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COMPETITION

Criminalisation of cartels: a potential cure with side effects

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Competition authorities particularly in the United Kingdom, the United States and Australia have enacted and entrenched criminal penalties for cartel behaviour. South Africa seems to desire to follow suit although the amendments to our Competition Act, ("Competition Act") in relation to criminal sanctions have yet to come into operation.

INTRODUCTION

Punishing cartel ring-leaders, the offenders, seems to be an obvious solution for cartel behaviour. But is it? We submit that a closer look reveals side effects, which could bring about the very problems criminalisation is intended to prevent.

Cartel activities in terms of the Competition Act relate to *inter alia* price-fixing, dividing markets and collusive tendering or otherwise referred to as bid rigging. The penalties in place for taking part in cartel activities are different throughout the world although there has been a steady shift from civil sanctions to criminal sanctions by competition authorities.

CURRENT SA LAW

The highest penalty that can be imposed currently in South Africa for taking part in a cartel is 10% of the company's annual turnover. However, with the amendment of section 73A, the Competition Act now potentially provides for new criminal sanctions to be imposed on individuals. These criminal sanctions provided for in the Amendment Act, 2009 are yet to become effective and are set to remain ineffective for some time, will allow for a fine not exceeding R500 000 and a prison sentence of up to 10 years for individuals.

WHY CRIMINAL SANCTIONS?

The ultimate goal of competition law is to promote consumer welfare through the regulation of anti-competitive practice in the market. In order to achieve this goal of consumer welfare consumers must have quality products and services available to them that are sold to them at reasonable prices. This can only be achieved through vigorous competition in the market, which forces companies to produce a larger quantity and better quality of product and at a price point that will convince consumers to buy the better quality and priced product from the most efficient competitor in the market.

On the other hand a market is manipulated through price-fixing and market sharing and thereby consumers may be forced to pay higher prices for lower-quality goods. This manipulated market situation can have extremely detrimental effects on the poor and vulnerable. An example would be in the "bread cartel" case. The competition authorities concluded that the bread cartel resulted in many people, particularly in rural and poor communities of South Africa where bread is a staple food, being forced to pay much higher prices for bread.

The reason for the introduction of criminal sanctions into cartel practices is to crack down on the individuals involved, to deter future cartel activities. The need for a harsher penalty comes from the fact that the market activities of powerful companies driven by their leaders can have drastic effects on ordinary people who depend on a fair and competitive market for their day-to-day survival.

PROBLEMS WITH CRIMINAL SANCTIONS

Although the purpose of imposing criminal sanctions on those participating in cartel practices is to protect the position of the consumer, there are problems in proving the existence of cartel behaviour. The higher standard of proof in criminal cases, "beyond a reasonable doubt", has been a problem overseas particularly in Australia and criminal proceedings regarding cartels have also been scarce in the United Kingdom. The Australian Competition and Consumer Commission have been reluctant to prosecute criminal cases that might be unsuccessful rather than to pursue civil cases, where the burden of proof is less onerous.

It has also been stated in Australia that the criminalisation of cartels has caused "a chilling effect on pro-competitive behaviour" because so many firms are concerned about being caught up in allegations of cartel behaviour.

New Zealand has adopted a different strategy as a means of promoting pro-competitive behaviour in markets. The Amendments to the Cartels Bill, December 2015, as put forward by Paul Goldsmith, the Minister of Commerce and Consumer Affairs in New Zealand, will remove the criminal sanctions in New Zealand for cartel behaviour and allow for companies to collaborate with one another, if that collaboration promotes competition and enhances efficiency.

CONCLUSION

Those countries, including South Africa which are considering introducing criminal sanctions for cartel behaviour, regard consumer welfare as the ultimate end. In practice though there have been problems implementing criminal sanctions. The difficulty in proving criminal offences as opposed to civil offences is one such problem. Another issue faced by these countries has been that pro competitive behaviour in the market has been diminished by the fear of criminal sanctions. The difficulty then, with regard to stamping out cartel behaviour in the market, is to balance the sanctions imposed against the effects of those sanctions on pro competitive behaviour.

Although the point of criminal sanctions is to support the most vulnerable consumers in a society, if the sanctions instil a chilling effect on competition and innovation specifically, the sanctions may bring about the very evil they are designed to prevent.



Ahmore Burger-Smidt

Head of Regulatory

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