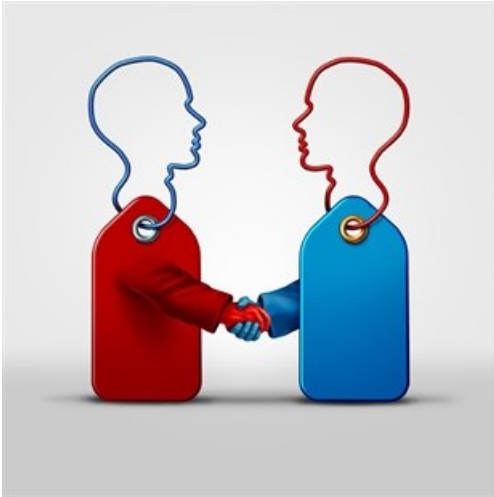


Beware: Industry-body pricing structures potentially contravene competition law

The recent spate of investigations by the South African Competition Commission into price-fixing should serve as a warning to businesses in industries that practice across-the-board, uniform pricing.



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Nick Altini, partner and head of the Competition Practice at Baker McKenzie in Johannesburg says that when an industry body advocates fixed prices and members of that body agree to charge those prices, they have likely committed an act of price fixing and could be guilty of contravening the Competition Act. Uniform pricing is usually only acceptable when pricing is regulated, for example with petrol prices.

“In order for price fixing and collusion to have taken place, there must either be an agreement between competitors (and “agreement” is widely defined in the Competition Act), or a concerted practice. A concerted practice occurs when businesses knowingly follow each other on pricing, or when they coordinate on pricing without agreement, but their independent behaviour is superseded by some of sort of behaviour the industry expects, and they toe that line,” he explains.

Recent charges

Altini explains that the members of the South African Football Intermediaries Association (SAFIA) and the Institute for Market Agents of South Africa (IMASA), currently face charges of price fixing and fixing trading conditions.

The Competition Commission is investigating SAFIA and 36 of its members in relation to the fixing of pricing and trading conditions in representing football clients. SAFIA is an industry body for sports agents who manage football players and coaches. According to the Commission, SAFIA members agreed to charge soccer players and coaches a standard 10% commission fee when negotiating and concluding contracts on their behalf.

The Commission also recently referred 14 fresh produce market agents belonging to IMASA to the Competition Tribunal, after carrying out an investigation into how these agents pay farmers. They noted that the 50-year-old practice of agents charging fixed commissions to farmers amounted to price fixing.

“The Commission’s interest in industry-body related price fixing cases is not new,” says Altini.

Price-fixing in media and real estate

“The Commission is in the process of concluding a long running case against media owners who sell advertising space. The media owners are alleged to be guilty of ‘the fixing of prices or fixing of trading conditions in contravention of the Competition Act’ because they had agreements to offer similar discounts and payment terms to advertising agencies.

As far back as 2004, the Commission investigated fixed estate agency commissions and found that the Institute of Estate Agents of South Africa had contravened the Competition Act, by indirectly fixing the selling prices of services rendered by estate agents.

“Industry participants being investigated for price fixing might argue that they don’t agree to fixed pricing rules, but insist they do it this way because it always the way they have done business, including long before the Competition Act came into effect,” explains Altini.

“This might be a mitigating factor,” he says, “but the Competition Commission will argue that competition law has existed in South Africa for 17 years. It is not good enough for a business to say it knew the price it always charges was the same as its competitors, but it thought was okay because an industry body said it should charge that price. The Commission would argue that by now, businesses should know better.”

Altini adds that in terms of a trend developing in industry-wide price fixing cases, “When it comes to price fixing, the Commission often reacts to information put before it so I am not sure there is a pattern here where the Commission is deliberately going after industry-body driven price fixing cases. However, I think it is fair to say Commission will probably be more on the lookout for these kinds of cases going forward.”

“As such, if businesses are operating within an industry norm that amounts to fixed prices or trading conditions, they should be asking themselves if they could be charging a different price to be more competitive and what is stopping them from doing that. They should be making independent, unilateral pricing decisions based on what is best for their business and not the industry,” Altini adds.

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