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COMPETITION ALERT

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The conclusion of collusion – when is prohibited conduct too old for the commission to prosecute?

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The conclusion of collusion – when is prohibited conduct too old for the commission to prosecute?

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In the decision of *Competition Commission and Stuttaford Van Lines Gauteng Hub (Pty) Ltd and Others*, the Tribunal dismissed a case brought by the Competition Commission (Commission) against eleven furniture removal truck companies alleging price fixing by agreeing to charge a levy to customers to recover e-toll levies. The Tribunal found that although there was likely a collusive agreement, the prosecution of the matter was time-barred.

Relevant Facts

The matter concerned an alleged collusive agreement reached at a trade association meeting on 22 January 2014. The respondent attendees and members of the association were competitors in the market of furniture removal in Gauteng. A draft of the minutes of the meeting conveyed that a discussion arose about passing e-toll costs on to customers, and parties shared information about what charges they were imposing or thinking of imposing. The draft minutes indicated that it was “generally concurred” that a flat rate levy for e-tolls would be applied. However, the final minutes were amended to exclude such wording.

In February 2014, a legal opinion was solicited indicating the competition risk of the e-tolls discussion and was circulated among the members of the association on 10 May 2014. The Commission initiated its investigation on 8 February 2017.

The respondents raised the defence that the Commission’s referral was time-barred by the provisions of section 67(1) of the Act which prohibits prosecution of a complaint which was initiated more than three years after the practice has ceased. This was because the 22 January 2014 meeting took place more than three years before the 8 February 2017 initiation.

The Commission argued that the conduct had not ceased on 22 January 2014; that “because the respondents at the meeting had indicated variously what they might charge, ..., that influenced their later charging. [A]ny subsequent act of implementation was likely to have been influenced by this prior unlawful exchange.” The Commission had also asserted that the practice continued until at least the date of issue of the opinion, which essentially advised the respondents that the discussion at the meeting was likely a contravention of the Act.

Tribunal Analysis

On whether there was a collusive agreement, the Tribunal noted that, although the meeting minutes presented conflicting versions of events, and that “[although] it was not an agreement to fix a price in precise terms, [this] does not

The conclusion of collusion – when is prohibited conduct too old for the commission to prosecute?...*continued*

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detract from the conclusion that there was an agreement. When competitors reach an understanding to raise prices to consumers, whether by reference to an agreed price or an agreed price raising form of conduct, consumer welfare is adversely affected". The respondents having reached an understanding that they would pass such costs on to consumers sufficed to constitute a contravention of section 4(1)(b).

However, on the question of whether the prosecution was time-barred, the Tribunal found that *"there needs to be evidence of implementation that travels beyond the prescription date"* and that there be a causal link between the "implementation" and the collusive agreement – i.e. that the "implementation" was implementation of the agreement, and not conduct that occurred for different reasons.

The Tribunal found that the facts disclosed no nexus between the agreement reached at the meeting, and subsequent pricing practices of the respondents. The respondents had proven that the Commission failed to establish that the agreement had not "ceased" and was in existence within three years after initiation. The Tribunal thus had to conclude that the Commission's claim had prescribed.

Key Outcomes

The Tribunal has created quite a high burden in requiring evidence which proves implementation beyond the date of agreement and within the prescription period. However, it somewhat eased that burden by placing the onus on the respondents to show no such implementation took place or that implementation was not causally related to the agreement. The decision is not clear that this constitutes a formal shifting of the onus for all future prescription cases, or whether the Tribunal did so in this case purely to show that, even if the burden on the Commission were eased, it was not enough.

It is also notable that section 67(1) of the Act provides that a claim against collusive conduct prescribes three years after the collusive conduct ceases. Prohibited conduct that commences outside this three-year limitation period but can be shown to have continued beyond that date to a date less than three years after the initiation date, can still be the subject of a prosecution.

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