



COMPETITION LAW ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
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Where there's smoke, there's fire: The Competition Appeal Court clarifies when you have exited bid-rigging cartel

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On 10 February 2022, the Competition Appeal Court (CAC) in the case of *Cross Fire Management (Pty) Ltd v The Competition Commission of South Africa Cross Fire Management (Pty) [2022] CAC Case Nr. 192/CACFeb21* provided some clarity on when a party should be judged to have extricated itself from a bid-rigging cartel.

Cross Fire Management (Pty) Ltd (Cross Fire), a company operating in the fire protection sector, was a respondent in complaint proceedings brought against it by the Competition Commission (Commission). The Commission alleged that Cross Fire, together with four other fire protection companies, engaged in collusive tendering (i.e. bid-rigging) on numerous tenders throughout an extended time period in violation of section 4(1)(b) of the Competition Act 89 of 1998 (Act). Bid-rigging is a per se prohibited practice in which firms collectively act to subvert a competitive tender process, for instance by agreeing to submit offers at non-competitive levels (cover pricing) in favour of an identified preferred firm, or withholding a bid, in the hopes that the identified preferred firm will be awarded the tender. In this way, tenders might be rotated or allocated amongst cartel members according to their own manipulations, rather than through a more competitive "one-shot game".

The Competition Tribunal (Tribunal), in the initial hearing of the matter, found that Cross Fire violated section 4(1)(b) of the Act and imposed an administrative penalty of approximately R12,8 million. The case before the CAC was an appeal against the Tribunal's finding as far as it related to the merits and the penalty imposed.

The appeal ultimately turned on the central question of whether and when Cross Fire extricated itself from a pre-existing bid-rigging cartel. This question is relevant because, in terms of section 67(1) of the Act, read with *Pickfords Removals SA (Pty) Ltd v Competition Commission (CR129Sep15/PIL162Sep17) [2018] ZACT 109*, a complaint that has ceased more than three years prior to it being initiated is time-barred from being referred to the Tribunal for prosecution and, in line with the Constitutional Court's controversial

ruling in *Pickfords* (link to article discussing the case [here](#)), the Commission would have to seek condonation from the Tribunal to condone a referral of conduct outside of the time period.

WHEN HAVE YOU LEFT A BID-RIGGING CARTEL?

In this case, the CAC engaged in an analysis of a complex set of factual findings to hold that Cross Fire had extricated itself from the bid-rigging cartel by refusing to participate in collusive activity from a certain point onwards and that it had done so more than three years before the initiation of the complaint against it.

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Importantly, the CAC distinguished between the jurisprudence dealing with extrication from a price-fixing arrangement and that of a bid-rigging cartel. In a price-fixing arrangement (where competitors come together to agree to fix future prices) the standard for extricating oneself is one of "*clear and unambiguous distancing*" from a cartel. This means that a representative in a meeting with competitors cannot claim their silence during discussions, or failure to implement any agreement, as an indication that their firm did not participate in the cartel – positive distancing and communication to the members of the cartel of the fact are required to extricate itself from the cartel. This is because silence, without more, would indicate acceptance of the arrangement with other members who would then act accordingly. The CAC contrasted this situation with that of a bid-rigging cartel.

The CAC found that in a bid-rigging cartel, the offence stems from constant communication between members for each tender in which the preferred firm needs to be identified and the prices/terms of the cover bids be agreed, along with actual co-operative action (i.e. to submit a cover bid). This is in contrast to a price-fixing arrangement, where the fix is agreed at the outset and may persist for a future period (and every time an affected product is sold) without any further interactions between the members. Simply put, mere presence at pricing discussions is enough to enter a price-fixing cartel (which then persists until there is clear and express distancing) whereas a bid-rigging cartel (at least in the context under consideration) requires actual conduct to achieve a collusive outcome. Therefore, a firm's silence in a bid-rigging cartel coupled with a failure to assist in the conspiracy will present a defence that the prohibited conduct ceased after the last instance of providing a cover bid.

THE ISSUE OF CONDONATION

In an interesting side note, the Pickfords decision that confirmed that a referral outside of the three-year period could be condoned was handed down only after the Tribunal hearing in the Cross Fire matter. Accordingly, the Commission at the appeal stage before the CAC, and also in case the appeal was upheld, made an application to the CAC to condone the late initiation of the investigation in an attempt to avoid the section 67 time-bar.

The CAC held that, as an appellate forum and despite possessing a significant degree of powers to regulate its own procedure, it could not hear a condonation application for non-compliance with the Act as a court of first instance as its scope is limited to hearing appeals or reviews of matters adequately brought before the Tribunal. The CAC, following the same reasoning, also held that it did not have the power to remit such an application, brought only at the appeal stage, to the Tribunal as



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the Tribunal would in such instance be *functus officio*. The CAC went further to hold that even if it was incorrect about its own jurisdiction, the condonation application would nevertheless be dismissed on the merits.

CONCLUSION

Although many of the conclusions reached in the judgment were largely based on the facts, the CAC has managed to clarify the type of analysis to be conducted when looking into extrication from a bid-rigging cartel. In particular, it appears that the emphasis would be on an "incident-by-incident" analysis, by looking into the facts of every alleged rigged tender and whether the conduct of the respondent in question has broken down consensus.

Now firms can, at least in principle, rely on their non-participation in rigged tenders as evidence of their exit from an ongoing cartel. However, this non-participation must always be viewed in light of the evidence as a whole to determine whether (and by what time) such extrication took place.

Because of Pickfords, however, erstwhile participants in a cartel are no longer secure in the knowledge that three years after exiting they are safe from prosecution. Cross Fire presented the last opportunity to rely on a "prescription" type defence and going forward, reformed cartelists will be well advised to apply for corporate leniency rather than rely on any three-year interval since leaving the conspiracy.

At the time of writing, the Commission has lodged an application for leave to appeal the CAC's judgment to the Constitutional Court, so the fire has not been extinguished just yet.

CHRIS CHARTER AND REECE MAY



OUR TEAM

For more information about our Competition Law practice and services in South Africa and Kenya, please contact:



Chris Charter

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



Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Sammy Ndolo

Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com



Naasha Loopoo

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



Albert Aukema

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



Preanka Gounden

Senior Associate
T +27 (0)21 481 6389
E preanka.gounden@cdhlegal.com



Lara Granville

Director
T +27 (0)11 562 1720
E lara.granville@cdhlegal.com



Reece May

Senior Associate
T +27 (0)11 562 1071
E reece.may@cdhlegal.com



Andries le Grange

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



Nelisiwe Khumalo

Associate
T +27 (0)11 562 1116
E nelisiwe.khumalo@cdhlegal.com



Susan Meyer

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



Mmakgabo Makgabo

Associate Designate
T +27 (0)11 562 1723
E mmakgabo.makgabo@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

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA