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COMPETITION ALERT

IN THIS ISSUE

DIRECTORS AND MANAGERS OF COLLUDING FIRMS NOW FACE CRIMINAL SANCTIONS

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Proponents of the criminalisation of cartel conduct have long argued that administrative penalties levied on firms, regardless of the amount, are inadequate deterrents that are ultimately paid for by consumers.

In terms of the Amendment Act, company directors and those with management authority will not only commit a criminal offence if they cause the company to engage in price fixing, market division or collusive tendering, but will also be at risk if they 'knowingly acquiesced' to the company engaging in collusive conduct.



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Addressing Parliament on 21 April 2016, Minister Patel stated:

"We are confident that because our work on cartels over the past five years has given clarity in the market on what collusion entails and what kind of acts falls within prohibited practices, we can now step up our efforts to the next level in our endeavour to combat corruption, cartels and anti-competitive conduct that raise prices and keep businesses and new entrants out of local markets."

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In terms of the Amendment Act, company directors and those with management authority will not only commit a criminal offence if they cause the company to engage in price fixing, market division or collusive tendering, but will also be at risk if they 'knowingly acquiesced' to the company engaging in collusive conduct. According to the Amendment Act 'knowingly acquiesced' means 'having acquiesced while having actual knowledge' of the collusive conduct. However, it is expected that the courts will have to give further meaning to this concept given the gravity of a finding of criminal conduct against a person.

Although individuals may only be prosecuted under the new provision where a firm has acknowledged in a consent order that it has engaged in cartel conduct, or where the Competition Tribunal or the Competition Appeal Court has made a finding to this effect, critics have raised concerns about the rights of implicated individuals. Competition Tribunal proceedings are less formal than criminal proceedings, accordingly care will have to be taken to safeguard the rights of individuals during the investigation and hearing of collusion complaints.

It also remains to be seen whether the risk of criminal liability for individuals will chill the effectiveness of the Competition Commission's corporate leniency program, which has been widely lauded as an effective mechanism for the detection and prosecution of cartels. The Amendment Act does not allow for automatic immunity to be granted to individuals in firms that make use of the leniency program.

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Albert Aukema and George Miller

OUR TEAM

For more information about our Competition practice and services, please contact:



Chris Charter
National Practice Head
Director
T +27 (0)11 562 1053
E chris.charter@cdhlegal.com



Albert Aukema
Director
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com



Nazeera Mia
Senior Associate
T +27 (0)21 481 6337
E nazeera.ramroop@cdhlegal.com



Andries Le Grange
Director
T +27 (0)11 562 1092
E andries.legrange@cdhlegal.com



Naasha Loopoo
Associate
T +27 (0)11 562 1010
E naasha.loopoo@cdhlegal.com



Susan Meyer
Director
T +27(0)21 481 6469
E susan.meyer@cdhlegal.com



George Miller
Associate
T +27 (0)21 481 6356
E george.miller@cdhlegal.com



Natalie von Ey
Director
T +27 (0)11 562 1333
E natalie.von_ey@cdhlegal.com



Kitso Tlhabanelo
Associate
T +27 (0)11 562 1544
E kitso.tlhabanelo@cdhlegal.com

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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