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HAUNTED BY THE PAST … UNTIL WHEN SHOULD HISTORIC CARTEL CONDUCT SPOOK YOU?

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COMPETITION COMMISSION V PICKFORDS REMOVAL (167/CAC/Jul18)

How long does a firm remain at risk after having ceased contravening the Competition Act 89 of 1998 ("**the Competition Act**")?

The starting point is section 67(1): *"A complaint in respect of a prohibited practice that ceased more than three years before the complaint was initiated may not be referred to the Competition Tribunal".* Simple as it may seem, this is one of the issues the Competition Appeal Court ("**CAC**") recently had to grapple with in the *Pickfords* matter.

Here, multiple furniture removal companies were accused of tendering collusively by providing "cover quotes" to customers at elevated prices so as to create an illusion of competition when they were really favouring the acceptance of a fellow cartel member's quote. The Competition Commission ("**Commission**") had initiated two complaints: in November 2010 ("**first initiation**") and in June 2011 ("**second initiation**"). *Pickfords* was only identified in the second initiation, whereafter it was prosecuted for numerous instances of collusive tendering as self-standing complaints. Twenty of these happened more than three years before the second initiation. *Pickfords* relied on section 67(1) to challenge the inclusion of these instances in the complaint. The Commission countered that the three years should only run once it acquires knowledge of the collusion. The Commission also argued that it was wrong to use the second initiation's date as it was a mere amendment of the first initiation, so that the three year time period extended back to much earlier. We highlight four aspects of the CAC's decision:

SECTION 67(1) CREATES A "LIMITATION OR EXPIRY PERIOD" NOT A "PRESCRIPTION PERIOD"

The Prescription Act 68 of 1969 requires the creditor to have knowledge of the identity of the debtor and the facts giving rise to the debt, before the prescription period starts running. By contrast, section 67(1) of the Competition Act applies a lower threshold, requiring only reasonable suspicion for a complaint initiation. The section intends to bar investigations into conduct that ceased an appreciable time ago and no longer endangers the public, regardless of whether the Commission had knowledge thereof. Section 67(1) thus creates a limitation or expiry period. It is also not possible to condone an initiation outside this period as the Competition Act does not confer the power of condoning a late initiation. Thus the three year period is fixed and runs from the date that the effect of the offending conduct ceased.

SPLITTING VARIOUS INSTANCES OF THE SAME CONDUCT INTO SEPARATE COMPLAINTS?

The Commission elected to prosecute each tender as a separate case of collusion and not as part of one over-arching practice by *Pickfords* and its competitors. The CAC first criticised this approach, indicating that a "prohibited practice" in section 67(1) include ongoing conduct and that it would be inappropriate to break such conduct down and prosecute each manifestation thereof as a self-standing contravention. The CAC nonetheless proceeded to treat each complaint separately for purposes of applying the three year limitation or expiry period. The apparent contradiction seems to flow from the fact that *Pickfords*' exception did not take issue with the Commission's multiplication of complaints.

This situation demonstrates the conundrum facing a firm that is prosecuted separately for each instance of cartel conduct even though they were all occasioned by the same overarching collusive arrangement. Where some incidents fall outside and others inside the three year period, a careful weighing will be required of the advantages and disadvantages of (a) insisting on a consolidation of such overlapping complaints or (b) agreeing to defend them separately: Fragmenting the conduct into multiple complaints exposes a firm to multiple fines, potentially threatening the firm's continued existence. However, the downside of treating all incidents as a single, combined complaint is that incidents that precede the complaint initiation by more than three years will be taken into account as part of the over-arching cartel conduct. This will extend the contravention period, which extension will have a multiplying effect on the penalty calculation.

WAS THE SECOND INITIATION A SEPARATE INITIATION OR AN AMENDMENT OF THE FIRST?

This issue turned out to be a red herring. Whilst the CAC agreed with the Commission that the second initiation constituted an amendment of the first, and not a separate initiation, it still held that the section 67(1) clock only stopped on the date of the second initiation. The reason for this is that *Pickfords* was not mentioned in the first initiation and its alleged collusion was only discovered later. This despite the CAC's confirmation that after a complaint is initiated, its investigation may well reveal participation by more participants than originally identified.

A PURE EXCEPTION?

Ordinarily an exception is concerned only with the facts as alleged by the Commission in its referral and requires a decision on whether or not the alleged facts, if proved, would constitute a contravention. If not, the Commission is often ordered to provide further particulars to cure its deficient case. Curiously, however, the outcome of this "exception" was that both parties were directed to state when the last payment was received for each tender (from which the three year period would then apply). As a result, the proceedings appear to have amounted to a "separation of issues" (deferring a consideration of the merits of the complaints) rather than an exception in the ordinary sense.

CONCLUSION

The three year period in section 67(1) creates a hard and fast rule against the prosecution of historic cartel conduct. This means that where it is alleged that the same cartel colluded on multiple occasions over a long period of time, section 67(1) may serve to prevent the individual prosecution of earlier incidents. This is one of the factors an alleged cartelist has to weigh when deciding whether or not to insist on having all incidents of alleged collusion prosecuted collectively rather than individually.



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