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## Competition's Cardinal Sin – Cartels

By Dominique Arteiro, Director and Mmadika Moloi, Associate

Legal Brief

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The competition authorities appear to be on a drive to eradicate cartels. Not a week seems to go by without some announcement in the press of the Competition Commission (“Commission”) uncovering another cartel. The Commission has dealt with several cases involving cartel behaviour. Cartels have been uncovered in the airline, steel, milk, bread, piped gas and petroleum industries, and even the bicycle industry, to mention a few.

### What is a Cartel?

A cartel is comprised of two or more competitors in a particular market co-operating (or co-ordinating their actions) with one another in order to achieve an unlawful anti-competitive effect. Members of a cartel are often aware that their participation in the cartel is not aimed at the attainment of any lawful object and therefore their conduct is usually not governed or regulated by a written contract. The members of a cartel often act in concert on the strength of a so-called gentlemen’s agreement. The Competition Act, No 89 of 1998 (“the Competition Act”) recognizes this clandestine feature of a cartel and thus any “contract, arrangement or understanding, whether or not legally enforceable” between competitors is sufficient to give rise to a cartel.

As a result of the secretive manner in which cartels typically operate, it is often difficult for the competition authorities to detect a cartel. In an example mentioned in a recent Commission newsletter the *modus operandi* was that the cartel members referred to one another by reference to a number and the agreed percentages of the market that each cartel member was entitled to.

Therefore, any understanding between competitors involving any form of cooperative action between them regarding pricing or market division, which has the effect of replacing their independent action, is likely to constitute a contravention of the Competition Act. In certain circumstances, even a joint venture or a consortium could constitute a prohibited cartel.

### What type of behaviour is prohibited?

Cartel behaviour is classified as a *per se* prohibition in the Competition Act as there is no legal justification or defence for participating in a cartel. As such, it could be said that cartel conduct is one of the most heinous of competition law contraventions.

The Competition Act prohibits competitors from:

- ▶ directly or indirectly fixing prices of goods or services;
- ▶ dividing markets by allocating customers, suppliers, territories or specific types of goods or services; or
- ▶ collusive tendering.

The Competition Act also prohibits competitors from fixing a trading term for the supply or sale of a product or service. Competition authorities are generally speaking suspicious of the following conduct:

- ▶ competitors implementing price increases or decreases in the same amounts or at similar times;
- ▶ the exchange of price lists between competitors;
- ▶ competitors' market shares remaining reasonably constant over extended periods of time; and
- ▶ detailed public announcements relating to prices or terms of supply, which go beyond what is normally expected in the context or results presentations or announcements to shareholders.

Collusive tendering occurs in the context of responding to tenders, whether those requests for proposals are issued by government or by private enterprise, for the provision of goods or services. The members of a cartel will decide amongst themselves which member will submit the lowest bid, which usually ends up being the winning bid. The purpose is to allocate tenders amongst cartel members over a period of time so that each member obtains a share of the market, at prices acceptable to cartel members. The end result is that prices are maintained at an artificially high level, and not determined naturally by the level of competition in the particular market.

#### Punishment for cartel offences

A firm involved in an unlawful collusive or cooperative arrangement with its competitors could be given a fine of up to 10% of its annual turnover in or into South Africa. The penalties which have been imposed in the past are severe, as illustrated by the following table:

		R
2004	SA Medical Association	900,000
2004	Hospitals Association of SA	4,500,000
2004	United SA Pharmacies	250,000
2004	The Institute of Estate Agents of SA	522,000
2004	Board of Healthcare Funders of SA	500,000
2005	USA Citrus Alliance	400,000
2006	South African Airways	40,000,000
2006	Lufthansa	8,500,000
2006	Zip Heaters	78,500
2007	Tiger Brands	98,000,000
2007	Nedschroef Jhb	200,000
2007	CBC Fasteners	300,000
2008	Aveng	45,000,000
2008	Lancewood	100,000
2008	Food Corp	45,000
2008	Ansac	10,000,000
2008	Adcock Ingram	54,000,000
2008	Dismed	1,200,000
2008	Thusanong	287,415
2008	Reclam Group	146,000,000
2009	Sasol	250,000,000

#### How are cartels uncovered?

Given that a cartel is usually characterised by 'cloak and dagger' behaviour by its members, cartels are usually uncovered by a 'whistle blower' or during the Commission's investigation into mergers.

The Commission's Corporate Leniency Policy is one of its powerful weapons in uncovering cartels, as it allows a cartel member to turn 'state witness' and be granted immunity from prosecution in return for full and frank disclosure of all transgressions. The Corporate Leniency Policy is only granted to a self-confessing cartel member who is first to approach the Commission for immunity. The Corporate Leniency Policy does not provide for partial leniency. There is only one form of leniency, namely total immunity, which may be preceded by the granting of conditional immunity.

In instances where the Commission has insufficient information in respect of an initiated investigation, the Commission may decide to use the firms under investigation as its key witness in the ensuing prosecution.

A cartel member wishing to avail itself of the provisions of the Corporate Leniency Policy must provide complete and truthful disclosure of all evidence relating to the cartel activity in question, co-operate fully until the Commission's investigations have been completed, immediately cease all participation in the cartel activity, not alert the former cartel members about its leniency application and must not have been the instigator of, or coerced other firm(s) to be part of, the cartel activity.

#### What is the effect of cartel conduct?

Cartels artificially drive up prices and stifle competition in a particular market. Competitors may be forced out of that market and economic growth may be impeded.

A person who has suffered loss or damages as a result of a cartel is entitled to commence a civil action for damages once there is a guilt finding and confirmation by the Competition Tribunal or Competition Appeal Court that the conduct constituting the basis of the action was indeed a prohibited practice in terms of the Competition Act.

In light of the seemingly effective weeding out of cartels by the Commission, many firms are voluntarily performing competition compliance audits on their high risk business units or divisions, implementing compliance review programmes and are educating staff about the dangers of cartel behaviour which might, even unwittingly, be in the workplace. As the old adage goes, "prevention is better than cure".

## About the authors



### Dominique Arteiro

Title: Director  
Direct tel: +27 (0)11 535 8330  
Direct fax: +27 (0)11 535 8730  
Switchboard: +27 (0)11 535 8000  
Email: [darteiro@werksmans.com](mailto:darteiro@werksmans.com)

Dominique, a director of the firm, is a competition law specialist, with significant expertise in relation to the competition-related aspects of mergers and takeovers and dealing with complaints of alleged anti-competitive conduct. Dominique advises on all aspects of competition law including applications for leniency, for exemption from the Competition Act and compliance audits and programmes. Dominique, a qualified notary, has BA and LLB degrees from the University of Johannesburg as well as a Higher Diploma in Company Law from Wits University.



### Mmadika Moloji

Title: Associate  
Direct tel: +27 (0)11 535 8140  
Direct fax: +27 (0)11 535 8740  
Switchboard: +27 (0)11 535 8000  
Email: [mmoloi@werksmans.com](mailto:mmoloi@werksmans.com)

Mmadika is an associate at the firm with a strong focus on competition law. In addition to advising on the Competition Act, she has experience in due diligence investigations as well as issues relating to merger control. Mmadika has BA and LLB degrees from Wits University.

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Our firm also has a formidable reputation in commercial litigation and dispute resolution, as well as banking and finance. We are distinguished by the people, clients and work that we attract and retain - our more than 160 lawyers are a powerful team of independent-minded individuals who share a common service ethos.

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