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THE FIGHT AGAINST CARTELS: AN EVALUATION OF THE CURRENT AND PROSPECTIVE LEGISLATIVE FRAMEWORK FOR COMBATING CARTELS IN SOUTH AFRICA?

The recent exposure of extensive cartel activity throughout the South African market in the motor, bread, milling, milk, tyre and pharmaceutical industries has sparked a sense of outrage amongst various groups including the competition authorities, consumers and even trade unions. The sense of injustice is only heightened when the services or products in question are not considered luxury commodities, but rather basic needs or consumables. The ongoing level of prohibited cartel activity in the South African market might suggest that the legislative framework and punitive measures currently in force are not serving as a sufficient deterrent to curb anti-competitive conduct.

What is a cartel?

A cartel[1] is "an association by agreement (which would include an understanding [or concerted practice]) between competing firms [or firms in a horizontal relationship] to engage in

[1] Notably, the word "cartel" is not referred to in the Competition Act, 89 of 1998 (the "Act"). Cartels form part of restrictive horizontal practices in section 4 of the Act.

price fixing, division or allocation of markets, and/or collusive tendering".[2] Cartel activity occurs when people of the same trade or competitors decide to co-operate with one another, rather than to compete.[3]

What is the effect on consumers?

Studies suggest that cartel activities can lead to an average increase of 10 per cent of the selling price, with a corresponding reduction in output and choice of 20 per cent. In real terms, this could see South Africans paying 10 per cent more for individual products and/or services. This price increase can be particularly severe for poorer consumers when the products involved are basic commodities like bread, medicines and milk. Cartel activity is also considered a hindrance to development and innovation in the industries within which they occur.[4]

Why do competitors engage in such conduct?

The tendency for competitors to collude is driven by the increased profits that follow collusion. Posing as competitors, cartel members destroy competition and cause serious harm to economies and consumers. Collusion enables competitors to charge monopoly prices (or reduce output) and make monopoly profits, collectively, as well as individually.[5] Co-ordination between competitors enables a group of firms collectively to exert and abuse market power, which they might not be able to do alone.[6]

How does the South African Competition Commission aim to eradicate cartel activity – at present?

As a result of the serious consequences of cartel activity, particularly on underprivileged

[2] See International Competition Network *Anti Cartel Enforcement Template: South Africa*. (31 October 2005), available at http://www.compcom.co.za/resources/South%20Africa.pdf. [Accessed on 30 May 2008].

[3] Neuhoff et al (Ed) *A Practical Guide to the South African Competition Act* (2006) p 62.

[4] See Competition Commission of South Africa, Corporate Leniency Policy (the "CLP") available at www.compcom.co.za/resources/Government%20Gazette_111.doc [Accessed on 30 May 2008].

[5] Neuhoff et al (Ed) *A Practical Guide to the South African Competition Act* (2006) p 62.

[6] Neuhoff et al (Ed) *A Practical Guide to the South African Competition Act* (2006) p 62.

consumers, the South African Competition Commission (the "Commission"), like many other competition authorities, has prioritized the eradication of cartels as being one of the most egregious contraventions of competition legislation.[7] Cartel activity constitutes a *per se* prohibition in terms of section 4(1)*(b)* of the Competition Act[8] (the "Act") which provides that:

> "(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if–
>
> *(a)* …
>
> *(b)* it involves any of the following restrictive horizontal practices:
>
> (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
>
> (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
>
> (iii) collusive tendering."

Notably, section 4(1)*(b)* of the Act is an outright prohibition or a *per se* offence, which does not permit an enquiry into "technological, efficiency or other pro-competitive gains" as a defence to such activity, as is provided for under 4(1)*(a)* of the Act, the rule of reason prohibitions. Firms (which include a person, partnership or trust) found in contravention of the Act may be subject to an administrative penalty or fine, even for first-time offenders.[9] The administrative penalty may not exceed 10 per cent of the firm's annual turnover generated in, into or from South Africa during its preceding financial year.[10] The Act sets out a wide range of factors that must be considered in determining an appropriate penalty which include: the nature, duration, gravity and extent of the contravention; any loss or damage suffered as a result of the contravention; the behaviour of the respondent; the market circumstances in which the contravention took place; the level of profit derived from the contravention; the degree to which the respondent has co-operated with the competition authorities; and whether the respondent has

[7] Whish 5th ed *Competition Law* (2003) p 453.

[8] Act 89 of 1998.

[9] See section 59 of the Act read with section 1(1)*(x)* of the Act.

[10] Section 59(2) of the Act.

previously been found in contravention of the Act.[11] The competition authorities are also entitled to order divestiture;[12] order that the firms concerned supply or distribute goods to another party on terms reasonably required to end a prohibited practice; or declare an agreement, or portion thereof, to be void.[13]

Over and above the fine imposed by the competition authorities, there is nothing in the Act that prevents parties aggrieved by cartel activity from applying individually or collectively for damages from a civil court for conduct found to be in contravention of the Act. This issue was to be addressed by the Pretoria High Court in the *Nationwide Airlines – South African Airways* case heard on 13 February 2008, but the matter was settled out of court before judgment was handed down. To date, there have been no successful claims for damages brought in the civil courts and no established jurisprudence on the quantum of damages which could be sought in these circumstances. However, regardless of the outcome reached by a court, such civil action may not prove useful to individual consumers, who will still face the many difficulties that emerge from this type of litigation. This would include the difficulties associated with litigating against large corporate entities, the potential difficulties of calculating what the price would have been absent the collusion, and the precise extent of the consumer's harm in any individual circumstance.

Although there are limited criminal sanctions imposed by the Act;[14] partaking in cartel activity is currently not deemed a criminal offence. As such, firms who contravene the Act may be liable for the payment of a fine, but the individuals behind the firms will not incur any criminal sanction for partaking in the cartel.

Cartels are detected either as a result of a complaint made to the Commission by any interested party or through a Commission-initiated investigation.[15] In order to facilitate the

[11] Section 59(3) of the Act.

[12] Section 60 of the Act.

[13] See section 58 of the Act read with Rule 42 of the Rules of the Competition Tribunal of South Africa (Government Notice in *Government Gazette* No. 22025 vol 428 on 1 February 2001).

[14] Sections 69 to 75 and 77 of the Act.

[15] Sections 49B(2)*(b)* and 49B(1) of the Act respectively.

detection and gathering of information related to anti-competitive conduct, the Commission has been given wide powers of search and seizure in terms of the Act.[16] The inherently secretive nature of cartels, however, usually makes this type of information very difficult to obtain.[17] As such, the Commission, on 6 February 2004,[18] issued the Corporate Leniency Policy ("the CLP")[19] in order to assist the competition authorities in obtaining information in respect of cartel activity within the South African market.[20]

The CLP outlines a process through which the Commission, in its discretion, may grant a self-confessing cartel member, who is first to approach the Commission, immunity or indemnity for its participation in cartel activity upon fulfilling specific requirements and conditions.[21] The CLP effectively incentivises parties to the clandestine activities to provide incriminating information to the Commission themselves.

Under the CLP, a cartel member who is the first in line to approach the Commission qualifies for leniency by: providing complete and truthful disclosure of all information available to it; offering full, expeditious and continued co-operation to the Commission; immediately ceasing the cartel activity or acting as directed by the Commission; not being the instigator or not having coerced other firms to participate in the cartel; and not alerting former cartel members that it has applied for leniency. A CLP applicant is required to submit a written application, and the Commission retains the discretion to grant or refuse the application, regardless of whether the applicant meets all of the requirements or not.

If the participant in the cartel activity is successful, the firm will not need to appear before the Competition Tribunal (the "Tribunal"), nor will it be liable to pay a fine. As such, the CLP allows the whistle-blower firm to escape the administrative penalty and other sanctions

[16] Chapter 5 of the Act. See also sections 46 to 49 of the Act.

[17] The Competition Commission's Corporate Leniency Policy (the "CLP") available at www.compcom.co.za/resources/Government%20Gazette_111.doc at para 2.4 [Accessed 30 May 2008].

[18] 6 February 2004.

[19] Notably, the CLP is based on a model adopted in the United States.

[20] See section 79 of the Act.

[21] The CLP at para 2.5.

traditionally imposed on cartel members for such behaviour.[22]

The CLP is primarily aimed at cartel activity that is not known to the Commission except in the following circumstances:

- where the Commission is aware of the conduct but has insufficient information, and no investigation has been initiated. The applicant that has sufficient information or evidence to enable the Commission to institute proceedings may be considered for leniency under the CLP; and/or
- in respect of pending investigations and investigations already initiated by the Commission, if the Commission, having assessed the matter, is of the view that it has insufficient evidence to prosecute and one of the firms under investigation could be used as a key witness in the prosecution of other firms involved in cartel activity.[23]

A firm that approaches the Commission after another firm has already applied for, and been granted immunity, will not quality for immunity under the CLP. If other members of the cartel still wish to disclose their involvement in a cartel to which an applicant has already confessed, the Commission may, however, incentivise such disclosures through other processes outside the CLP. This could result in the reduction of the administrative penalty, or the conclusion of a settlement agreement or a consent order; sometimes on terms more favourable than those that could be imposed through prosecution by the Commission of an unco-operative cartel member. Also, if, the matter is referred for adjudication before the Tribunal, the Commission may consider asking the Tribunal for favourable treatment[24] of applicants who were not first in line to approach

[22] The CLP at para 5.9.

[23] The CLP at para 5.5.

[24] Favourable treatment implies substantial or minimum reduced fine from the one prescribed, which will be dictated by the nature and circumstances of each case, as well as the level of cooperation given.

the Commission, but were co-operative during the Commission's investigation.[25]

Where a firm is unsure whether or not the CLP would apply to a particular conduct, it may approach the Commission on a hypothetical basis for clarity. This may be done telephonically or in writing. The firm concerned may choose to remain anonymous if it wishes to.[26]

Although the CLP is considered to be overall a success, the CLP is not without its shortfalls. In 2007, the Commission, by its own admission, identified six main areas for reconsideration in its CLP review discussion paper.[27] The first identified area of concern was that provision was not made for the CLP in the Act or in the Rules of the Commission.[28] This raised concerns in respect of the legal standing of the CLP and any agreements entered into in terms thereof. The second concern was that the wording of the CLP had been interpreted as conferring an unfettered discretion on the Commission in respect of the granting of immunity on leniency applicants and that the Commission was not bound to grant immunity, even where firms fulfilled all the requirements contained in the CLP. The result of the uncertainty could be that a potential applicant might be discouraged from applying for leniency because they would not necessarily qualify for its benefits. Thirdly, the CLP provides that leniency applications be made only in writing, in order to be considered for immunity. The concern here was that applicants would again be reluctant to apply for leniency and disclose incriminating information in writing that could be subject to discovery in any subsequent proceedings. The CLP also excludes from qualification for immunity the instigator of a cartel; an unnecessary limitation in the circumstances. A fifth consideration is that concern was raised that the CLP did not provide for "markers" – where an applicant can contact the Commission to establish whether leniency would be available and put down a marker to reserve its place in line while collating the requisite information for a leniency application. Finally, procedurally there was no guidance in the CLP regarding who a potential leniency applicant should approach regarding their application to the

[25] The CLP at para 5.6.

[26] The CLP at paras 8.1 and 8.2.

[27] Competition Commission of South Africa *Corporate Leniency Policy Review Discussion Paper* (September 2007).

[28] Rules of the Competition Commission of South Africa (Government Notice No. 22025 in Government Gazette vol 428 on 1 February 2001).

Commission.

However, despite the inadequacies of the CLP identified above, the competition authorities have recently enjoyed a great deal of success in the context of detecting and penalising cartel activity within the South African market. The very recent findings in the pharmaceutical and bread industries illustrate the seeming success of both the legislation and the CLP in action.

In February 2008, the Commission referred its findings in respect of collusive conduct against Adcock Ingram Critical Care (Proprietary) Limited ("Adcock"), Dismed Criticare (Proprietary) Limited and Thusanong Health Care (Proprietary) Limited to the Tribunal for prosecution.[29] The referral followed an investigation into collusive tendering and market division in the market for the supply of intravenous medical products to public and private hospitals between 1993 and 2007. Subsequent to the referral, Adcock and the Commission concluded a consent agreement in terms of which Adcock admitted its involvement in a cartel and agreed to pay an administrative penalty of eight per cent of turnover in the preceding financial year in the amount of ZAR53 million. Fresenius Kabi South Africa (Proprietary) Limited ("FKSA"), was also a subject of the investigation, but confessed its involvement in the cartel and agreed to co-operate with the Commission's investigation. As such, it was granted immunity from prosecution in terms of the CLP. Much of the success from the prosecution perspective emerged from the information provided by FKSA, the whistle-blower in this instance.

Similarly, on 12 November 2007, and subsequent to the Commission's investigation into cartel activity in the bread and milling industry in the Western Cape, Tiger Brands Limited ("Tiger Brands") reached a settlement agreement with the Commission in respect of its participation in bread cartels.[30] Tiger Brands agreed to an administrative penalty of 5.7 per cent of turnover for the preceding financial year in the amount of ZAR98 million. Premier Foods and

[29] See Media release 1 from the Competition Commission of South Africa dated 11 February 2008 available at www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202008/MR01_2008.doc [Accessed on 30 May 2008].

Tiger Brands applied for immunity from prosecution under the CLP. Premier Foods was granted conditional immunity in respect of the bread and milling industries and Tiger Brands was awarded immunity only in respect of the milling cartel.

Aside from these two very recent and publicised cartel enforcement cases, the competition authorities have also been responsible for collecting enormous amounts of revenue, amounting to many millions, from cartel members in various other industries including the airline,[31] scrap metal[32] and the motor industries,[33] through either agreed-upon consent agreements or the unilateral imposition of the administrative penalty through prosecution. The outcome of the investigations into the milk industry will be revealed only later this year in September, when the Tribunal will hear a cartel case against eight dairy processors.[34] Notably, Clover has, however, recently applied to have the Tribunal hearings set for September quashed on the basis that the Commission's receipt of the complaint and the referral exceeded a year. Clover has argued that as a result, the complaint has expired, or prescribed. The outcome of this application could set an important precedent for how anti-competitive complaints are handled in future.

In light of the numerous successes enjoyed by the competition authorities, the current cartel enforcement framework is working, despite its shortfalls. There is, however, still a widely held

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[30] See Press Statements of the Competition Commission of South Africa dated 12 November 2007 available at www.compcom.co.za/resources/Media%Releases/Media%20Releases%202007/PR08_2007.doc [Accessed on 30 May 2008].

[31] See Media Release 17 of the Competition Commission of South Africa dated 24 May 2006 available at http://www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202006/MR03_2006.doc [Accessed on 30 May 2008].

[32] See Press Statement 2 of the Competition Commission of South Africa dated 22 July 2007 available at www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202007/PR02_2007_scan.pdf [Accessed on 30 May 2008].

[33] See Press Statement 2 of the Competition Commission of South Africa dated 7 December 2005 available at www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202005/PS02_2005.doc [Accessed on 30 May 2008]. Notably, there has been recent suggestion that this hearing may not in fact occur.

[34] See Press Statement 3 of the Competition Commission of South Africa dated 1 February 2008 available at http://www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202008/PR03_2008.doc [Accessed on 30 May 2008].

view that more should be done to curb cartel activity further, and disincentivise cartel participants from engaging in such conduct. The two central areas of criticism have centred on the inadequacies of the CLP and the extent of the current penalties imposed on cartel participants in respect of both the companies and individuals involved. Some of these concerns may be addressed in the proposed changes to the legislative regime contained in the Draft Competition Amendment Bill (the "Amendment Bill"), published on 24 April 2008, and the revised terms of the CLP.

How does the South African Competition Commission aim to eradicate cartel activity – looking forward?

(i) The inadequacies of the CLP

The salient terms of these proposed legislative changes, in so far as they apply to cartel activity, are set out below. Section 50(1) of the Amendment Bill incorporates the CLP as follows:

> "(1) At any time after initiating a complaint, the Competition Commission may–
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> *(a)* partially or completely excuse any particular respondent from the complaint, with or without conditions, if the Competition Commission considers it reasonable and just to do so; or
>
> *(b)* refer the complaint to the Competition Tribunal in respect of any respondent who has not been excused in terms of paragraph *(a)*; …"

The codification of the CLP in the Amendment Bill is complemented by the publication of a gazetted and revised version of the CLP, dated 23 May 2008 (the "gazetted CLP"), which is aimed at addressing the shortfalls of the CLP identified above.[35] The gazetted CLP is to have immediate effect; it replaces the previous CLP and is applicable in respect of all pending and future applications for leniency before the Commission.[36]

In substance, the terms of the gazetted CLP and the "old" CLP are similar, but for the following significant additions. The gazetted CLP fetters the discretion given to the Commission,

[35] See Government Notice 628 in *Government Gazette* No. 31064 on 23 May 2008 (the "gazetted CLP").

[36] See section 1.2 of the gazetted CLP.

in so far as the Commission now appears to be compelled to award leniency if all of the prescribed requirements contained in the CLP are met.[37] The gazetted CLP provides that leniency seekers may make their leniency application submissions orally.[38] It is, however, in a practical sense, quite unclear how this will alleviate applicants' concerns of information being used later in discovery; as the provision requires that the oral submissions be recorded and transcribed in writing in any event. The gazetted CLP also provides that the instigator of a cartel is no longer excluded from applying for immunity, and that a prospective leniency applicant may apply in writing to the Manager of the Enforcement and Exemptions Division for a marker in its leniency application.[39] Aside from the above-mentioned specific changes, the gazetted CLP overall adds much-needed guidance, both substantively and procedurally, to the CLP and significantly addresses the shortfalls of the CLP identified by the Commission in 2007.

The upshot of the codification and revision of the CLP through the Amendment Bill and the gazetted CLP is that the leniency application process has been "fine tuned" and should operate more optimally going forward. In many senses, the gazetted CLP seems to be a well-placed and significant improvement on the legislative framework for detecting and prosecuting cartel activity and as such a most satisfactory outcome to the critics of the "old" CLP. Admittedly, there may be a legitimate concern that the full benefit of the gazetted CLP is inextricably linked to the date of enactment of the Amendment Bill (through section 50), which at this stage is still undetermined. But even this issue does not seem to be one of great concern, in so far as the enactment of the Amendment Bill seems imminent. The second issue, being the penalties imposed on cartel participants is, however, slightly more complex.

(ii) The extent of the penalties imposed on cartel participants

It is a commonly held view that one of the most influential starting points to disencentivise undesirable conduct is through increasing punitive measures. But within this context, one needs

[37] Section 5.4 read with section 10.1 of the gazetted CLP.

[38] Section 15 of the gazetted CLP.

[39] Section 12 of the gazetted CLP.

to define carefully the kind of punitive measure that will be effective in the particular circumstances. It would seem that the dti (formerly the Department of Trade and Industry) has over the last while been engaging with this very issue, and its response to the perceived need to increase punitive measures for anti-competitive behaviour is contained in the provisions of the Amendment Bill.

For many, the most obvious starting point to strengthen the punitive sanctions in respect of cartel activity would have been to amend the cap placed on the administrative penalty imposed on firms, currently set at 10 per cent of the revenue of the firm over the previous financial year,[40] to a percentage of revenue for the *entire* period over which the cartel was operational. It is perhaps surprising that this change was not provided for in the Amendment Bill, and the reasons for electing not to do so are, at this stage, unclear. Although this kind of amendment could have served as a useful deterrent to cartel activity; and perhaps should have been amended, in the light of comments which appear below, related to the usefulness of imposing monetary fines to the *consumer* in the South African context, nothing more needs be said in this regard.

The next most obvious means of strengthening the legislative regime would be to hold those individuals involved in cartel activity personally liable for their conduct. In respect of this issue, section 73A(1) of the Amendment Bill provides that personal liability may be imposed on persons causing or permitting a firm to engage in a cartel in the following circumstances:

> "A person commits an offence if, while being a director of the firm or while engaged or purporting to be engaged by a firm in a position having management authority within the firm, the person–
>
> (a) was **responsible** for causing the firm to engage in a prohibited practice in terms of section 4(1)*(b)*; or
>
> (b) **knowingly acquiesced** in the firm engaging in a prohibited practice in terms of section 4(1)*(b)*." [My emphasis.]

For purposes of this section, "knowingly acquiesced" means acquiesced while having

[40] Section 59(2) of the Act.

actual knowledge of the conduct in the firm, or being in a position in which the person ought reasonably to have had actual knowledge of the facts; or to have investigated the matter to an extent that could have provided the person with actual knowledge; or to have taken other measures which could reasonably be expected to have provided the person with actual knowledge.[41] A person may be prosecuted for an offence either if the firm in question has acknowledged in a consent order that it engaged in a prohibited practice,[42] or the competition authorities have made a finding that the firm has engaged in a prohibited practice.[43] A finding of a prohibited practice by the competition authorities is considered to be conclusive evidence of the fact that the firm has engaged in that conduct. Section 74 of the Amendment Bill provides further that a contravention of the Act will be liable to a fine not exceeding ZAR500 000.00, or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment. In respect of the addition of a further monetary sanction imposed on the individuals involved in cartel activity, the following points must be kept in mind:

Firstly, in respect of the consumer benefit of cartel combating, it is noteworthy that all money obtained by the Commission through the imposition of the fine, either on an individual or on a company, is placed in the coffers of the National Revenue Fund.[44] Notionally, the public at large could, or should, benefit from the proceeds of the Commission's collections through government spending on basic infrastructure and the like. This assumes, however, that government spends monies obtained from the National Revenue Fund efficiently, but for many South Africans, the experience expected is not necessarily the one obtained. The actual end result of the imposition of an administrative penalty from the consumer perspective is that more hard-earned consumer money may ultimately end up in the "Bermuda Triangle of Government Spend", never to be seen again and unlikely to be returned to the consumer pocket. From a commercial perspective, it also seems likely that the fine imposed will be provided for in the companies' cost of production and paid for again by the consumer in the long run, in any event.

[41] Section 73A(2) of the Draft Competition Amendment Bill, published on 24 April 2008 (the "Amendment Bill").

[42] As defined in section 4(1)*(b)* of the Act. See also Section 73A(3) of the Amendment Bill.

[43] As defined in section 4(1)*(b)* of the Act. See also Section 73A(3) of the Amendment Bill.

[44] Section 213 of the Constitution of the Republic of South Africa.

Within this context, consumers are left only with the potential benefit of promised future reprieve of decreased prices. But the consumer may remember that in the wake of the finding of collusion in the bread industry, prices in fact increased.[45]

Secondly, there is the question of whether or not the imposition of a financial penalty on a director's or senior management official's pocket will serve as a real or effective deterrent to cartel participants. It seems that the penalty amount proposed of ZAR500 000.00 might not reasonably be considered a sufficient amount significantly to deter a would-be cartel participant, in so far as the amount "lost" is relatively nominal in comparison to the large profits generally derived from cartel behaviour or earned by high-ranking staff officials in large companies. As such, it seems that overall the inclusion of a further monetary penalty in the circumstances will neither benefit the consumer in any meaningful sense nor serve as an effective deterrent to the human players behind the firms involved. Overall, the proposed amendments to the Act from this perspective may add little effective relief to the South African consumer.

Fortunately, however, the Amendment Bill has one final and redeeming sting in its tail - the introduction of a criminal sanction to be imposed on individuals for their participation in cartel activity. It seems trite to say that the potential for imprisonment is generally considered a very effective means of deterring unaccepted behaviour and for most, a more compelling deterrent than any fine, no matter how large.[46] In light of the comments made above in respect of the seriousness of the effect of cartel activity – particularly on the underprivileged – the seeming numbers of firms involved in cartel activity, and the usefulness/significance of the financial sanctions imposed, it seems that the imposition of a criminal sanction in this context might provide an effective deterrent and necessary sanction in the circumstances.

There are two main concerns that relate to this proposed amendment. One is the mere effect that the imposition of criminal sanctions on directors may have on business directorships in

[45] Press statement 2, dated 16 February 2008, available at www.compcom.co.za/resources/media2008.asp?level=1&child=1 [Accessed 7 March 2008].

[46] See Baker "The use of Criminal Law Remedies to Deter and Punish Cartels and Bid-rigging" 69 *George Washington Law Review* (2001) 693.

general, and the other a more specific concern regarding the exact structure of the proposed wording in the Amendment Act. Although both concerns raise legitimate and critical questions, the issues they raise do not seem insurmountable or lead one to conclude that the imposition of a criminal sanction should not be introduced in the circumstances. Each is dealt with below.

Concern has been raised that criminal sanctions in this context would only result in fewer directorships being accepted, as the risks would be too great, with a concomitant result that there would be a general decrease in skilled leadership in business. Although there may be some merit in this argument; the concern seems over-stated. Criminal sanctions have been acceptably imposed in other business contexts for fraud and the like and in other foreign jurisdictions, including the United States[47] and the United Kingdom,[48] both of which consider imprisonment an acceptable sanction in the cartel context. The trick to a successful and effective criminal sanction seems to lie in defining specifically under what circumstances one may be held criminally liable for cartel conduct and when those involved may acceptably escape the most extreme form of punishment, being imprisonment; and accepting that not every infringement by an individual will or should result in imprisonment.

Related to this point, although identified separately above, section 74 of the Amendment Bill is on the face of it open to criticism for being potentially vague on the specific circumstances under which individual participants involved in cartels would be placed behind bars and could be legitimately criticised for placing rather skeletal guidelines for application of a serious sanction like imprisonment. Notably, the South African sanction of up to 10 years is a marginally higher imprisonment threshold than those contained in other similar jurisdictions. In some senses this is a rather serious concern when one comprehends the seriousness of the sanction and that imprisonment is considered one of the most serious invasions of one's personal liberties in the constitutional context. But the scant dressings of new legislation are not particularly new within the legal system, and it seems feasible that section 73A(1) can and will be further fleshed out and perhaps narrowed by the judiciary over time on a case-by-case basis, using interpretations

[47] The Antitrust Criminal Penalty Enhancement and Reform Act, 2004.

[48] Section 188 of the Enterprise Act, 2002.

adopted from the text of the Amendment Bill, precedent, and other comparable contexts – a legislative reality quite common in the circumstances, although admittedly not ideal. Overall, the introduction of a criminal sanction on individual cartel participants is undoubtedly an important and necessary means of deterring cartel players and falls in line with the approaches adopted in many other jurisdictions. However, the implementation of this sanction may be made more difficult as a result of the lack of specific guidance and consideration provided by the Amendment Bill.

Any questions or comment on the content of this *Sibergramme* may be directed to Robert Legh at rlegh@bowman.co.za.