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PRICE SIGNALLING AND THE SOUTH AFRICAN COMPETITION ACT

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For the last few years, so-called 'price signalling' has sparked great interest and debate among competition lawyers around the world. It has yet to be dealt with in any decision by the South African authorities. This paper examines the potential treatment of price signalling under South African competition law. In particular, we examine whether the practice of price signalling could properly be characterised as conduct which could fall within the prohibitions in section 4 of the South African Competition Act[5].

This requires us, **first**, to describe what we understand by the term 'price signalling' when it is used in international competition law discourse. This includes a summary of the potential effects of price signalling on competition. **Second**, against this background, we proceed to evaluate whether and how the conduct of price signalling could be classified under the provisions of the South African Competition Act. This requires some comparative analysis of how this behaviour has been considered in foreign jurisdictions, and in particular in Europe. **Finally**, we draw conclusions on whether it would make sense for price signalling to be actively pursued by the South African competition authorities, having regard to our law's current stage of development and the complexity that would probably be involved in identifying and proving a case of anti-competitive price signalling.

Our intention is not to provide a comprehensive analysis of how other competition laws have previously been applied to price signalling conduct. The purpose of this paper is simply to explore the logic and policy implications of applying South African competition law to price signalling, and to introduce debate on this subject.

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[5] Act 89 of 1998.

Section 1 - What is price signalling?

In the context of competition law, 'signalling' is a broad phrase which captures many scenarios. In essence, it involves a firm using a public forum to broadcast information about some strategic aspect of its business, which may include current or intended future pricing – so-called price signalling.

Certain jurisdictions (including at least Australia[6]) also make reference to signalling in circumstances where a firm communicates information to its rival privately and directly. This paper does not address this private transmission of information between competitors, which we think is best characterised and explained under the normal principles of competition law that relate to information exchange. In this paper we use the word 'signalling' to describe the situation where a firm broadcasts information into the market generally.

Examples of the types of platforms that could be used to price signal include statements to the media, presentations at public or industry conferences, comments in publicly available annual reports or announcements on a company's website. Communications to customers or other groups via open email distribution lists, without any restrictions on further distribution contained in the communications could also have the same effect as publication, and therefore be considered a potential platform for signalling.

Publishing information about prices and other commercial variables (for example planned investments, sales volumes, market share estimates and capacity) may benefit consumers, whose search time and costs are reduced because information is made more easily available. This is particularly true when consumers are made aware of current and future prices through the publication. The announcement may also enable investors to make more informed investment decisions because future changes in market dynamics can be predicted with greater certainty based on the published information.

The effect may therefore be to enhance the announcing company's competitive position in the market and make the market more efficient. Where these are the only effects, a price

[6] Section 44ZZX of the Australian Competition and Consumer Act, 2010, as interpreted in the note entitled, "Anti-competitive price signalling and information disclosures" (2012) Available at: https://www.accc.gov.au/system/files/Anti-competitive%20price%20signalling%20and%20information%20disclosures.pdf.

signal is self-evidently a good thing.

However, due to the public nature of the statement, rival firms are able to easily access the information communicated. This is not necessarily a bad thing, as in some circumstances the announcement may elicit a competitive response from rivals, who are free to choose whether to meet, beat or ignore the announced price. But in some circumstances the announcement may render the market artificially transparent and lead to a reduction in competition.

What is the potential problem?

A central and obvious principle in competition law is that every firm must determine its own strategy independently. The concern is that price signalling may remove a degree of uncertainty in the market in relation to an important aspect of competition relating to price or some other relevant dimension of competition[7]. A rival of the announcing firm, having viewed the price announcement, may use the information announced to coordinate its strategy with that of the announcing firm to their mutual benefit, and to the detriment of competition and consumers.

The most obvious example may be where one firm deliberately announces a non-binding intention to increase its price on a specific date. Prior to the announcement, a competitor may have no intention to increase its own price, but having seen the announcement may decide it is now feasible to do so profitably. The competitor proceeds to raise its price. After observing the competitor's price increase, the announcing firm's intended price increase can now be implemented without losing significant sales. Without direct communication, the two firms have coordinated a price increase above competitive levels and to the detriment of consumers, facilitated through the publication of one firm's pricing intention.

After the price announcement, neither firm's competitive strategy can be said to have been determined independently.

[7] Price signalling is an umbrella term used which does not only refer to price – it can also be used to describe announcing other competitively sensitive information such as expected sales volumes, investment plans and target geographic markets. This paper refers to firms signalling prices only, but the consequences of announcing other company-specific, strategic information would be treated the same way in our view.

Despite this possibility that price signalling could potentially have anti-competitive effects in certain circumstances, the question whether the provisions of South Africa's competition law are sufficiently broad to effectively prohibit anti-competitive price signalling is not straightforward. The Act contains no provision which specifically deals with price signalling. It is therefore necessary to evaluate whether this conduct could be boxed into the existing prohibitions of certain interactions between competitors?

Section 2 – Characterising price signalling under South African competition law

Section 4 of the Competition Act prohibits certain *agreements* between and *concerted practices*[8] by competing firms. As a starting point, to be illegal price signalling would have to be construed either as an agreement or concerted practice.

Agreement

An agreement *arises from the actions of and discussions among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest*.[9] It requires a *concurrence of wills* between two firms to *conduct themselves in the market in a specific way*.[10]

It is doubtful whether price signalling could constitute an agreement. In the United States, for instance, unilateral disclosures have been held not to meet the requirements in section 1 of the Sherman Act which prohibits a "contract, combination or conspiracy".[11] Instead, unilateral disclosures of information which can adversely impact competition are dealt with under the catch-all provisions of section 5 of the Federal Trade Commission Act which prohibits "unfair methods of competition".[12]

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[8] The Competition Act also includes *decisions* within the ambit of section 4. However, we do not feel that *decisions* are relevant in the context of price signalling. Therefore, *decisions* shall not be dealt with in this article.

[9] *Netstar (Pty) Ltd and Others v Competition Commission South Africa and Another* (99/CAC/MAY10, 98/CAC/MAY10, 97/CAC/MAY10) [2011] ZACAC 1; 2011 (3) SA 171 (CAC) (15 February 2011) at paragraph 25.

[10] *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 (3 February 2010) at page 9.

[11] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984).

[12] Federal Trade Commission Act, 15 U.S.C. § 45.

It is conceivable that price signalling may constitute an 'agreement' in circumstances where an on-going pattern is established of firms signalling to each other through public announcements, and then coordinating their behaviour around the strategic variables published. Here it would not be the act of signalling on its own which constitutes the agreement. The on-going pattern of repeated signals and following behaviour may cumulatively amount to an agreement. Demonstrating such an agreement would no doubt be a significant and difficult undertaking.

The Australian Competition and Consumer Act specifically recognises "*whether the disclosure is part of a pattern of similar disclosures by the corporation*" as part of the test to determine whether a public disclosure has "*the purpose of substantially lessening competition in a market*."[13]

In general, however, our view is that, price signalling itself, on a once-off basis could probably not constitute an agreement because it is a unilateral act. Except in peculiar circumstances, the element of consensus between multiple firms would be lacking.

<u>Concerted practice</u>

A concerted practice is defined in section 1 of the Competition Act as *'co-operative or coordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement'*. The focus is on conduct of the parties - '*the absence of any arrangement between them or any belief that they are obliged to act in that fashion is immaterial*.'[14]

The concept of "concerted practice" under South African law is borrowed from European law.

The Guidelines[15] of the European Commission ("**EC**") make it clear that under European law a once-off unilateral pricing announcement made by a company can amount to a concerted practice where it is received by a competitor and that competitor acts in response to it.

[13] Section 44ZZX(2)(e) of the Competition and Consumer Act, 2010.
[14] Netstar at paragraph 25.
[15] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, § 62 and 63.

There is a general presumption that when a company receives strategic data from a competitor, it has accepted it and adapted its market conduct accordingly unless it makes it particularly clear that it does not intend to do so. Even where only one company discloses strategic information, this still reduces strategic uncertainty as to the future operation of the market and increases the risk of collusive behaviour. Mere attendance at a meeting where a company for instance discloses its pricing policies, is likely to be considered a concerted practice, regardless of the announcing firm's intentions.

Price signalling is considered a specific type of information exchange and concerted practice. Due to its 'public' nature, it differs from an information exchange from one competitor to another or others where the competitor(s) is the intended recipient of the information. In practice, the intended recipients of price signalling are initially mainly the company's clients or investors, however the information often indirectly reaches competitors.

Therefore, a genuine public unilateral announcement made by a company will not be considered to be a concerted practice under European law unless the facts of the case lead to another assessment. This is particularly the case where such an announcement is followed by apparently unilateral public announcements by a competitor(s), which could be part of an overall strategy to reach a common understanding about the terms of coordination.

In the *Wire Mesh* decision[16], the South African Competition Tribunal cited with approval the European case law establishing the principle that a concerted practice can be a unilateral communication. Where one firm communicates information to another, the latter is presumed to have taken the information into account in determining its strategy. The onus falls upon the receiver of information to demonstrate that the communication from its competitor was ignored.[17] As a result, simply receiving information is sufficient for a firm to become party to a concerted practice.

Therefore, our law seems to recognise that a concerted practice does not require a two-way, reciprocal, on-going communication. It is certainly arguable that price signalling constitutes indirect contact between firms - information about price is communicated from one firm to

[16] Commission v Aveng, RMS, Vulcania and BRC, case 84/CR/Dec09, decided on 7 May 2012.
[17] Ibid at paragraphs 86 and 87.

another, albeit indirectly through a public platform.

In our view, by applying the *Wire Mesh* presumption, a once-off announcement of a price, received by a competitor, may theoretically amount to a concerted practice but is only likely to attract the interest of the competition authority in certain limited circumstances.

An interesting and difficult question is whether the intention of the announcing firm is relevant to the assessment. On the one hand, a deliberate transmission of price information to a rival through a public platform would most likely be the type of communication which the law should intend to prohibit. Intention should therefore be a relevant factor in deciding whether a particular publication of competitively sensitive information should be considered to constitute a concerted practice. Australian competition law is the only regime we are aware of where price signalling is expressly dealt with in a statute. The Competition and Consumer Act seems to explicitly recognise the requirement of intention by prohibiting only certain disclosures which are "*for the purpose of substantially lessening competition*"[18].

However, on the other hand, intention should not necessarily be determinative of the issue. There may be strong argument that the relevant question is whether the public communication is capable of restricting competition. If it is, then the publication should qualify for analysis under section 4 of the Act on the basis that it constitutes a concerted practice, regardless of the intention of the announcing firm.

In our view a pragmatic approach to this question would be to follow the principles enunciated by the Competition Tribunal in the *Media 24* case[19]. In discussing the advantages and pitfalls of relying on evidence of intent (albeit in the context of a predatory pricing case), the Tribunal says:

> *…intention has its weaknesses making it susceptible to deciding cases based on evidence of false positives. On the other hand, dispensing with it altogether would again increase the possibility of false negatives or under enforcement. A more modern solution to the use of intention is to recognise it as a source of circumstantial*

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[18] Section 44ZZX(2) of the Competition and Consumer Act, 2010.
[19] Commission v Media 24, CT Case No: 013938 / CR154Oct11, decided on 8 September 2015.

evidence, but that needs to be assessed against other sources of evidence.[20]

The Tribunal therefore settles on a balanced approach which is to:

> *…make use of evidence of intention but caution against relying on it as the sole' evidence of predation and use it in tandem with other evidence.*[21]

We note that the role that a respondent firm's intention should play in assessment of a potential competition law infringement, in particular regarding alleged concertation, is an exceptionally complex question. A detailed analysis of this issue is beyond the scope of this paper.

<u>But could price signalling be an illegal concerted practice?</u>

If price signalling may be classified as a concerted practice, this does not mean that the inquiry ends. Not all concerted practices are anti-competitive and illegal.

In South Africa, concerted practices can be illegal under two circumstances. First, concerted practices that involve price fixing, market allocation and collusive tendering are prohibited outright by section 4(1)(b) of the Act. The law treats them as *per se* illegal and their effect is irrelevant.

All other concerted practices are only illegal if their effect is to, on balance, substantially prevent or lessen competition. This category of 'effects-based' prohibitions is captured in section 4(1)(a) of the Act.

Under European law, a concerted practice can be considered as a *'restriction of competition by object'*. This means that the objectives and content of the agreement or concerted practice must be to restrict competition, even if it is only to potentially restrict competition. The great advantage of such characterisation is that it alleviates the burden of proof of the competition authorities as they do not have to prove any effect on the market. Indeed, restrictions by object are presumed to be anticompetitive.

[20] Media 24 case, paragraph 258.
[21] Media 24 case, paragraph 264.

In the *T-Mobile* case[22], the European Court of Justice (the "**ECJ**") held that:

> *…an exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings'*

and that for the assessment of the practice,

> *…the national court is required, subject to proof to the contrary, which it is for the undertakings concerned to adduce, to apply the presumption of a causal connection established in the Court's case-law, according to which, where they remain active on that market, such undertakings are presumed to take account of the information exchanged with their competitors.*

In this case, one of the issues at stake was to determine if a concerted practice could be characterised when an undertaking attended only one meeting at which individualised data was exchanged between competitors.

Whether price signalling should be characterised as conduct worthy of *per se* illegality under section 4(1)(b) is a complex question. Our view is that in general it should not. The Competition Appeal Court has cited with approval the American approach to this exercise of 'characterisation':

> *…our inquiry must focus on whether ... the practice facially appears to be one that would <u>always or almost always tend to restrict competition and decrease output</u>, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive'.*[23]

[22] European Court of Justice, 4 June 2009, *T-Mobile*, C-8/08, Official Journal C 180 dated 01.08.2009 page 12.
[23] *Broadcast Music, Inc. v. CBS* (441 U.S. 1 [1979] par 19), cited in Commission v South African Breweries, 129/CAC/2014 par 35.

In most cases, unilateral price announcements will have, at worst, an ambiguous effect on competition. As explained above, consumers may benefit, investors may benefit, efficiency may be enhanced and a collusive response from rivals may not be realistic. It would be incorrect to say that price signalling '*always or almost always tends to restrict competition and decrease output*'.

It would therefore usually be inappropriate to box price signalling into the *per se* prohibitions of section 4(1)(b) of the Act, except in peculiar circumstances. The more sensible approach would be to analyse the effect of price signalling under the less exacting standard of section 4(1)(a).

This is subject to one exception in particular. When firms announce their intentions relating to a particular tender process, the risk of *per se* collusive tendering may arise. Announcements of intentions to bid for an upcoming tender, a preference to bid for one project over another, or any information which could soften competition for a tender if interpreted by a potential rival in a specific way, may raise a risk.

<u>When could price signalling have an anti-competitive effect?</u>

The analysis of particular behaviour's effect on competition is inherently fact-specific.[24] The nature of the information published, the forum of the communication and the market context in which it takes place must be assessed in detail. It is therefore impossible to spell out categorically when price signalling will be acceptable, and when it will create a risk under competition law for the announcing and receiving firms.

However, enforcement action against price signalling in other countries has enabled a number of principles to be identified which may guide firms wishing to make public announcements which carry minimal risk. A closer look at European case law is useful.

The EC first considered the anticompetitive effect of pricing announcements in the *Woodpulp* case[25]. The EC held that the use by pulp producers of a system of quarterly public

[24] *Netstar* at paragraph 30.
[25] Commission decision of 19 December 1984 relating to a proceeding under Article [101 TFEU] (IV/29.725 – Wood Pulp) [1985] OJ L 85/1.

announcements of their planned prices for the following quarter to the trade press or to the sales agents constituted an indirect exchange of information on future market conduct. Prices were published well in advance of their entry into effect which gave competitors time to adjust their own new prices accordingly. On appeal to the ECJ, however, the EC's decision was overturned. The ECJ held that the price announcements, standing alone, did not reduce uncertainty as to the future actions of competitors because at the time each company made its announcement it could not be sure of the future conduct of the others in the market[26]. The EC was not able to sufficiently evidence that the parallel pricing observed on the market could only result from the public communication system.

Despite the ECJ's judgment in *Woodpulp*, the EC issued Guidelines[27] in which it expressly states that unilateral public announcements about future prices may be deemed anti-competitive practices, especially when they are followed by public announcements by competitors. Recent decisions of two European National Competition Authorities indicate that this approach is more likely to be adopted going forward than that of the ECJ in *Woodpulp*.

The first case concerns the three major mobile network operators in the Netherlands. The Dutch Authority for Consumers and Markets ruled that a risk of collusion could not be excluded in relation to public announcements of these operators which included statements about their future market strategies. The risk of collusion was all the more greater as the strategies communicated were not finalised when publicly announced, thus enabling the operators to adjust to such statements[28].

In the second case, the UK Competition Commission investigated the cement market and based its assessment on the letters sent by a cement supplier to its customers in which the supplier indicated its intentions to increase prices in the near future. However, the increases communicated to customers exceeded the actual increases that were implemented by the supplier. The UK Competition Commission found that the conduct still restricted competition

[26] Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, A. Ahlström Osakeyhtiö and others v Commission [1993] ECR I-1307, at paragraph 64.
[27] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.
[28] Besluit ACM van 7 januari 2014, zaak 13.0612.53.

by reducing uncertainty in the market[29].

A number of container shipping lines were recently investigated by the EC. The EC commenced antitrust proceedings in November 2013 to assess whether the practice of making regular public announcements of general rate increases could be considered an anti-competitive practice. The EC was particularly concerned about the time gap between the announcement of the price increase and its implementation. A sufficiently long gap in time could indeed enable competitors to adapt their pricing policy accordingly.[30].

The container shipping lines matter was concluded in July 2016 when the EC accepted a range of commitments offered by the respondent firms, aimed at remedying the alleged anti-competitive conduct.[31] The EC's concern was helpfully expressed as follows:

> *The Commission had concerns that General Rate Increase announcements do not provide full information on new prices to customers but merely allow carriers to be aware of each other's pricing intentions and make it possible for them to coordinate their behaviour.*
>
> *Announcing future price increases may signal the intended market conduct of carriers and by reducing the level of uncertainty about their pricing behaviour, decrease their incentives to compete against each other. Because the announcements provide only partial information to customers, and may not be binding on the carriers, customers may not be able to rely on them and therefore carriers may be able to adjust prices without the risk of losing customers.*
>
> *This practice may lead to higher prices for container liner shipping services and harm to competition and consumers…*

The commitments ultimately accepted by the EC included requirements that price announcements should be binding maximum prices, and should include sufficient detail to

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[29] Competition Commission, Aggregates, cement and ready-mix concrete market investigation, final report, 14 January 2014.
[30] "EU seeks settlement offers in liner-shipping price-signalling probe," MLex, 7 March 2014.
[31] "European Commission accepts commitments by container liner shipping companies on price transparency", 7 July 2016 (http://europa.eu/rapid/press-release_IP-16-2446_en.htm).

be of benefit to consumers, rather than only an indication of the likely amount of a future increase. The respondents also committed to making future price announcements no more than 31 days in advance of implementation. The significance of this period was that it represents the length of time usually required by customers to plan their shipments.

In our view, the critical theme of the commitments in this case is that they ensure that the public announcements of strategic intentions are tailored specifically to fulfil the needs of customers, rather than competitors. In our view this indicates a fundamental feature of a lawful price announcement – it should address the requirements of customers directly, without assisting strategic planning of competitors.

This introduces the central concern in international practice, that a public announcement may sometimes be nothing more than a private invitation to collude directed at competitors, despite its ostensibly public nature, rather than a communication aimed at benefitting customers.[32] In the words of Areeda and Hovenkamp:

> *[A] solicitation to raise prices in concert may reduce the uncertainty, either by setting a target price or by raising confidence that rivals will follow.*[33]

The stylised example on page 3 above under the heading 'What is the problem?' should hopefully explain this concern.

The US Federal Trade Commission provides a useful summary of how unilateral announcements may be analysed to determine whether potential anti-competitive effects may arise:

> *…the U.S. antitrust agencies evaluate the legality of unilateral disclosures of information by considering such factors as the nature and quantity of information disclosed, the specificity and context of the information disclosure, the nature of the industry and the market involved, and whether there are procompetitive business*

[32] Federal Trade Commission Directorate For Financial And Enterprise Affairs Competition Committee, Working Party No. 3 on Co-Operation and Enforcement – "Unilateral Disclosure Of Information With Anticompetitive Effects (eg. Through Press Announcements), 4 February 2012.

[33] Areeda and Hovenkamp, "Antitrust Law: An Analysis Of Antitrust Principles And Their Application" (Aspen Publishers 1998-2010), page 1419.

justifications for the disclosure of information.[34]

Therefore, to reduce the risk of avoidable scrutiny under competition law when announcing a price or other strategic information, the key is to ensure that the announcement is not, and cannot be interpreted as an invitation to collude. The following guidance should be considered:

- Ask, what could a rival firm do with the information announced? Is it competitively relevant? If not, the risk under competition law will be lower. Information about prices, volumes, targeted geographic markets and specific investment plans will generally be more sensitive than, for instance, announcements of intentions to comply with new regulations, an intention to grow globally, or an intention to invest in greater production capacity.

- The more concentrated the market, the greater the risk. This is because in markets with fewer firms, a competitor will be more able to adapt its conduct to coordinate with the announcing firm, without disruption by other rivals.

- Announcements targeted at a particular competitor or group of firms raise greater risk than announcements that are genuinely public or aimed specifically at consumers or investors.

- Announcements of actual, finalised plans raise less risk than conditional statements. For example, the statement that 'I intend to increase price on Friday if the market appears able to tolerate the increase' enables a competitor to respond by increasing its prices in the expectation that the announcing firm will follow. Simply announcing that 'my price has increased by 5% yesterday' allows no room for retreat in the event that a rival does not follow suit, and could therefore not operate as an effective invitation to collude.

- Ask, 'what is the business rationale for the proposed announcement'? If a clear explanation aimed at winning customers or satisfying customer requirements cannot

[34] Unilateral Disclosure of Information with Anticompetitive Effects (eg. Through Press Announcements), *op cit* at paragraph 7.

be articulated, the announcement should be avoided.

By following this guidance, firms will protect themselves from having legitimate announcements construed unnecessarily as potentially anti-competitive actions.

<u>Section 3 – Conclusions and policy implications</u>

To summarise the central points arising from the discussion above:

- Price signalling is most likely to generally be pro-competitive or, at worst, ambiguous in its effect on competition.

- Price announcements which can be demonstrated to deliver benefits to customers and investors, by giving greater certainty and enabling more effective planning and investment, are likely to be considered efficiency enhancing and pro-competitive.

- Anti-competitive effects are only likely to arise in the limited circumstances where an announcement could have the effect of inviting a coordinated response from a competitor.

- This limited class of potentially anti-competitive price signalling would fall to be analysed under the rule of reason enshrined in section 4(1)(a) of the South African Competition Act.

Potential contraventions of section 4(1)(a) have, correctly in our view, not been treated as a particular enforcement priority by the South African Competition Commission. One reason for this is that the 'effects analysis' mandated by this section is inherently fact-intensive and complex. Significant economic and factual analysis is required to understand the potential effect of the conduct on competition. Any conclusions of anti-competitive effects are likely to be hotly contested by the respondent firms, making for lengthy hearings. The substantial onus on the Commission when attempting to prove a contravention of section 4(1)(a) is borne out by the experience in the *Netstar case*[35], the only case of a section 4(1)(a)

[35] *Netstar op cit.*

allegation which has been fully ventilated before the Competition Tribunal and Competition Appeal Court.

A second potential reason for the understandable reluctance to pursues section 4(1)(a) cases is that no administrative penalty can be imposed on a firm for a first offence. After a complex investigation and protracted adjudication proceedings (possibly involving a number of appeals) the most significant likely sanction that could be imposed is an order that the firm cease the impugned behaviour.

It is possible that the South African competition authorities may follow the lead of their international colleagues in scrutinising price signalling in certain circumstances. However, it is likely that this area sits relatively low on the Commission's list of priorities at the moment, and with good reason. It is submitted that a more sensible way to deal with the phenomenon of price signalling in South Africa would be to engage in advocacy efforts to educate firms about the potential risks and anti-competitive effects, and also to pay attention to the degree of transparency in any market which is subjected to a market inquiry under newly introduced provisions of the Competition Act.

This does not mean that this practice is risk-free. Firms should be vigilant whenever their communications are capable of reaching competitors, in particular when announcing plans relating to any aspect of tender processes which are not yet finalised, and when announcing plans in a format which cannot be demonstrated to benefit customers and investors.

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