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Bid rigging vs price fixing: Clarification on when you will be deemed to have exited a cartel

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Understanding what is exactly required to demonstrate that a company has distanced itself from a cartel is undoubtedly of great importance. The Competition Appeal Court (CAC) has now provided clarity on this issue in the matter of *Cross Fire Management (Pty) Ltd v Competition Commission of South Africa* (192/CACFeb21) [2022] ZACAC.

Bid Rigging vs Price Fixing

Cross Fire Management (Pty) Ltd (Cross Fire) was one of a number of companies against which the Competition Commission brought a complaint. These companies were in the business of supplying and installing fire control and protection systems and the allegation was that they had engaged in numerous instances of bid rigging over an extended period of time dating back to the mid-1990s.

Bid-rigging comprises of an agreement between competitors not to compete on the bids they submit after being invited to tender. This can take the form of

- **Complementary bidding**, where competitors agree to have one of them submit the lowest bid or only bid containing acceptable terms;
- **Bid suppression**, where some competitors agree to refrain from bidding in view of having an identified preferred firm awarded the tender; and
- **Bid rotation**, where competitors submit undesirably high bids (cover pricing) so as to ensure that a predetermined bidder wins the tender. Through such a practice, competitors take turns being the winning bidder in a series of tenders.

This, together with price fixing and market allocation, falls within a class of conduct referred to as "cartel activity". This conduct destroys the basis of the competitive process and often leads to increased prices, reduced quality in products and services, stifled development or innovation in a market and harm to consumer welfare. As such, cartel activity is prohibited outright (i.e. per se prohibited) by the Competition Act 89 of 1998, as amended (Competition Act) which means that no pro competitive justification can excuse the conduct.

The Tribunal found that Cross Fire had engaged in bid rigging and an administrative penalty of approximately R12.8million was imposed on it. Cross Fire then appealed this decision to the CAC. The main dispute before the CAC was whether, for a number of years, Cross Fire had been party to the bid-rigging cartel.

This was relevant because according to section 67(1) of the Competition Act read with *Pickfords Removals SA (Pty) Ltd v Competition Commission* (CR129Sep15/PIL162Sep17) [2018] ZACT 109 (*Pickfords*), a complaint in respect of conduct that has ceased more than three years prior to it being initiated is time barred from being referred to the Tribunal.

The most important aspect to take note of is the assessment as to when a company actually exits a bid-rigging cartel or price fixing cartel.

Price fixing

In a context where the price to be fixed is agreed upon at the outset between the parties (at a meeting or in communications where future prices are discussed) and persists without further communication or positive conduct by the members of the cartel to achieve the collusive outcome, price fixing has occurred.

As such, the mere fact that parties acquiesce to a price fixing arrangement is enough for a company to become party to a price fixing cartel. The CAC stated that ***it is only when there is a clear and unambiguous distancing from the cartel that a party will be considered to have exited the arrangement.***

Bid-rigging

A bid-rigging cartel is characterised by continuous communication and reaffirming actions by its members. Therefore, consensus is achieved in respect of each tender where a preferred firm has been identified and the necessary actions (e.g. bid suppression) are performed to ensure the outcome of a tender. ***As such, the CAC stated that silence by a party and its failure to give effect to the collusion will present a defence for it when judging whether it exited a bid rigging cartel.***

The CAC found that Cross Fire, through its conduct of not participating in further collusive tenders, exited the bid-rigging cartel. It further found that such an exit had occurred more than three years prior to the Commission referring its complaint to the Tribunal.

The time bar and condonation

The Constitutional Court in *Pickfords* held that section 67(1) of the Competition Act was a time bar provision and that in terms of section 58(1)(c) the Tribunal could condone non compliance with the time limit. This was an important pronouncement because prior to *Pickfords*, section 67(1) was viewed as a non condonable prescription provision. Accordingly, the new pronouncement meant that the Commission had to seek condonation from the Tribunal for referring the abovementioned complaint outside of the three year time period.

The burden of proving that a complaint initiation is out of time generally rests on the party invoking the time limit. However, this is not a rigid rule and considerations of fairness may dictate that in a particular case the Commission should bear the burden of proving when the prohibited conduct ceased. For example, where the necessary evidence is not readily available to a company and the Commission can use its investigative powers to obtain the evidence.

Conclusion

Consequently, this case provides guidance on the type of assessment that must be conducted when determining whether and when a party can be deemed to have exited a big-rigging or price fixing cartel. The CAC's approach also revealed that it is best to address such matters on a case by case basis, considering the facts of each alleged collusive tender and whether the conduct of the accused party can be said to have broken down consensus.

Another noteworthy principle is that of **section 67(1) of the Competition Act** being a time-bar provision and not prescription. For that reason, a lapse of the three years since the collusive conduct ceased does not mean that former participants in a bid rigging cartel will be safe from prosecution.

The Commission is still entitled to apply for condonation to prosecute cases of alleged bid rigging (which may well be granted). Accordingly, it may serve parties to rather go the route of corporate leniency as a way of mitigating their risk should they have been a party to cartel conduct.



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