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# South Africa

Justin Balkin, Marisa Coetzee and Tsakane Marolen

Edward Nathan Sonnenbergs

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## Legislation and jurisdiction

### 1 Relevant legislation

What is the relevant legislation and who enforces it?

South African competition law is regulated by the Competition Act, 89 of 1998, as amended (the Competition Act). Various regulations have been promulgated under and in terms of the Competition Act, including the Rules for the Conduct of Proceedings in each of the Competition Commission, the Competition Tribunal and the Competition Appeal Court, as well as various threshold notices.

The Competition Act establishes three competition authorities: the Competition Commission (the Commission), the Competition Tribunal (the Tribunal) and the Competition Appeal Court (the CAC).

The Commission's role is both investigative and prosecutorial, whilst the Tribunal's role is adjudicative. In this regard, the Commission investigates cartel complaints. If the Commission believes that there is merit to a complaint, it will refer the matter to the Tribunal for adjudication. Generally speaking, the Commission will act as prosecutor in the Tribunal, but there is scope for co-prosecution by the complainant or, if the Commission declines to refer the matter to the Tribunal, self-prosecution by the complainant.

The CAC's role is primarily to hear appeals against, and reviews of, decisions made by the Tribunal.

In addition, in *American Natural Soda Ash Corporation and another v Botswana Ash (Pty) Ltd and others* [2005] (the *Ansa/Botash* decision), the Supreme Court of Appeal (the SCA) held that the CAC did not have final jurisdiction in relation to competition law matters because its decisions were capable of being taken on appeal and review to the SCA.

Finally, the Constitutional Court may also hear appeals of competition matters if they raise constitutional issues.

### 2 Substantive law

What is the substantive law on cartels in the jurisdiction?

Cartel regulation in South Africa is governed by section 4 of the Competition Act, under the heading of 'restrictive horizontal practices'.

Section 4(1)(a) of the Competition Act provides that an agreement between parties in a horizontal relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to an agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect (namely, the rule of reason test).

The prohibitions contained in section 4(1)(b) are as follows:

- directly or indirectly fixing a purchase or selling price or any other trading condition;
- dividing markets by allocating customers, suppliers, territories or specific types of goods or services; and
- collusive tendering.

Distinct from section 4(1)(a), the prohibitions in section 4(1)(b) of the Competition Act are referred to as per se prohibitions. These prohibitions are automatically and absolutely prohibited and cannot be justified on the basis of the rule of reason test. Accordingly, section 4(1)(b) of the Competition Act provides that, if firms in a horizontal relationship are found to have contravened the provisions thereof, they will be held to have engaged in a restrictive horizontal practice and will face the applicable sanctions.

In the *Ansa/Botash* decision, the Supreme Court of Appeal held that it is necessary to first 'characterise' the conduct as falling within the prohibitions contained in section 4(1)(b). This 'characterisation' test requires the relevant provisions of section 4(1)(b) of the Competition Act to be construed so as to determine precisely the ambit and characteristics of the legislative prohibition under scrutiny. Once there is clarity on what the legislation prohibits (and on what is permissible), an evidential enquiry can commence in order to determine whether the prohibited conduct has, as a matter of fact, occurred.

Section 4(5) of the Competition Act permits a company and its wholly owned subsidiary, as well as groups forming part of a single economic entity, to cooperate in manners that, but for the relationship between the companies in question, would be prohibited in terms of section 4(1) of the Competition Act.

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### 3 Industry-specific offences and defences

Are there any industry-specific offences and defences?

There are no industry-specific offences or defences. The Commission does, however, enjoy concurrent jurisdiction over competition matters together with other industry-specific regulators. Concurrent jurisdiction is to be regulated by way of agreements between the Commission and the industry regulators. To date, the Commission has entered into such agreements with each of the South African telecommunications, electricity and postal regulators.

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### 4 Application of the law

Does the law apply to individuals or corporations or both?

Section 4 of the Competition Act refers to arrangements between 'firms'. 'Firms' are in turn defined to include 'a person, partnership or a trust'. Accordingly, the Competition Act applies to both individuals and corporations.

Although amendments in this regard are in the process of being passed (dealt with in more detail in Question 6 hereof), the Competition Act does not currently provide for criminal or civil sanctions against individuals involved in cartel activities. Once these amendments become law, individuals may be held personally liable for anti-competitive conduct.

## 5 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction?

In terms of section 3 thereof, the Competition Act applies to all economic activity occurring within or having an effect within South Africa.

The *Ansac/Botash* decision indicates that economic activity having an effect in South Africa, irrespective of the nature of such effect (whether positive, negative or neutral), would satisfy the jurisdictional requirements of the Competition Act. However, the connection between the effects and the conduct cannot be tangential – jurisdiction will be limited to avoid de minimis cases.

## 6 Proposals for change

Are there any proposals for change to the regime?

The Competition Amendment Bill (the Bill) has recently been approved by parliament and is in the process of being signed by the state president. Although there has been much debate as to the efficacy of the proposed amendments, the Bill is likely to be passed.

The Bill focuses on strengthening the existing provisions of the Competition Act to deal with anti-competitive practices under the following five broad categories:

- to provide greater certainty in relation to market enquiries to be conducted by the Commission.
- to allow the Commission to take action concerning ‘complex monopolies’, where uncompetitive outcomes result from multi-firm conduct that restricts or distorts competition to the detriment of consumers.
- to introduce personal liability (dealt with in more detail in question 14);
- to provide legislative backing for the current corporate leniency practice that has been adopted by the Commission; and
- to correct inconsistencies in relation to the manner in which concurrent jurisdiction between the Commission and sector specific regulators is managed.

## Investigation

### 7 Steps in an investigation

What are the typical steps in an investigation?

A complaint proceeding can commence through the submission of a complaint by any person, or through the Commission itself initiating a complaint. A person submitting a complaint must do so in the prescribed form, which includes a concise statement describing the conduct complained of.

A complainant may identify certain information as confidential by filing the prescribed form together with the complaint. Information claimed as confidential will be protected by the Commission unless the Tribunal rules otherwise (in which event the person claiming confidentiality will be given the chance to defend his or her claim).

Once the Commission receives a complaint or initiates its own complaint, it will engage in a quick analysis in an endeavour to filter out spurious complaints. If the complaint passes this prima facie test, an investigator will be appointed.

The investigator will begin the investigation by examining the complaint and publicly available information. Thereafter, the investigator will seek additional information from the complainant, the respondent and other industry participants.

The Commission’s initial approach is to seek information voluntarily, generally by way of a letter setting out its queries. However, the Commission also has powers to subpoena documentation

or individuals (or both), a power that it frequently uses. Failure to comply with a subpoena is a criminal offence.

The Commission may also make use of its search and seizure powers (otherwise known as ‘dawn raids’) to gather information.

If, following its investigation, the Commission forms the view that the complaint has merit, it will refer the matter to the Tribunal for adjudication. The process that follows in relation to the adjudication of the complaint before the Tribunal is dealt with in question 11.

It is noteworthy that the Commission has a period of one year to complete its investigation, which period may be extended with the approval of the complainant.

### 8 Investigative powers of the authorities

What investigative powers do the authorities have?

The Commission’s general powers of summons are set out in section 49A of the Competition Act. This section provides that the Commission may, at any time during an investigation in terms of the Competition Act, summon any person who is believed to be able to furnish any information on the subject of the investigation to deliver or produce any book, document or other objects specified in the summons.

Further, the Tribunal itself also enjoys the power of summons in terms of section 54(c) of the Competition Act, which provides that the Tribunal member presiding at a hearing may summon or order any person to produce any book, document or item necessary for the purposes of the hearing.

It is an offence, in terms of section 71 of the Competition Act, to fail to produce a book, document or other item pursuant to a summons, if it is in the possession of, or under the control of, that person. It is also an offence to hinder, oppose, obstruct or unduly influence any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by the Competition Act.

The Commission also has powers of search and seizure. Section 46 of the Competition Act makes provision for the issue of a warrant authorising an investigator to enter and search any premises and to examine articles and documents as part of its investigative function. A search without a warrant is also permissible where the investigator believes on reasonable grounds that a warrant would have been issued if applied for and the delay in obtaining a warrant would defeat the purpose of the entry and search.

No person is obliged to answer any question put to him or her by an investigator, if the answer to which would be self-incriminating. No self-incriminating statement made will be admissible in criminal proceedings against the maker thereof, except where that person is being tried for perjury. These offences relate to knowingly failing to answer questions truthfully, or knowingly providing false or misleading information.

## International cooperation

### 9 Inter-agency cooperation

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

Although there is no specific legal basis for cooperation in the Competition Act, there are currently both formal and informal arrangements between the South African competition authorities and the authorities in other jurisdictions (specifically the European Commission, the Department of Justice, the Federal Trade Commission and the Australian Consumer and Competition Commission). Both the Commission and the Tribunal are members of the International Competition Network (ICN).

The Commission has recently been party to a number of multi-jurisdictional cartel investigations. In some cases, worldwide dawn raids have been coordinated.

The South African competition authorities are likely bound by confidentiality claims of parties submitting information to it, even in discussions with foreign regulators (unless waivers in this regard are received from the parties claiming confidentiality or if the Tribunal finds that the information is not in fact confidential). This is, however, untested in South Africa.

## 10 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

While the South African competition authorities are not ashamed to take guidance from foreign precedent in relation to similar cases before them, South African competition law is distinct and is developing its own jurisprudence.

## 11 Adjudication

How is a cartel matter adjudicated?

If the Commission, following the completion of its investigation (dealt with in question 7), is of the view that there is merit to a complaint, it will refer the matter to the Tribunal for adjudication. At this stage, the Commission acts as prosecutor.

The Commission's referral takes the form of an affidavit, setting out the its case. The respondent then has an opportunity to file an answering affidavit, countering all of the allegations made by the Commission, whereafter the Commission will file its replying affidavit.

Once pleadings have closed, the matter is set down for a pre-hearing or hearing. The pre-hearing, if scheduled, will deal with procedural issues, including the timing for the completion of the hearing.

Interlocutory issues that may be required to be disposed of prior to the hearing include issues of confidentiality, discovery and the filing of witness statements.

The hearing itself takes place with the Commission and the respondent calling witnesses and experts (which witnesses and experts may be cross-examined by the other side). The hearing may become inquisitorial, where the members of the Tribunal may themselves question witnesses to clarify any issues that they may have.

There is also scope for the complainant to be admitted as an intervener (to co-prosecute the matter with the Commission). The complainant must make application to the Tribunal to be so admitted, which application may be opposed by the respondent.

If, following its investigation, the Commission forms the view that the complaint has no merit, it will issue a notice of non-referral. In this event, the complainant may self-prosecute the complaint. If so, the complainant must file its statement of case with the Tribunal. This takes the place of the Commission's referral affidavit, and the process that follows is the same as the above (with the complainant taking the place of the Commission). Following the hearing, the Tribunal will hand down its decision.

At any time during the Commission's investigation or the Tribunal hearing, the respondent and the Commission can enter into a settlement agreement (which will be confirmed by the Tribunal as a consent order). Although there is scope for a settlement without an admission of guilt, this is unlikely in the current climate.

## 12 Appeal process

What is the appeal process?

A person affected by a decision of the Tribunal may appeal against a decision of the Tribunal or may apply for a decision of the Tribunal to be reviewed.

Appeals from the Tribunal are heard by the CAC, which is a specialist High Court to hear competition law appeals from the Tribunal. The CAC forms part of the system of High Courts.

Although the Competition Act provides that certain matters fall within the exclusive jurisdiction of the CAC, other matters may be appealed further to the Supreme Court of Appeal (SCA) and to the Constitutional Court.

In the *Ansa/Botash* decision, the SCA held that it may even hear appeals on matters on which exclusive jurisdiction has been conferred on the SCA by the Act. However, in these instances special leave to appeal is required.

The appeal process is initiated by the appellant filing a notice of appeal, which sets out the grounds on which it appeals the decision of the Tribunal. This notice must be served on all parties within a prescribed time period (which, if no period is prescribed in the Competition Act, is 15 business days after the date of the decision or order that is the subject of the appeal).

Within 40 business days after filing a Notice of Appeal, the appellant must serve and file a copy of the record of the proceedings in the Tribunal.

The appellant must file its heads of argument 15 days before the hearing, while the respondent must file its heads of argument 10 days before the hearing.

## 13 Burden of proof

With which party is the burden of proof?

There is no single answer to this question.

In terms of section 4(1) of the Competition Act, the Commission or the complainant must prove that the respondent has contravened the Competition Act.

If a respondent wishes to raise efficiency, technological or other pro-competitive gains to counter the anti-competitive finding, the respondent bears the onus in this regard.

Section 4(2) of the Competition Act sets out a rebuttable presumption that an arrangement to engage in a restrictive horizontal practice (cartel activity) exists between two or more firms if any of the firms owns a significant interest in the other or they have a common director and a combination of the firms engage in cartel activity. In these instances, the burden of proof therefore, rests with the respondent to rebut the presumption.

## Sanctions

### 14 Criminal sanctions

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

There are currently no criminal sanctions for cartel activity. However, as stated in question 6, the Bill proposes to introduce criminal sanctions for cartel activity.

In terms of section 73A of the Bill, a person commits a criminal offence if he or she, while being a director of a firm or acting as a person having management authority in the firm, either caused the firm to engage in cartel activity or knowingly acquiesced in the firm engaging in cartel activity.

'Knowingly acquiesced' is defined as having acquiesced while either having actual knowledge of the cartel conduct, or being in a

position in which the person reasonably ought to have had actual knowledge (by investigation of the matter or other measures).

If an individual is found to have contravened this section, he or she may be punished with a fine of up to 500,000 rand or imprisonment for a period not exceeding 10 years. There is no minimum sanction.

#### 15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Tribunal may impose administrative penalties, interdict prohibited practices, declare conduct to be prohibited, declare the whole or part of an agreement to be void or order access to an essential facility.

The maximum administrative penalty that can be imposed is 10 per cent of the relevant firm's turnover in and exports from South Africa during its previous financial year. This is dealt with in more detail in question 18.

In the case of a contravention of section 4(1)(a) of the Competition Act, an administrative penalty may be imposed only if the conduct is substantially a repeat by the same firm of conduct previously found by the Tribunal to be a prohibited practice.

On the other hand, in the case of a contravention of section 4(1)(b) of the Competition Act (namely, price fixing, market division and collusive tendering), an administrative penalty may be imposed where a firm is a first time offender.

In addition, a person who has suffered loss or damage as a result of a prohibited practice may bring a claim for civil damages arising from that practice. This is dealt with in more detail in question 17.

#### 16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Although the Bill has not yet come into operation, it is expected that the sanctions that may be imposed by the Tribunal may be pursued in conjunction with the criminal sanctions set out in the Bill.

In addition, a person who has suffered loss or damage as a result of a prohibited practice will always be able to bring a claim for civil damages arising from that practice.

#### 17 Private damage claims and class actions

Are private damage claims or class actions possible?

A person who has suffered loss or damage as a result of a prohibited practice may bring a claim for civil damages arising from that practice. Before such a claim can succeed, it is necessary for the Tribunal to have found that the relevant practice is in contravention of the Competition Act. In addition, such a claim cannot succeed if the person claiming private damages has been awarded damages in a Consent Order agreement (a settlement agreement) before the Competition Tribunal. It is noteworthy that South African courts will not award punitive damages.

The Competition Act does not make any reference to class actions. However, class actions were introduced into the South African legal system in 1994 with the promulgation with the Constitution of the Republic of South Africa (the Constitution). Although the Constitution refers to class actions, it does not deal extensively with the procedure to be followed in instituting such actions. However, the Law Commission of South Africa is currently drafting legislation aimed at regulating class and public interest actions.

#### 18 Recent fines and penalties

What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated? What is the history of criminal sanctions against individuals?

The maximum administrative penalty that can be imposed is 10 per cent of the relevant firm's turnover in and exports from South Africa during its previous financial year. In determining the appropriate level of a fine, the Tribunal must take into account various factors. The Tribunal has set out a weighting of these factors to arrive at the 10 per cent maximum. These weightings can also be applied in mitigation, to lessen the percentage applicable. These weightings were set out in *The Competition Commission v South African Airways* (Case No. 18/CR/MAR01) as follows:

- the nature, duration and extent of the contravention: 3 per cent;
- loss or damage as a result of the contravention: 1 per cent;
- behaviour of the respondent: 1 per cent;
- market circumstances: 1 per cent;
- level of profit derived: 0.5 per cent;
- degree of cooperation with the Commission and Tribunal: 1.5 per cent; and
- whether in previous contravention: 2 per cent.

Administrative penalties have been increasing since the introduction of the Competition Act in 1999. Although there have been penalties imposed (or agreed to) in relation to minimum resale price maintenance and abuses of dominance, we have focused here on cartel activities. In this regard:

- in the matter involving International Healthcare Distributors, each of the 10 respondents in the matter agreed, by way of a Consent Order, to pay a fine of 2 million rand (approximately US\$198,000) (without any admission of liability);
- shortly thereafter, the Board of Healthcare Funders (the BHF), the South African Medical Association and the Hospital Association of South Africa agreed, by way of Consent Orders, to pay 500,000 rand, 900,000 rand and 4.5 million rand respectively (in the case of the BHF, without an admission of liability);
- in 2007, Tiger Brands agreed to pay a penalty of 5.7 per cent of its affected turnover (being turnover arising from the prohibited conduct) in relation to cartel activity in the bread industry, equating to a fine of 98.8 million rand;
- this year, Adcock Ingram Critical Care (AICC) agreed to pay 53 million rand, equating to 8 per cent of its affected turnover in relation to market division and collusive tendering in the pharmaceutical market;
- in addition, The New Reclamation Group agreed to pay a fine of 145 million rand (6 per cent of its affected turnover) for fixing prices of ferrous and non-ferrous scrap metal; and
- most recently, American Soda Ash Corporation (Ansac) agreed to pay a penalty of 8 per cent of its turnover (equating to 9.7 million) in relation to setting prices and trading conditions.

#### Sanctions

#### 19 Sentencing guidelines

Do sentencing guidelines exist?

There are currently no sentencing guidelines. However, as stated in question 18, the Tribunal has set out some guidelines for the determination of the appropriate administrative penalty in relevant circumstances.

**20 Sentencing guidelines and the adjudicator**

Are sentencing guidelines binding on the adjudicator?

As set out above, there are currently no sentencing guidelines.

**21 Leniency and immunity programmes**

Is there a leniency or immunity programme?

The Commission published a corporate leniency programme (CLP) in 2004. The CLP was revised in May 2008.

Importantly, the Bill seeks to introduce legislative backing for the CLP, which is currently lacking.

**22 Elements of a leniency or immunity programme**

What are the basic elements of a leniency or immunity programme?

In terms of the CLP, the Commission has a discretion to grant leniency or immunity to a self-confessing cartel member. Leniency or immunity in this context means that the Commission will not prosecute the successful applicant before the Tribunal. Clearly, the intention behind the CLP is to incentivise cartel members to regularise their conduct, to provide evidence concerning the cartel and the remaining members thereof and to cease cartel activity.

Leniency is available under the CLP only in relation to contraventions of section 4(1)(b) of the Competition Act (namely price fixing, market division and collusive tendering).

Details of what is required for a successful application under the CLP are set out in the answer to question 27.

Please note that the CLP does not protect leniency applicants from civil liability (that is, liability to third parties bringing private damages actions) or from criminal sanctions (once the Bill is passed).

**23 First in**

What is the importance of being 'first in' to cooperate?

Full immunity from administrative penalties and prosecution under the Competition Act is available only if the applicant is the first member of that cartel to confess its anti-competitive conduct to the Commission.

The CLP provides for a marker system under which an applicant can protect its place in the queue of applications for immunity. A marker application must:

- identify that it is being made to request a marker;
- include the applicant's name and address;
- detail the alleged cartel activity and its participants; and
- justify the need for a marker.

**24 Going in second**

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

Unless a firm is first to approach the Commission for leniency, it will not be eligible for immunity.

Firms that subsequently approach the Commission to confess and cooperate may, however, be able to negotiate a reduced fine, a settlement agreement or a consent order. Should the matter be referred to the Tribunal, the Commission may at its discretion also request favourable treatment for additional applicants who were not first to apply.

The CLP does not consider whether full immunity may become available to other applicants, if withdrawn from the first applicant. However, the CLP allows leniency to be granted where the Commission is aware of the relevant cartel but lacks sufficient evidence. Therefore, it may be possible for a second applicant to obtain full

immunity where the Commission requires information from that applicant to be able to start or continue proceedings.

**25 Approaching the authorities**

What is the best time to approach the authorities when seeking leniency or immunity?

Leniency is granted only where the Commission is unaware of the anti-competitive conduct or has insufficient evidence to investigate or prosecute a cartel of which it is aware. Therefore, an application for leniency must be made as soon as the relevant firm suspects or becomes aware that its conduct represents a prohibited horizontal restrictive practice.

If a firm is uncertain whether it is eligible for immunity under the CLP, it may approach the Commission telephonically or in writing on an anonymous and hypothetical basis in order to attain further clarity. A firm disclosing its identity does so at its own risk as the CLP affords it no protection at this stage. The Commission will, however, treat all information submitted by the potential applicant as confidential.

**26 Confidentiality**

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

An applicant's identity is kept fully confidential until the first meeting with the Commission. After the first meeting, the applicant's identity can be kept confidential while the Commission investigates but, under the CLP, the applicant must act as a witness in proceedings against the other cartel members. Therefore, the applicant's identity will be revealed if the Commission refers the matter to the Tribunal.

The Commission keeps information, evidence and documents provided by the applicant secret and confidential. However, it reserves the right to use this material in subsequent Tribunal proceedings against the other cartel members.

As stated above, however, parties can request that information furnished by them to the Commission be kept confidential.

**27 Successful leniency or immunity applicant**

What is needed to be a successful leniency or immunity applicant?

For full immunity to be available from administrative penalties and prosecution under the Competition Act, the following conditions must be met:

- The applicant is, or was, a member of a cartel and is the first member of that cartel to confess its anti-competitive conduct to the Commission.
- Prior to the immunity applicant alerting the Commission to the anti-competitive conduct, the Commission was not aware of that conduct, unless the Commission:
  - is aware of the anti-competitive conduct but has insufficient information to start proceedings against the cartel members; and
  - has already started an investigation into the anti-competitive conduct but, having assessed the matter, considers that it has insufficient evidence to prosecute the offenders under the Competition Act.
- The applicant must immediately stop the cartel activity or act as directed by the Commission.
- The applicant makes a full and frank disclosure of all relevant information and evidence to the Commission.
- The applicant must cooperate with the Commission during its subsequent investigation into the remaining cartel members' activities.

- The applicant must be willing to act as a witness in any subsequent proceedings against the other cartel members.
- The applicant must not destroy, falsify or conceal information relevant to cartel activity and must not make a misrepresentation concerning the material facts of such activity or act dishonestly.
- The applicant must not alert other cartel members of the investigation that results from its successful application for immunity.

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### 28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

The Competition Act allows for the parties to a complaint to either prosecute the matter before the Tribunal or to enter into a settlement agreement with the Commission. The Tribunal, without hearing any evidence, may confirm such an agreement as a consent order. Once confirmed by the Tribunal, a consent order has the effect of an order of the Competition Tribunal.

A consent order does not prevent a complainant from pursuing a civil claim for damages against a respondent. To the contrary, a guilty plea in a consent order itself grounds a cause of action for a civil claim against the respondent.

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### 29 Corporate defendant and employees

What is the effect of leniency or immunity granted to a corporate defendant on its employees?

The CLP does not provide for leniency of individuals or natural persons, except where such person is the 'firm' involved in an economic activity (for example, a sole trader or a partner in a business partnership).

At present, liability for a company's conduct does not extend to its employees. However, as stated above, the Bill proposes to introduce personal liability for individuals who cause a firm to engage in cartel activity or knowingly acquiesce in the firm engaging in cartel activity.

One of the concerns arising from the provisions of the Bill is that the CLP will not provide immunity to individuals. Since this is a criminal matter, the decision as to whether or not to prosecute an individual will fall to the National Prosecuting Authority (a decision entirely independent of the Commission and the CLP).

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### 30 Cooperation

What guarantee of leniency or immunity exists if a party cooperates?

In terms of the CLP, the Commission has discretion to grant leniency or immunity to a self-confessing cartel member.

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### 31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

The following procedure must be followed.

Applications are usually made in writing and delivered to the Commission by fax or email. However, the CLP now allows applicants to request to make an oral application. The Commission has discretion to accept or refuse such a request, on a case-by-case basis. The applicant will in any event be required to provide the Commission with all existing written information, evidence and documents in its possession regarding the alleged cartel.

The Commission will notify the applicant within five days of receiving the application (or longer, if this is reasonable in the circumstances) as to whether it is the first member of the cartel to apply for leniency in relation to the same conduct.

If the Commission has notified the applicant that no other firm has already made an application concerning the same conduct, the applicant must arrange a first meeting with the Commission, within five days of receiving notification (or longer, if reasonable). The applicant must reveal its identity at the first meeting. The meeting's purpose is for the Commission to evaluate whether the applicant can qualify for leniency. The Commission can examine relevant documents at this meeting but cannot make copies.

The Commission must notify the applicant in writing of whether it qualifies for leniency within five days of the first meeting (or longer if reasonable).

If the applicant qualifies for leniency, a second meeting is arranged, at which the applicant produces all relevant evidence and documentation and allows the Commission to make copies. The Commission then decides whether or not to grant conditional immunity.

If the Commission is satisfied that the applicant has met the requirements for full immunity, the Commission must call a final meeting. Full immunity is granted at this meeting and confirmed in writing.

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### 32 Ongoing policy assessments and reviews

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

The revised CLP has been in effect for approximately six months. There are no assessments or reviews currently taking place.

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### Defending a case

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#### 33 Representation

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

As set out above, the Competition Act does not currently provide for the liability of employees in their personal capacity. However, the Bill will introduce criminal liability of directors and other senior employees.

The Bill does not make specific mention of the legal representation of employees and it is expected that there will be no absolute bar against joint representation.

However, it is pointed out that this may not always be in the best interests of the employee or the company as their interests may not be aligned. For example, under the Bill, a corporation may enter into a consent agreement and admit guilt instead of opposing a complaint. However, this is not in the best interest of employees, as the admission of guilt by the corporate entity will serve as a basis for the competition authorities to prosecute the employee. Accordingly, it would be prudent to advise an employee to obtain independent legal advice as soon as it becomes known that the corporation and its employees are under investigation.

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#### 34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

Yes. Subject to the normal ethical obligation to avoid a conflict of interest, counsel may represent multiple corporate defendants.

**Update and trends**

The most important development in cartel enforcement in South Africa is the Bill.

There has been widespread opposition to the introduction of the Bill. One of the most controversial sections to be introduced will provide for the personal and criminal liability of individuals who cause the firm to engage in cartel activity. Another controversial provision is a section dealing with complex monopolies. In this regard, much

debate has been focused on the efficacy of such a section.

It is also noteworthy that the Competition Commission has become more aggressive in its prosecution of cartels. This has resulted in more firms seeking leniency, resulting in greater success for the Commission (in particular, more consent agreements have been entered into).

**35 Payment of legal costs**


May a corporation pay the legal costs of and penalties imposed on its employees?

As indicated above, there is currently no provision in the Competition Act for individual penalties. However, the Bill provides that a firm may not pay the fine imposed on a person held criminally liable in terms of the provisions, nor may the firm indemnify, reimburse or in any way defray the expense occurred by such a person in relation to being held criminally liable.

**36 Getting the fine down**

What is the optimal way in which to get the fine down?

The most effective way to reduce a fine is by successfully applying for corporate leniency. However, if this is not possible, the optimal way in which to reduce the fine is to enter into a consent agreement with the Commission as soon as possible and to fully cooperate with their investigation. The factors set out in question 27 above are also guidelines for reducing the fine.

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# Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice.

The information in each table has been supplied by the authors of the relevant chapter.

South Africa				
Is the regime criminal or civil/administrative?	What is the maximum sanction?	Is there a leniency programme?	Does the regime extend to conduct that takes place outside the jurisdiction?	Remarks
The Act currently only provides for civil and administrative enforcement. However, criminal sanctions for individuals will be introduced with the enactment of the Bill.	The maximum administrative sanction is 10% of the turnover derived by the contravening firm for its preceding financial year.	Since May 2008, a formal corporate leniency programme has been introduced.	The jurisdictional test is whether the conduct amounts to economic activity within or having an effect within South Africa.	The competition authorities have been much more vigilant in their approach to the enforcement of cartels during the past 12 months. This is evidenced by the number of consent orders entered into with contraveners as well as the increase in the fines imposed.

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