

The Impact on Leniency and Cartel Enforcement of Criminal Sanctions

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Outline

- Competition Act
- Competition Amendment Bill
- Current commentary
- Specific provisions
- National Prosecuting Authority
- Comments

Competition Act



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- Offences
- Penalties



Offences

- Breach of confidence – s69
 - disclose confidential information of another
 - obtained by
 - carrying out function,
 - initiating a complaint, or
 - participating in any proceedings
 - exceptions
- Hindering administration of the Act – s70
 - hinder, oppose, obstruct or unduly influence
 - person exercising power or performing duty



Offences

- Failure to attend when summoned – s71
 - fail to appear or remain in attendance,
 - attend but fail to take oath or make affirmation, or
 - attend but fail to produce item as ordered
- Failure to answer fully and truthfully – s72
 - take oath or make affirmation but
 - fail to answer fully or to best of ability, or
 - knowingly give false evidence



Offences

- Failure to comply with the Act – s73
 - contravene or fail to comply with interim or final order of the Tribunal or CAC
 - improperly influence the Tribunal or CAC
 - anticipate finding of the Tribunal or CAC
 - *quasi* contempt of court [or obstruction of justice]
 - provide false information to the Commission [or Tribunal]
 - defame the Tribunal or CAC or their members
 - wilfully interrupt proceedings or misbehave at a hearing
 - contravene search warrant
 - without authority but so claiming
 - enters and searches, or
 - attaches and removes



Penalties

- Contravene or fail to comply with interim or final order of the Tribunal or CAC
 - fine not exceeding R500 000,
 - imprisonment not exceeding 10 years, or
 - both a fine and imprisonment
- Other offences
 - fine not exceeding R2 000,
 - imprisonment not exceeding 6 months, or
 - both a fine and imprisonment



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Competition Amendment Bill

- Legislative history
- Main amendments
 - Concurrent jurisdiction
 - Market inquiries
 - Complex monopolies
 - Personal liability
 - Leniency



Legislative History

- The Department of Trade and Industry believed the Act should be amended, *inter alia*, to strengthen cartel enforcement by introducing personal liability
- On 10 June 2008 the Competition Amendment Bill was presented to Parliament by the Minister of Trade and Industry
- The Bill was publicly commented on in the relevant committees of the National Assembly and the National Council of Provinces
- Changes were made to the Bill before being passed by the Assembly on 21 August 2008, the Council on 25 September 2008 and the Assembly again on 21 October 2008
- On 2 February 2009 the President referred the Bill back to Parliament for reconsideration due to his reservations about its constitutionality
- On 19 February 2009 Parliament submitted the Bill to the President unaltered
- The President recently referred the Bill to the Constitutional Court for a decision on its constitutionality



Personal Liability

- Section 73A was introduced to hold personally accountable those individuals who cause firms to engage in cartels
- A director or manager of a firm commits an offence if he/she
 - caused the firm to fix prices, allocate markets or collusively tender, or
 - knowingly acquiesced in the firm engaging in such *per se* prohibited restrictive horizontal practices
- Knowingly acquiesced means having acquiesced while having actual knowledge of the conduct



Personal Liability

- A director or manager may be prosecuted for an offence if
 - the firm acknowledged in a consent order that it fixed prices, allocated markets or collusively tendered, or
 - the Tribunal or the CAC found that the firm engaged in such *per se* prohibited restrictive horizontal practices
- This acknowledgement or finding is *prima facie* proof in the criminal proceedings against the director or manager that the firm engaged in price fixing, market sharing or collusive tendering



Personal Liability

- A director or manager found in contravention of s73A is liable to
 - fine not exceeding R500 000,
 - imprisonment not exceeding 10 years, or
 - both a fine and imprisonment
- A firm may not directly or indirectly
 - pay any fine imposed on a director or manager convicted of such an offence, or
 - indemnify, reimburse, compensate or otherwise defray the expenses of a director or manager in defending a prosecution (unless the prosecution is abandoned or he/she is acquitted)



Leniency

- The Commission published its revised Corporate Leniency Policy (CLP) in May 2008
- The CLP outlines a process through which the Commission may grant a self-confessing cartel member, who is first to approach the Commission, “immunity” for its participation in cartel conduct if it complies with the CLP
- Sections 50 and 73A were introduced to immunise from competition and criminal prosecution a firm, a director or manager if they assisted the Commission prosecute a cartel
- CLP immunity does not preclude a complainant from applying to the Tribunal for a declaration that conduct is a prohibited practice or that the whole or part of an agreement is void, and for an award of civil damages
- If a director or manager is certified as deserving of “leniency”, the Commission may not seek or request criminal prosecution, and may make submissions to the National Prosecuting Authority for leniency



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Current Commentary

- Company law liability
- Executive disincentive
- Disproportionate
- NPA capacity
- Commission and NPA coordination
- Reverse onus
- CLP
- Cartel enforcement



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Specific Provisions

- Section 73A(4)
- Section 1(1)(viii)
- Section 50(1)



Section 73A(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.”



Section 1(1)(viii)

"In this Act –

.....

'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,"



Section 50(1)

"At any time after -

(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,....."



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National Prosecuting Authority



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- Constitution
- National Prosecuting Authority Act
- Policy Directive
- Public interest
- Question



Constitution

- Section 179(2)

“The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.”

- Section 179(5)

“The National Director of Public Prosecutions –

(a)

(b) must issue policy directives which must be observed by the prosecuting process;”

National Prosecuting Authority Act



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- Section 21(1)

“The National Director shall, in accordance with Section 179(a) and (b) and any other relevant section of the Constitution –

(a)

(b) issue policy directives,

which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in this Act and any other law.”



Policy Directive

- When deciding whether or not to institute criminal proceedings, the NPA should assess whether there is sufficient evidence to provide a reasonable prospect of successful prosecution
- Factors when evaluating the evidence
 - how strong is the case?
 - will the evidence be admissible?
 - will the state witnesses be credible?
 - will the evidence be reliable?
 - is the evidence available?
 - how strong is the case for the defence?
- Once the NPA is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow unless public interest demands otherwise



Public Interest

- Factors relevant to the NPA
 - nature and seriousness of the offence
 - interests of the victim and the broader community
 - circumstances of the offender
- Factors relevant to the Commission
 - CLP
 - cartel enforcement
- Independence of the NPA
 - Commission may not interfere with, hinder or obstruct the NPA in the exercise, carrying out or performance of its powers, duties and functions



Question

- If there is *prima facie* evidence that a director or manager caused or acquiesced in a firm engaging in cartel conduct
- and there is a reasonable prospect of successful prosecution
- but this person provided information to the Commission or otherwise co-operated with the Commission's investigation to the satisfaction of the Commission
- and the Commission made submissions to the NPA in support of criminal leniency for this person
- does this submission constitute a factor which the NPA may or must take into account when deciding to not prosecute
- and if so, what weight must be accorded to the submission?



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Comments

- Leniency vs. immunity
- Subjective test for certification
- “Conditional” certification
- Right or expectation to be certified
- Commission may seek or request the prosecution of a non-certified director or manager
- NPA may prosecute a certified or non-certified director or manager



Comments

- Content and weight of the Commission's submissions to the NPA to grant criminal leniency
- NPA must decide whether or not to prosecute a director or manager in accordance with other laws and policies
- Chilling effect of uncertainty
- Amending the CLP, or the Commission and the NPA concluding a s21 agreement, is inappropriate
- May be necessary to change the Bill and/or the Policy Directive

Thank you



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