A Review of Bid-rigging and price-fixing in South Africa

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Disclaimer

The views expressed in this presentation should not be attributed to the Competition Commission of South Africa ("the Commission"), as they have not been officially endorsed. They certainly reflect the presenter's analysis and assessment of Bid-rigging and price-fixing, and are purported to enhance a robust and fruitful debate.

Introduction

In the South African Competition Law, Bid-rigging and price-fixing are dealt with in terms of section 4(1)(b)(i) and (iii) of the Competition Act 89 of 1998, as amended ("the Act").

- The purpose of this presentation is to answer the following questions:
  - How does the Competition Commission of South Africa (CCSA) tackle "hybrid" cases/cases with multiple theories of harm?

- Does the CCSA have defined criteria that it uses to decide how it will proceed? If so, what are they?
- What successful /unsuccessful cases of this kind have the CCSA had?
- What lessons have we drawn from these experiences?

- Prior to dealing with the above, I first wish to explain what Bid-rigging and price-fixing entails.

What is bid-rigging?

- Bid-rigging is an agreement amongst competitors not to compete on the bid they submit after being invited to tender.

- There are three forms of bid-rigging namely:

  - Complementary bid;
  - Bid suppression; and
  - Bid rotation.

- Complementary bid occurs when some potential competitors agree to submit tenders that are too high or low to be accepted.

- Bid suppression occurs when one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner's bid will be accepted.

- Bid rotation occurs when all potential competitors submit tenders but only one of them submit the lowest and winning tender at any one time, mostly, the conspirators receive the agreed share of the value of the contract.

What is price fixing?

Price fixing occurs whenever a contract, arrangement or understanding has the effect or likely effect of fixing, controlling or maintaining prices, discounts, allowances, rebates or credits, credit terms and margins in relation to goods or services or sold by parties in competition with one another.

Legislative Framework

- Section 4(1)(b) of the Act provides as follows:

(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 –

(b) *It involves any of the following restrictive horizontal practices;*

(i) Directly or indirectly fixing a purchase or selling price or any other trading conditions;

(ii)……

(iii)Collusive tendering".

Legislative Framework – (Cont)

Of particular importance to this presentation is section 4(1)(b)(i) and (iii) of the Act.

- In order to prove a contravention of section 4(1)(b)(i), the following elements must be proved:

- *an agreement or concerted practice*
- *between firms in a horizontal relationship (Competitors)*
- *to fix prices*

Legislative Framework – (Cont)

- With regard to section 4(1)(b)(iii) of the Act the following elements must be proved;

- *an agreement or concerted practice*
- *between firms or an association of firms in horizontal relationship (Competitors)*
- *to engage in collusive tendering*

How does CCSA tackle “hybrid” cases/cases with multiple theories of harm?

- In SA, hybrid cases are investigated simultaneously even if they have multiple theories of harm.
- When the hybrid cases are referred to CT, the CCSA can plead cumulatively from the same facts for both price fixing and collusive tendering conduct.
- In certain instances, i.e. where facts are not the same for this contravention, CCSA can plead price fixing separate and collusive tendering in the alternative.

Does the CCSA have defined criteria that it uses to decide how it will proceed? If so, what are they?

In SA, there is no defined criteria that is used on how to proceed.

Hybrid cases are investigated simultaneously.

When investigating price fixing, CCSA would look for agreements that include the following:

- Establish or adhere to price discounts;
- Hold prices firm, eliminate or reduce discounts;
- Adopt a standard formula for computing prices;
- Maintain certain price differentials between different types, sizes, or quantities of products;
- Adhere to a minimum fee or price schedule;
- Fix credit terms; and
- Not advertise prices; or exchange current price information.

When investigating collusive tendering, CCSA would look for the following evidence:

- Similarity in bid documents submitted by competing firms e.g. bid prices, same corrections and alterations, same signatures in both bid documents, same bid documents containing same or similar errors or irregularities such as spelling, grammatical and calculation;

- Bid documents for both or more firms submitted by the same person; and

- Bid documents for both or more firms packaged by one person from the other firms that submitted their bids.

What successful /unsuccessful cases of this kind have the CCSA had?

Raite and Today's Destiny

- CT confirmed consent order between CC, Today's Destiny and Raite.
- Today's Destiny and Raite engaged in price fixing and collusive tendering in contravention of section 4(1)(b)(i) and (iii) of the Act i.r.o a tender for provision of security services.
- CC found that Respondents assisted each other to complete their respective bid documents.
- Respondents pricing pattern for the tender were the same.

Raite and Today's Destiny – (Cont)

- Respondents bid documents were identical and similar in content and form.
- Respondents submitted same letters from bank, same postal address and same cars to be used in carrying out the work.
- Both Respondents admitted that they fixed prices and tendered collusively i.r.o the above tender.
- Today's Destiny agreed to pay R 50 000.00 admin penalty and to implement compliance programme.
- Raite agreed to pay R 1 593 820.00 admin penalty and to implement compliance programme.

Aveng

- CT confirmed consent order between CC and Aveng.
- This follows an investigation by CC into collusion by manufacturers of pipes, culverts and manholes.
- Infraset, a division of Aveng, manufactures pre-cast concrete pipes and culverts which are used in building and construction.
- Aveng admitted that Infraset has contravened section 4(1)(b)(i), 4(1)(b)(ii) and 4(1)(b)(iii) of the Act by engaging in price fixing, dividing and allocating the markets and collusive tendering in the markets for concrete pipes and culverts in Gauteng, Kwazulu-Natal and the Western Cape.

Aveng – (Cont)

- Aveng agreed to pay an admin penalty of R 46 277 000.00 and to implement a formal compliance programme.
- In addition, Aveng agreed to co-operate fully with the Commission in relation to the prosecution of other firms allegedly involved in this cartel.

DPI Plastics (Pty) Ltd and Others

- This complaint was triggered by findings from CCSA's merger investigation wherein it was found that DPI Plastics and other competitors engaged in cartel activities in the market for supply of various types of plastic pipes.
- CCSA initiated a complaint against the Respondents for contravention of section 4(1)(b)(i),(ii) and (iii) of the Act.
- DPI applied for and was granted conditional leniency the CCSA.
- No relief was sought against it.

DPI Plastics (Pty) Ltd and Others – (Cont)

- Three other Respondents concluded consent orders with CCSA (i.e. Marley Pipe Systems (Pty) Ltd (“Marley”), Swan Plastics CC (“Swan”) and Flo-Tek Pipes and Irrigation (Pty) Ltd (“Flo-Tek”).
- Five Respondents did not settle and pursued the case before CT. Two of them accepted liability for cartel but differed with CCSA over extent of their involvement which had a bearing on their liability (i.e Petzetakis Africa (Pty) Ltd and Amitech SA (Pty) Ltd. The four remaining Respondents (“i.e Macneil, Andrag, Gazelle Plastics and Gazelle Engineering contested their liability.

DPI Plastics (Pty) Ltd and Others – (Cont)

- CT found that the case against Gazelle fell to be dismissed, the case against Macneil succeeded that it was liable for contravention of section 4(1)(b)(i) of the Act and a penalty of R 2 Million was imposed.
- The case against Andrag succeeded, it was liable for contravention of section 4(1)(b)(i) of the Act, but no penalty was imposed on it.
- The case against Amitech, in which liability for contravening section 4(1)(b)(i),(ii) and (iii) of the Act was admitted, led to the imposition of an admin penalty of R 11.1 Million.

DPI Plastics (Pty) Ltd and Others – (Cont)

- The case against Petzetakis in which liability for contravention of section 4(1)(b)(i),(ii) and (iii) of the Act was admitted, led to the imposition of an admin penalty of R 9.92 Million.
- The case against Gazelle Plastic and Gazelle Engineering was dismissed.

What lessons have we drawn from these experiences?

- As already alluded, in SA, there is no defined criteria that is used on how to proceed when dealing with hybrid cases.
- CCSA investigate the conduct simultaneously bearing in mind the relevant evidence to be collated to sustain a case for each conduct (i.e. price fixing and bid rigging).
- In dealing with hybrid cases, CCSA is guided by the requirements for each conduct (alleged contravention).
- What we learnt is that the collusive tendering sometimes has an element of price fixing and or market allocation.

What lessons have we drawn from these experiences? -(Cont)

- Therefore, it depends on the type of evidence obtained or the manner in which collusive tendering occurred, hence it is necessary to investigate them cumulatively where the conduct appears to be involving all or some contravention of section 4(1)(b) of the Act.

Questions and Discussion

Thank you