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A new era dawns – criminalisation of cartel conduct

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On 22 April 2016, a Presidential Proclamation ("Proclamation") appeared in the Government Gazette which confirmed that the provisions contained in section 12 of the Competition Amendment Act, No. 1 of 2009 ("Amendment Act"), insofar as it relates to section 73A(1), (2), (3) and (4) of the Competition Act, 1998, would come into operation from 1 May 2016. These provisions make it a criminal offence for directors or managers of a firm to collude with their competitors to fix prices, divide markets amongst themselves or collude in tenders or to acquiesce in collusion and [which will expose them] to time in jail if convicted.

INTRODUCTION

The criminalisation provisions will not operate retrospectively. However, any cartel conduct which continues after 1 May 2016 will be subject to these criminalisation provisions.

This article considers whether there is a sufficiently detailed framework within which the provisions of section 73A can efficiently be implemented and enforced. We start by considering the provisions of the Competition Commission's Corporate Leniency Policy ("CLP"). Next we consider whether there are any other imminent developments on the horizon in relation to section 73A.

THE CLP

According to the CLP, the prohibition in section 4(1)(b) of the Competition Act, No. 89 of 1998 ("Competition Act") is aimed at eradicating and preventing cartel activity which harms the economy. Cartels are particularly damaging as they often result in price increases that are harmful to consumers of goods or services concerned. Not only does such activity affect consumer welfare, but it also hinders development and innovation in the industries within which this activity occurs.

In its endeavours to detect, stop, and prevent cartel behaviour, the Competition Commission ("Commission") has, in line with other international jurisdictions, developed a CLP to facilitate the process through which firms participating in a cartel are encouraged to disclose information on the cartel conduct in return for immunity from prosecution.

The CLP outlines a process through which the Commission will grant a self-confessing cartel member, who is "first to the door" to approach the Commission, immunity (i.e. from prosecution before the Competition Tribunal) for its participation in cartel activity upon the cartel member fulfilling specific requirements and conditions set out under the CLP. The CLP is, thus, only applicable in relation to cartel conduct prohibited under section 4(1)(b)(i), (ii) and (iii) of the Competition Act.

DOES THE CLP PROVIDE IMMUNITY FROM CRIMINAL PROSECUTION?

The CLP applies to a firm, which includes a person, partnership or a trust. A person refers to both a natural and a juristic person. The CLP will apply to a natural person insofar as that person is involved in an economic activity, for instance, a sole trader or a partner in a business partnership.

Furthermore, it is important to note that the CLP provides that the person making the application is authorised to act for the firm in question. In this regard, the CLP provides that reporting of cartel activity by individual employees of a firm or by a person not authorised to act for such firm will only amount to whistle blowing and not to an application for immunity under the CLP. The Commission also encourages whistle blowing, as such would also assist the Commission in detecting anticompetitive behaviour.

Importantly, the immunity granted pursuant to the CLP does not protect the applicant from criminal or civil liability resulting from its participation in a cartel infringing the Competition Act.

IS THE CLP, AS IT CURRENTLY STANDS, EQUIPPED TO DEAL WITH THE TENSIONS CREATED BY THE INTRODUCTION OF SECTION 73A?

The new provisions of section 73A(4) of the Competition Act provide an indication of how immunity from criminal prosecution is intended to operate. Section 73A(4) of the Competition Act provides that the Commission may:

1 not seek or request the prosecution of a person for an offence in terms of this section if the Commission has certified that the person is deserving of leniency in the circumstances; and

2 make submissions to the National Prosecuting Authority ("NPA") in support of leniency for any person prosecuted for an offence in terms of this section, if the Commission has certified that the person is deserving of leniency in the circumstances.

From our reading of the above provision, the following appears to be the position:

i) the Commission will have the power to certify that a director or manager is deserving of leniency;

ii) the effect of that certification is that the Commission may not actively seek or request the NPA to criminally prosecute the person who has been certified as deserving of leniency; and

iii) the NPA will have the discretion to decide whether or not to grant leniency to any person prosecuted for an offence in terms of this section, but only if the Commission has certified that such person is deserving of leniency.

However, what is not clear from the above provisions is, amongst other things, what the legislative framework is within which the Commission will certify that a person is deserving of leniency, the manner and content of the submissions which the Commission may make to the NPA and when it will do so, the factors which the NPA will take into account in exercising the discretion to grant leniency, whether such leniency could ever constitute complete immunity from criminal prosecution and whether the person certified by the Commission as deserving of leniency may make representations to the NPA and, if so, under what circumstances that person may do so.

As indicated above, there is no provision in the CLP which allows a person to be granted immunity if that person is a director or manager in a firm involved in cartel conduct. More importantly, the CLP provides that the immunity granted pursuant to the CLP does not protect the applicant from criminal or civil liability resulting from its participation in a cartel infringing the Competition Act.

Is there a solution on the horizon?

The Department of Economic Development is consulting with government and the competition authorities and expects to release details of certain proposals for wider public consultation during the course of 2016. These proposals relate to possible solutions for gaps and weaknesses identified and will include changes to legislation to address matters relating to excessive pricing, abuse of market dominance, guidelines for competition leniency applications and procedures for the work of the competition authorities, including on information claimed as confidential.

In light of the envisaged public participation process, it is uncertain how long it will take for these proposals to be finalised and implemented after they have been drafted. What seems clear is that if these proposals are intended to regulate the manner in which the Commission and the NPA will interact with one another in relation to the provisions of section 73A, then those proposals will not be in place by the 1 May 2016 date referred to in the Proclamation.

CONCLUSION

It appears that government is aware that there are certain issues which urgently need to be addressed in order to ensure the proper and efficient functioning of the provisions of section 73A which are effective from 1 May 2016. However, it seems to us to be unlikely that these proposals will be finalised and implemented in time to give the necessary detail required for the implementation and functioning of section 73A.

To our knowledge, there are no provisions in the Competition Act, the CLP or in the Criminal Procedure Act, No 51 of 1977 which specifically regulate the process envisaged in section 73A(4) of the Competition Act or to prosecute directors/managers for the offence created in section 73A(1) of the Competition Act.

Unless there are other plans underway to address these issues, the provisions of section 73A may be the subject of legal challenges in view of the lack of detail of how it will be implemented.



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