

Consumers may pay for cartel fines

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South African consumers may indirectly be financing the hefty fines imposed by the competition authorities.

Marianne Wagener, of commercial law firm Deney's Reitz, said at the weekend the question arose whether anything prevented fined companies from recouping the costs through price increases.

“Are consumers paying higher prices due to anticompetitive behaviour, and then also indirectly paying the fine imposed?”

Deputy competition commissioner Tembinkosi Bonakele said although the issue of companies raising their prices to fund a probe had been raised from time to time, no one had come up with evidence of such moves so far.

“However, we accept that penalties on their own are not adequate to stop anticompetitive behaviour,” Bonakele said.

Often the structure of the market was the source of the problem, and unless this was addressed the potential for anticompetitive behaviour would remain.

Cartels thrived in markets where there were few players — an oligopoly. A solution to cartel behaviour was, to a large extent, to promote the entry of new players who would undermine the cartel and make it unsustainable.

“Fines may deter firms from engaging in cartel activity — they are meant to — but they do not go to the root cause of the problem.”

Bonakele said a solution to abuse of dominance was to structurally reduce or eliminate market power, or at least to apply behavioural remedies to prevent the abuse of market power.

“Once again, fines should deter abuse of dominance, but they do not get to the root cause of the problem.”

The commission had called on all role players, including the government, to respond to such problems using the most effective tools. The commission's biggest contribution was to uncover and prosecute anticompetitive conduct, which would lead to the companies involved being fined, but someone else better placed to pick up from there had to do so, as in the case of the bread situation, he said.

Jason van Dijk of Deney's Reitz said the process to institute claims for damages was lengthy and expensive. Moreover, the law did not provide for class actions in which consumers could join forces, Van Dijk said.

Bonakele said there were legal and practical challenges, including litigation in courts, in claiming damages. “We are of the view that some of these problems can be overcome through a strong consumer movement — which does not exist in this country.”

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