

The Constitutionality of the Competition Amendment Bill's Complex Monopoly Provisions

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- Status of Competition Amendment Bill
- Mechanics of s10A
- Violation of separation of powers
- Vagueness and irrationality
- Lack of exemption

- Bill passed by Parliament
- Due to constitutional concerns, President referred it back to Parliament
- Portfolio Committee on Trade and Industry and Select Committee on Economic Affairs and Tourism rejected the concerns
- Sent back to President
- Now, in terms of s 79(4) the President may :
 - sign bill into law
 - refer to Constitutional Court

- Commission investigate if complex monopoly conduct exists
 - 2 or more firms act in conscious parallel manner without agreement
 - Effect of substantially preventing or lessening competition
 - Firm cannot prove pro-competitive gains
- Commission apply to Tribunal for declaratory order against 2 or more firms if:
 - At least one firm has 20% of market
 - Firms engaged in complex monopoly conduct
 - Effect of conduct:
 - High entry barriers
 - Exclusion
 - Excessive pricing
 - Refusal to supply
 - Other market characteristics of co-ordinated conduct
- Tribunal impose order reasonably requiring, prohibiting or setting conditions to mitigate or ameliorate conduct
- Contravention of that order is a prohibited practice

- **Internationally, complex monopolies are not prohibited**
- **Here, the competition authorities have been given very wide powers, with minimal guidance, to make policy decisions, determine economic policy and possibly re-structure industry**
- **The Competition Tribunal is not a court but an administrative body**
- **The Competition Appeal Court is a court**
- **The Constitution requires that unelected bodies not be given executive powers (*South African Association of Personal Injury lawyers v. Heath*)**
- **The result is an unconstitutional violation of separation of powers**
- **To the extent that legislative powers have been delegated, it is unconstitutional (*Executive Council of the Western Cape Legislature*)**

- Internationally, conscious parallelism is not anti-competitive
- Adapting to competitors' behaviour without agreement is rational and is a result of market structure
- Ambiguity due to terms: “conscious parallel manner”, “co-operative manner” and “co-ordinated manner” prevents firms knowing if they fall foul of provisions
- If market leader is followed by the remaining firms, its independent act is somehow “co-ordinated”
- Principle of legality requires certainty and rationality (*Pharmaceutical Manufactures and Affordable Medicines Trust*)
- As a result, the Bill could be unconstitutionally vague or irrational

- Compared to other acts of prohibited conduct unequal treatment as:
 - No exemption provisions
 - No up-front defence relating to economic benefit
- Could possibly be unconstitutional

What Next?

- President refer Bill to Constitutional Court
 - If constitutional, President must sign it
 - If not, process start again
- If Bill signed
 - Will there be constitutional challenges?