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Directors' liability and the competition commission's corporate leniency policy for cartel contraventions

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The Corporate Leniency Policy ("**CLP**") was published by the Competition Commission in 2004 and remains the principal tool employed by the Commission in cartel investigations and enforcement. The successful cartel member who is "first to the door" is granted immunity from significant penalties (up to 10% of South African turnover and exports for a first time contravention), provided that it admits to and makes full disclosure about the cartel (and its other members) to the Commission and assists the Commission in prosecuting the other cartel members. The success of the CLP is indicated by the fact that the vast majority of the Commission's successful cartel prosecutions have resulted from one cartel member being granted immunity under the CLP and the other cartel members then settling with the Commission. For example, in 2018, the Competition Tribunal confirmed 42 cartel consent order/settlement agreements concluded by the Commission and which imposed total penalties of about R268 million. By contrast, 2018 saw only five cartel cases being decided by the Tribunal on their merits following referrals by the Commission. The Commission was successful in three of these cases with a penalty of about R10.2 million being imposed in one case. These statistics illustrate the critical importance of the CLP to the Commission's anti-cartel enforcement strategy.

Cartel conduct was criminalised from 1 May 2016. Directors and managers who cause a company to engage in cartel conduct (or "knowingly acquiesce" to such conduct) after 1 May 2016 face a fine of up to R500 000 and/or imprisonment of up to ten years. However, the decision whether to criminally prosecute an individual rests solely with the National Prosecuting Authority ("**NPA**"). The Competition Commission cannot exempt a company or its directors or managers from criminal liability or civil damages claims. To date there have been no prosecutions by the NPA for cartel conduct, but directors of a company that engages in cartel conduct are placed in an invidious position as they risk personal criminal prosecution if the company discloses the conduct to the Commission by applying for immunity under the CLP. A potential conflict of interest arises between the best interests of the company and the risk of criminal prosecution of individual directors. Individual directors may well be best advised to seek their own individual legal advice, but this may restrict the ability of the company to make full disclosure to the Commission as required by the CLP (for example, if implicated directors and managers refuse to cooperate). The lack of certainty about the NPA's policy on prosecuting the directors and managers of the successful immunity applicant is a serious risk for affected directors and managers.

The Competition Act distinguishes between directors who cause the company to engage in cartel conduct and those who "knowingly acquiesce" to such conduct. The Competition Act defines this term as acquiescing while having actual knowledge of the cartel conduct. Directors who become aware of the conduct may accordingly avoid personal criminal liability if they promptly take action to stop or distance themselves from the conduct.

Section 67 of the Competition Act provides that the Commission may not take action against the company more than three years after the conduct ceases (the Commission takes the view that the three year period commences from the date that the "effect" of the conduct ceases). The option of "sitting out" the three year period accordingly exists, but the success of this option depends on the other cartel members also adopting the "sitting out" option (rather than applying for immunity) and the Commission not otherwise obtaining knowledge of the cartel's existence during that three year period. This option may not be feasible or practical depending on the circumstances.

In order to decide whether or not the company should make an immunity application in terms of the CLP, the company needs to be able to conduct an internal investigation promptly and thoroughly, so the directors may make an informed decision. This is especially important as a condition to obtaining immunity is to admit to the cartel conduct and provide full disclosure of the conduct to the Commission. Many companies have implemented competition law compliance programs for management and employees to prevent competition law contraventions and provide internal controls to enable the detection of potential contraventions at an early stage. This could enhance the company's ability to be able to make a quick decision on applying for immunity and be "first to the door" ahead of the other cartel members.

If another cartel member is granted immunity ahead of the company, then the directors need to decide whether to seek a consent order/settlement with the Commission. The Commission has the discretion to grant a discount of between 10% and 50% off the penalty, which would otherwise be payable by the company so there is potentially a real financial benefit to the company in settling with the Commission. However, full disclosure to and cooperation with the Commission is usually a condition to settlement and this again raises the potential conflict of interest between the best interests of the company and the risk of criminal prosecution of individual directors.

In terms of section 76 of the Companies Act 71 of 2008 (as well as the common law), each director has fiduciary duties to avoid a conflict of interest and exercise his powers and perform his functions in good faith and for a proper purpose, in the best interests of the company and with the degree of care, skill and diligence, which may reasonably be expected of person carrying out his functions as a director and having his general knowledge, skill and experience. Although directors are not required to be competition law experts, the serious consequences of competition law contraventions and the high media publicity given to the more high profile cases indicate that a director could reasonably be expected to be aware of the importance of competition law compliance. Directors who cause the company to engage in cartel conduct or who knowingly acquiesce in such conduct would accordingly arguably be in breach of their respective fiduciary duties in addition to being guilty of a criminal offence. Such breach could result in them being held personally liable in terms of section 77 of the Companies Act for any resulting loss, damage and expense suffered by the company (which may potentially include any penalty and civil damages payable by the company).

The question arises whether a failure by the company to apply successfully for immunity under the CLP may result in directors (other than those directors who are criminally liable) breaching their respective fiduciary duties to the company and incurring personal liability to the company. Much would depend on the circumstances of the particular case and key factors would include:

- the reasons why the company was not "first to the door". For example, did the directors unreasonably delay in obtaining legal advice? Under the CLP, a "marker" may be applied for which places the applicant first in line for immunity if it submits its formal immunity application at a later stage within a time limit determined by the Commission. The "marker" application is simple and only requires the name and address of the applicant, identity of the cartel conduct and other cartel members and a justification why the marker is requested;
- the strength of the evidence of a cartel contravention by the company. If the evidence is weak and the company has a defence, an immunity application may be inappropriate;
- whether the Commission already has knowledge of the cartel's existence and the company's conduct (as a result of for example a dawn raid or whistle-blower). If the Commission is aware of the cartel's existence, then immunity is not available under the CLP unless the Commission has insufficient evidence or information and such evidence/information is provided by the immunity applicant;
- the risk that other cartel members may apply for immunity.

A related question would be whether the cartel conduct could have been prevented if the company had a competition law compliance program and/or internal controls to prevent (or at least detect) competition law contraventions. Alternatively, if the company had such program and controls, why did they fail? Again, directors could (depending on the circumstances) face the risk of personal liability to the company in terms of section 77 of the Companies Act for breach of their fiduciary duties for not having adopted such program and controls or for the failure of such program and controls to prevent or detect the cartel conduct.

The liability of directors for breach of their fiduciary duties is complicated and each individual director needs to be separately assessed based on his specific knowledge, skill, experience and conduct. Section 76(4) of the Companies Act provides a

defence to a director if, inter alia, he:

- took reasonably diligent steps to become informed of the matter and made or supported a decision on a rational basis and in the actual belief that the decision was in the company's best interests;
- relied on the performance, opinions, reports or statements of competent and reputable legal counsel, accountants or other professional advisors;
- relied on the performance, opinions, reports or statements of company employees who he reasonably believed were reliable and competent.

Proving and quantifying the liability of individual directors for breach of their fiduciary duties may be difficult in practice and involve lengthy legal proceedings. This will generally be easier if a director is convicted of a criminal offence relating to cartel conduct. To date, the shareholders of companies that have paid significant cartel penalties have not instituted legal action against the company's directors even though these derivative actions are expressly provided for in section 165 of the Companies Act. Individual directors, however, need to be fully aware of the personal (especially criminal) risks arising from cartel contraventions by the company and are best advised to adopt a "prevention is better than cure" approach including the implementation by the company of a competition law compliance program and internal controls for the early detection of potential contraventions.



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