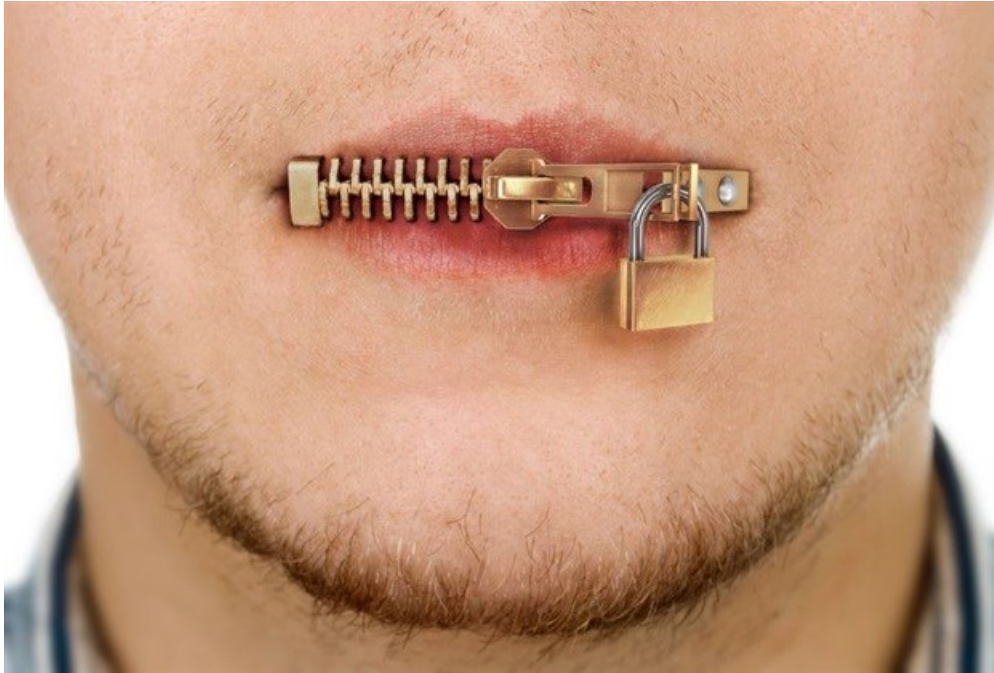


# Silent participation, passive attendance constitute contravention of Competition Act

By [Rishal Bipraj](#)

12 Sep 2017

The Competition Appeal Court has concluded that there is a duty to speak or to report to authorities or publicly distance oneself from any uncompetitive behaviour and that silent participation or passive attendance constitutes a contravention of the Competition Act. Silent or passive participants have a duty to report such proceedings.



© Igor Zakharevich – [123RF.com](#)

In 2008, about 20 bicycle retailers and wholesalers contravened the Competition Act, 1998 by agreeing to fix prices during a meeting held in September of that year.

The Competition Commission initiated a complaint against all 20 parties and subsequently concluded settlement agreements with 11 retailers and six wholesalers who admitted to having contravened the Act. Two companies (the appellants) did not conclude any settlement and pleaded not guilty.

The Competition Tribunal found that the appellants had contravened section 4(1)(b)(i) of the Act by concluding an agreement with other wholesalers and retailers that the recommended retail price (RRP) on certain bicycles and bicycle accessories would be increased by wholesalers, in a coordinated fashion, on an agreed date. The Tribunal found that the agreement had been reached because of the appellants attending an industry meeting where 60 wholesalers and retailers were present (the September Meeting).

The September Meeting took place pursuant to other meetings, which the appellants also attended. They contended that their attendance at these meetings was motivated by industry pressure and the need to monitor industry 'gossip', and that this did not amount to the conclusion of an agreement for the purposes of section 4(1)(b) of the Act. They argued that they did not 'actively participate' in the discussions and were therefore not liable. However, the appellants did raise the RRP on selected inventory items at the date agreed at the September Meeting, despite the quantum of their increase differing from rival wholesalers' increases.

The matter reached the Competition Appeal Court (CAC), which was required to consider whether silent participation, or

passive attendance, where the appellants did not speak, constituted the conclusion of an agreement sufficient to amount to a contravention of section 4 of the Competition Act.



Consistent with European competition jurisprudence, the CAC held that there is a duty to speak or to report to authorities or publicly distance oneself from any uncompetitive behaviour. '... the fact that an undertaking does not abide by the outcome of meetings, which have a manifestly anti-competitive purpose, does not relieve it a full responsibility for its participation in the cartel, if it has not publicly distanced itself from what was agreed in the meeting'.

The failure to speak out was therefore sufficient to find that an agreement was reached amongst wholesalers that there would be an increase in mark-up in agreed percentages. On this basis, the CAC said it was for the appellants to adduce sufficient evidence to rebut the finding that an agreement had been

reached, which they did not. The Constitutional Court, in 2017, dismissed the application by the appellants for leave to appeal to that court.

## ABOUT THE AUTHOR

Rishal Bipraj is an Associate in Commercial Department Garlick & Bousfield Inc.

For more, visit: <https://www.bizcommunity.com>