

An Analysis of the Efficacy of Criminal Sanctions in Combating Cartel Conduct: The Case of South Africa

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Abstract : Cartels within the international competition law framework have been dubbed the most egregious of competition law violations; this is because they entail a concerted effort by two or more competitor firms to knowingly 'rob' consumers of their welfare through their cooperation instead of competition. The net effect of cartel conduct is that the market is distorted as the colluding firms gain enough market power to constrain the supply of goods or services, ultimately driving up prices. As a result, consumers end up paying inflated prices for goods and services, which eventually affects their welfare. It is against this backdrop that competition authorities worldwide have mounted a robust fight against the proliferation of cartels. In South Africa, the fight against cartels saw an amendment to the Competition Act to allow for criminal prosecution of individuals who cause their firms to take part in cartels. The Competition Amendment Act 1 of 2009 introduced section 73A into the principal Competition Act, making it a criminal offence to engage in cartel conduct. This paper assesses the rationale for criminalisation of cartel conduct, discusses the challenges or potential challenges associated with criminalisation, and provides an evaluation of the efficacy of criminalisation of cartel conduct. It questions whether criminal sanctions for cartel conduct as a competition enforcement tool aimed at deterring such conduct are generally effective and whether they have been effective in South Africa specifically. It concludes by offering recommendations on how to effectively root out cartels.

Keywords : cartels, criminalisation, competition, deterrence, South Africa

Conference Title : ICCLMPL 2023 : International Conference on Commercial Law, Media and Public Law

Conference Location : Amsterdam, Netherlands

Conference Dates : August 03-04, 2023