

# Individuals now made accountable in cartel activities



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A personal liability provision introduces a new dimension to competition law which will affect the way firms who have engaged in cartel conduct deal with the issues arising therefrom

**C**ARTEL activities — price fixing, market sharing and collusive tendering among competitors — are uncontroversially seen as the most egregious of all anti-competitive offences.

In SA, the Competition Commission has focused on detecting cartels with its leniency policy and deterring cartels through the pursuit of high administrative penalties. However, under the current competition law regime, it is only the firms involved in cartel activity which are prosecuted. Individuals are not held liable and may not be criminally prosecuted for involvement in cartel activities. But this is about to change.

President Jacob Zuma has signed the Competition Amendment Act 1 of 2009 (the Amendment Act) into law. The Amendment Act is not yet of force and effect and will come into operation on a date fixed by the President by proclamation in the Government Gazette.

The Amendment Act does not overhaul the current competition law regime, but it expands and strengthens the existing provisions of the Competition Act through increasing the investigative tools, analytical powers and punishing and deterring sanctions available to the competition authorities.

A major new feature is the personal liability provision introduced by a new section 73A into the Competition Act, of 1998. In effect this section criminalises participation by individuals who are directors or persons with management authority

in any cartel activity either by active involvement therein or by having acquiesced while having actual knowledge of the relevant conduct by the firm. The sanction for a contravention of section 73(A) is a fine not exceeding R500 000 or imprisonment for a period not exceeding 10 years, or both.

Section 73A(5) provides that in any court proceedings against a director or person with management authority under that section, an acknowledgement by the company in a consent order or a finding by the Tribunal or the Competition Appeal Court that the firm in question has engaged in cartel conduct, is prima facie proof of the fact that the firm engaged in that conduct. However, the evidentiary standard that applies in criminal proceedings differs from the more lenient evidentiary standard that applies in civil proceedings (including those before the Tribunal and the Competition Appeal Court). In criminal proceedings, the state must prove each element of the offence with which the accused is charged beyond reasonable doubt. In civil proceedings, the “balance of probability” standard is lower (loosely described as certainty of 50% plus 1).

In summary, section 73A(5) of the Competition Act creates what is referred to in legal parlance as a “reverse onus provision” which is a provision that places an evidentiary burden on the accused in respect of an issue which is an element of a crime or which needs to be proved for the purposes of securing a conviction (i.e. lessening the burden

of proof on the state). On balance, reverse onus provisions have not survived challenges to their constitutional validity.

Furthermore, the personal liability provision introduces a fundamental new dimension to competition law which will have a profound effect on the manner in which firms who have engaged in cartel conduct deal with the issues arising therefrom.

Currently, if its involvement in cartel activities comes to the attention of a firm, a risk mitigating strategy is to immediately seek to establish whether leniency is available and, to the extent that it is, to claim leniency under the commission’s corporate leniency policy. This policy, which grants immunity to the first whistleblower firm, has been the most successful cartel detection instrument in the enforcement toolbox of the commission.

However, one of the conditions for the provision of immunity under the leniency policy is the disclosure by a firm of all evidence, information and documents in its possession or under its control relating to any cartel activity. Given the personal criminal liability that may follow from such disclosure, the incentives of managers and directors may not be aligned with those of the firm.

Prosecutions of individuals will be conducted by the National Prosecuting Authority (NPA) and not the competition authorities. The commission may, in appropriate circumstances, certify that an individual whose conduct is unlawful under this section is “deserving of

leniency”. The commission may also make submissions to the 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”. The commission does not, however, have the ultimate say and it is conceivable that a company may secure indemnity from prosecution in terms of the commission’s leniency policy while individual directors and individuals having management authority may be held criminally liable for their conduct or knowing acquiescence.

Any admissions of involvement in cartel activity by such individuals could therefore be self-incriminating. This may result in a failure to seek or obtain leniency as individuals invoke their constitutional right not to self-incriminate.

The commission has recently reported that it receives leniency applications at the average rate of three per month. This means it is presented with admissions and evidence of the activities of more than 30 cartels per year. Given the potential effect of the criminalisation of cartel activities on the incentives of individuals to co-operate with their firms and the commission in leniency applications, one wonders whether the criminalisation provision will not inadvertently have the opposite effect on cartel detection than that which was intended.

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