IMPLICATIONS OF REGIONAL COOPERATION ON COUNTRY SPECIFIC CORPORATE LENIENCY POLICIES

BY MFUNDO NGOBESE[1]

1 Principal Investigator, Competition Commission of South Africa. The views in this paper are those of the writer and are made in his personal capacity and do not reflect the views of the Competition Commission.

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I. INTRODUCTION

Cartels are notoriously difficult to detect and successfully prosecute due to their conspiratorial nature. However, cartels are also inherently unstable in that there is always a temptation to cheat on the cartel arrangement by each individual member in the hope that sufficient time will pass before other members detect the cheating. At the point of detection, the cheating member would have realized some gains from its actions.[2] It is for this reason that cartel members will need to maintain good relationships, including constant contact and communication, in order to renew their commitments to the cartel and to monitor each other's commercial activities.[3] Corporate Leniency Policy ("CLP") is meant to exploit this inherent temptation to cheat by creating a further uncertainty as to who will break ranks and be the first one to tell on the existence of a cartel.[4] However, the South African Competition Commission ("Commission") has noticed that overtime the efficacy of CLP in uncovering cartel conduct diminishes. In this paper we will demonstrate why this aspect should inform the sharpening of other investigative tools and the timing for implementation of a policy that is aimed at vigorously pursuing regional cooperation.

II. THE STANDARDS OF BEST PRACTICE WHEN IT COMES TO LENIENCY

The South African corporate leniency policy is in line with the best practices as found in the ICN Checklist for Efficient and Effective Leniency Programmes (2017).[5]

Firstly, it is founded on the "first to the door" principle in that it is the first firm to disclose the existence of a cartel that is eligible to full immunity from prosecution and from payment of the administrative penalty. Secondly, immunity is granted only if there is admission of liability for the cartel conduct. Thirdly, the applicant must provide the Commission with information about the conduct which the Commission did not have and

2 *The Journal of Economic Education* Poncey, C & Roldán, F. (2016), "How a cartel operates. Evidence from Graphite Electrode Cartel from A Social Network Perspective," http://www.bvrie.gub.uy/local/File/JAE/2016/ponce_roldan.pdf. The authors note that "The social organization of a price fixing conspiracy is a device of communication among participants, which should have two aims, namely an efficiency and an [sic] secrecy aim against any external menace. The level and the shape of communication will depend on market conditions, and on relationships among competitors involved in the conspiracy project."

3 Poncey, C & Roldán, F. (2016), "How a cartel operates. Evidence from Graphite Electrode Cartel from A Social Network Perspective," http://www.bvrie.gub.uy/local/File/JAE/2016/ponce_roldan.pdf. The authors note that "The social organization of a price fixing conspiracy is a device of communication among participants, which should have two aims, namely an efficiency and an [sic] secrecy aim against any external menace. The level and the shape of communication will depend on market conditions, and on relationships among competitors involved in the conspiracy project."

4 Corporate Leniency Policy of the South African Competition Commission, http://www.compcom.co.za/wp-content/uploads/2014/09/CLP-public-version-12052008.pdf.

5 https://www.internationalcompetitionnetwork.org/wpcontent/uploads/2018/09/CWG_LeniencyChecklist.pdf.

which places the Commission in a position to establish the existence of the cartel. Lastly, in order to foster cooperation going forward, full immunity is not granted on disclosure of information about a cartel but conditional immunity is granted to ensure that the applicant cooperates with the Commission until finalization of the case which could include litigation at the courts.

In addition to these important considerations, there are also procedural factors which the CLP considers in order to ensure the effectiveness of uncovering cartel conduct. Firstly, the CLP has been drafted to provide legal certainty in that the Commission's discretion whether or not to grant the CLP is removed once the substantive criteria set out above has been met. Secondly, the CLP is ambivalent as to who is the applicant for the purpose of qualifying for leniency. Therefore, even a ring leader in the cartel is granted the same status as any other member of the cartel depending only on whether it is first to the door or not. Thirdly, the CLP provides for a marker procedure which enables the applicant to approach the Commission as soon as it realizes that it may be involved in cartel conduct in order for the Commission to reserve its place as the first to the door. The applicant company will then go back and gather the information required for the submission of a full leniency application. Fourthly, the CLP provides for oral submissions. Oral submissions are sometimes preferred by international companies who may fear compellability of written submissions in other jurisdiction once the authorities in those jurisdictions learn of the fact that written submissions have been made elsewhere.

III. TRACING THE TREND IN THE NUMBER OF LENIENCY APPLICATIONS RECEIVED OVERTIME IN SOUTH AFRICA

Chantal Lavoie, in an unpublished article, noted as follows regarding the early years of the South African CLP which was adopted back in 2004 and perfected around 2008:

> Since its adoption five years ago, 54 CLP applications have been received by the Commission. Over 68% of these CLP applications have been made in the previous 12 months ending 30 June 2009. A sharp increase in CLP applications has been noted since 2008, notably in 2009 with the receipt of more CLP applications over a 6-month period than in the whole of the year 2008. In addition, the marker procedure has been applied consistently since adoption of the CLP amendments in May 2008, resulting in most CLP applications being preceded by a marker application.[6]

The amendments to the CLP back in 2008 brought about most of the best practices mentioned above including the introduction of the marker procedure. Clearly, one can argue that the apparent surge in the number of leniency applications during 2009 was triggered by these improvements in the text of the policy. However, it is the view in this paper that while these amendments were necessary, they were not sufficient to trigger an influx in leniency applications. A more recent trend that has been observed in South Africa is a decline in the number of leniency applications even though there has been an increase in the number of cartel cases that are being investigated by the Commission. Accordingly, the decline appears to have nothing to do with a decrease in incidence of cartelization.

For a five-year period beginning in 2007 and ending in 2011, the Commission received a total of about 83 leniency applications. The average number of enforcement cases investigated by the Commission during this period was about 80 cases per year (Note that this figure includes all complaints and not just cartels). The Commission was not reporting on cartel cases separately at that time. Therefore, most importantly, this is a period during which the Commission was investigating a number of abuse of dominance and vertical restraints cases in steel, polymers, and car dealerships. These cases could easily have constituted half of the total case load. This means that about 41 cases per year were actual cartel cases.

Now for the more recent five-year period beginning in 2012 to 2016 the Commission received about 20 leniency applications and investigated an average of about 101 pure cartel cases per year.[7] The reporting on cartels at this time had improved due to the establishment of an independent cartels division.

6 http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjroPHkhanfAhWVTRUIHRecBAwQFjAAegQICRAC&url=http%3A%2F%2Fwww.compcom.co.za%2Fwp-content%2Fuploads%2F2014%2F09%2Fclp-paper-conference-Chantal-Lavoie.docx&usg=AOvVaw0vSA1JSR2PCd1pUSB2dwFd.

7 Information obtained from various sources including internal case management documents of the Competition Commission and Annual Reports at http://www.compcom.co.za/annual-reports/.

Bearing in mind the difficulties in obtaining accurate data the available data shows that, relative to the average number of cartel cases investigated per year, there has been a significant decline in the number of leniency applications received during the 2012 to 2016 period when compared to the preceding five-year period. This brings us to the ultimate point of this discussion, which is why there was a huge initial uptake by firms of the leniency program and why are we now observing a limited number of leniency applications even though there has been an increase in the number of cartel cases investigated per year.

The uptake of leniency by firms appear to be dependent, not just on the nature of the leniency program, but also on the strength of relationships between firms and ability of competition authorities to independently detect cartels

As noted above, a leniency program that is in line with the standards of good practice is necessary but not sufficient. The conditions in various markets must also be ripe for defection by cartel members and/or the competition authority must be capable of detecting cartels using its own independent means.

In connection with conditions in the markets it must be noted that when the leniency program was introduced it brought a scare in the markets especially in those markets which were characterized by constant cheating on cartel arrangements and less strong relationships. Sometimes, it became a domino effect, as a decision of one company to file a leniency application could trigger other companies in the industry to do the same in respect of other instances of collusion, since belief that the cartel will be maintained is lost. In South Africa, the domino affect played out in respect of the construction industry when a number of construction companies, including large entities such as Group Five Limited and Murray and Roberts Holdings Limited filed leniency applications. A more recent domino effect also surfaced in respect of the chemicals market, in particular in the market for resin used in various applications. The dominant player in this market is a South African company and the next big player is a foreign entity. Attempts to enter this market have always been hindered by gate keeping actions of the South African entity which caused bad relations in the industry and an atmosphere of mistrust may have led to the filing of the first leniency application, but certainly the filing of the second leniency application.

It has thus been argued that in more recent times the competition authorities will see less cartels being uncovered due to leniency applications.[8] Those companies which are still colluding must have developed such strong ties with each other that they realize the danger of reverting to competition in the event that one of them blows a whistle on the cartel.

The only other available manner of stimulating fear among firms that either of them might disclose the cartel is for the competition authorities to strengthen their independent cartel detection and evidence gathering tools. In this regard it should be noted that a leniency application serves two kindred purposes. Firstly, it reveals a cartel which the Commission would otherwise have not known about and secondly, it provides evidence which the Commission can use to prosecute the other members of the cartel. Accordingly, strengthening other investigative tools such as dawn raids, (and especially dawn raids since they do not provide an opportunity for the firms to manipulate the information that they give to the commission) could go a long way in instilling uncertainty in firms if the Commission will not be able to obtain information about the cartel through its own proactive means.

IV. THE IMPACT OF REGIONAL COOPERATION ON THE EFFECTIVENESS OF A LENIENCY PROGRAM

There are other "don'ts" when an authority has just adopted a leniency program. However, overtime as the leniency program is starting to wane in effectiveness the authority can start embarking on such actions. This includes pursuing vigorous cooperation with regional partners which may include disclosures of information obtained by way of leniency applications. Obviously natural decline in leniency applications, discussed above, will be exacerbated by disclosure of information to other authorities. However, firms that intend to file leniency applications will normally do so in multiple jurisdictions almost simultaneously. Accordingly, disclosure through cooperation instruments is unlikely to have a huge chilling effect provided the leniency programs of the cooperating jurisdictions are not too incompatible. Divergence in the requirements of leniency programs by jurisdictions is thus the main consideration. Nonetheless, even in circumstances where there is divergence, given the diminishing role of a leniency program in uncovering cartels, the costs of cooperation may no longer be significant.

8 Ysewyn, J & Kahmann, S. (2018), "The decline and fall of the leniency programme in Europe," Concurrences Review N° 1-2018, Art. N° 86060, pp. 44-59.

Experience world-wide has shown that adoption and harmonization of leniency programs is important for jurisdictions seeking to cooperate with each other. This is a significant benefit to firms since it means the same documentary evidence used to file a leniency application with one jurisdiction can be used in another jurisdiction without more or less compliance requirements and the same criteria for qualifying for leniency will apply. This reduces the risk that a firm will become a successful leniency applicant in one state and not in another due to being pre-empted by another firm as a result of delays in preparation of sufficient applications for the second state or for failure to meet a criterion unique to that state's leniency program. This will in turn discourage the filing of the leniency application in the first state, especially if the states are known to have a strong cooperation regime.

A good leniency program is one of the best tools for the detection and combating of cartels. Among the eight jurisdictions within the Southern African Development Community ("SADC") charted in Table 1 below, five (63 percent) had an operational leniency program (Botswana, Mauritius, South Africa, Swaziland, and Zambia).

While there are widely-accepted views as to what a good leniency program should include, there are divergent approaches to leniency programs in different SADC Member States. Table 1 below provides some details about leniency programs in the SADC region.

Table 1: Leniency programs in the SADC region[9]

SADC member	Leniency program
Botswana	• Total immunity is available for an applicant who discloses information prior to an investigation being launched • First applicant to disclose information after the investigation is launched is eligible for a reduction of up to 100% of the penalty • Subsequent applicants are eligible for deductions up to 30% of the penalty • Leniency is not available to the initiators of a cartel
Malawi	No leniency program
Mauritius	• Total immunity is available for an applicant who discloses information prior to an investigation being launched • First applicant to disclose information after the investigation is launched is eligible for a reduction of up to 100% of the penalty • Subsequent applicants are eligible for deductions up to 50% of the penalty • Leniency is not available to the initiators of a cartel
Namibia	No leniency program

9 Except for South Africa, the information contained in this Table was obtained from interviews with representatives from competition authorities of respective countries.

South Africa	• Conditional immunity to first through the door in exchange for cooperation.
	• Total immunity is given at end of the prosecution if s/he is found to have complied fully with all requirements as set out in the CLP including:
	  ○ Full disclosure of information relating to the cartel
	  ○ Undertaking to testify on behalf of the Commission
	  ○ Stopping the cartel behavior
	  ○ Not discussing anything relating to the matter with the other respondents

Swaziland	• Immunity from fines for the first applicant to submit evidence which will enable the Commission to carry out targeted inspections in connection with the alleged cartel, where the Commission did not already have sufficient evidence • The applicant must also meet the conditions attached to the leniency policy. Where a party does not qualify for immunity as set out above, s/he may still qualify for a reduction of any fine which might have been imposed • A party that coerced another party to participate in the cartel is not eligible for immunity

Zambia	• An applicant that is first in line to self-confess may be guaranteed immunity from prosecution and imposition of full fines
	• Where the information provided by such an applicant requires further investigation to reasonably conclude the case, immunity from prosecution will be coupled with imposition of partial payment of a fine/s
	• An applicant that is second in line and provides corroborative evidence that significantly adds value or exhausts the need for further investigations will get immunity from prosecution and a partial fine
	• An applicant must satisfy the conditions for leniency including:
	  ○ Cooperation with the Commission throughout the process
	  ○ Willingness to appear as the principal witness for the Commission in the hearing or trial
	  ○ Cartel conduct should have ceased except where otherwise requested by the competition authority to persist with the conduct so as not to alert other cartel members resulting in loss of evidence.
	• No leniency for the party that is considered as the leader of the cartel

Zimbabwe	No leniency program

Competition authorities internationally recognize the need for the universal adoption of, and harmonization of, formal leniency policies in all jurisdictions. In recognition of sovereignty, harmonization is sought rather than standardization. Leniency programs need not be identical but ought to aid and not hinder each other. As can be seen from Table 1 above, there is quite a high degree of harmonization among those SADC competition authorities that have leniency programs. In this respect, joint cartel investigations would be facilitated. The work of the SADC Cartels Working Group in cataloguing the legislation and policies relating to cartels in SADC Member States is a good first step towards clarifying where areas of difference exist and in making proposals for harmonized provisions in key areas.

V. CONCLUSION

The corporate leniency program of the Commission remains an important tool for detection of cartels. However, the dwindling number of leniency applications in recent times has led to the conclusion that there is a probability that existing cartels are more stable. This has then provided an opportunity to strengthen other investigative tools in the hope that they will stimulate the filing of leniency applications. The current environment also provides an opportunity for the Commission to pursue other important goals such as intensifying cooperation with other regional competition authorities.

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