose getting tough on cartels or would be in favour of allowing those who create and drive them to escape with impunity. However, by virtue of the manner in which certain provisions have been drafted, the bill is of concern to lawyers and in fact even to President Kgalema Motlanthe. At the end of January, Motlanthe refused to sign the Competition Amendment Bill into law, and sent it back to the National Assembly for reconsideration.

The president's refusal to sign the bill is based on constitutional objections surrounding the introduction of two novel concepts into South African competition law; the first being related to the imposition of criminal liability for individuals and the second relating to complex monopoly provisions. We consider the first issue:

The criminalisation proposal permits criminal courts to treat consent orders or the findings of the competition authorities as prima facie proof that the firm engaged in cartel conduct. What it translates into is the ability of a criminal court (where the onus of proof is that of "beyond a reasonable doubt") to make use of a finding in a forum where the burden of proof is on "a balance of probabilities".

This conflates civil and criminal liability, and further infringes the basic constitutional right of being presumed innocent. South African law recognises the existence of civil liability as being a separate and distinct cause of action from criminal liability. This improper

coalescence has constitutional ramifications owing to the different burdens of proof involved. An administrative or civil finding is reached on the basis of a balance of probabilities whereas criminal courts use the higher standard of beyond a reasonable doubt.

In addition, the proposal places a reverse onus on the director accused of causing or acquiescing to the actions of a company which has contravened the Competition Act, to prove that he did not. This may well infringe an individual's fundamental constitutional rights (such as the right to a fair trial, which includes the right to remain silent and the presumption of innocence, which rights, we submit, cannot be outweighed by the objective of the proposed amendment or limited in terms of section 36 of the constitution to advance such objective). The Competition Act is one of the success stories of SA; a limitation of fundamental constitutional rights cannot be justified to advance what is already a highly effective instrument to root out anti-competitive conduct.

Notwithstanding the constitutional concerns, and the fact that the bill was referred by the president back to the National Assembly for reconsideration of its constitutionality, the Portfolio Committee on Trade and Industry decided, on February 4, that the bill "would remain unchanged, irrespective of the reservations expressed about certain clauses".

The criminalisation proposal will have far-reaching effects; if promulgated in its current form, it may

well lead to a chilling effect on corporate leniency applications, in that individuals who are not protected by the commission's corporate leniency policy will be far less forthcoming for fear of criminal prosecution.

In the light of the above the president has been urged by various proponents to invoke the powers conferred by section 84(2)(c) of the constitution, to refuse to assent to and sign the bill and to refer it to the Constitutional Court for a decision on its constitutionality (as envisaged in section 79(4)(b) of the constitution).

Time will tell whether the president invokes his powers as urged, or assents to and signs the bill. In either case, the constitutionality of the criminalisation section will no doubt be tested in due course.

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